

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

Injury No.: 07-075959

Employee: Deborah Vitale

Employer: St. Louis Envelope Company/Fowler Envelope, Missouri Envelope, LLC

Insurer: American Home Assurance Co.
c/o AIG Domestic Claims Inc.

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 4, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John A. Tackes, issued December 4, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8th day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Deborah Vitale

Injury No.: 07-075959

Dependents: N/A

Employer: St. Louis Envelope Company

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

Additional Party: N/A

Insurer: American Home Assurance Co.
c/o AIG Domestic Claims Inc.

Hearing Date: August 31, 2009

Checked by: JAT

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? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: June 22, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis 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? Yes
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:
Claimant was moving a table.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: \$0.00
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$1,575.00

Employee: Deborah Vitale

Injury No.: 07-075959

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$614.45
- 19. Weekly compensation rate: \$409.64 Temporary Total Disability; \$376.55 Permanent Partial Disability
- 20. Method wages computation: Stipulated Agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: NONE

Unpaid medical expenses:

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A , for Claimant's lifetime

- 22. Second Injury Fund liability: Open

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:

weekly differential () payable by SIF for weeks beginning

and, thereafter, for Claimant's lifetime

TOTAL: \$0.00

- 23. Future requirements awarded: NONE

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Stephen W. Thurmer.

Issued by DIVISION OF WORKERS' COMPENSATION

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Deborah Vitale Injury Nos.: 07-075959 & 08-012571

Dependents: N/A

Employer: St. Louis Envelope Company

Additional Party: N/A

Insurers: Twin City Fire Insurance Company ; and
American Home Assurance Co.
c/o AIG Domestic Claims Inc.

Hearing Date: August 31, 2009

Checked by: JAT

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

INTRODUCTION

A hearing was held on the above captioned matter was held August 31, 2009 at the Division of Workers' Compensation Office in the St. Louis, Missouri with Administrative Law Judge John Tackes presiding. The court reporter was Lori Sanders CCR. Attorney Stephen Thurmer represented the Claimant. Attorney John Palombi represented the Employer and its insurer Twin City Fire Insurance Company (08-012571); John Dietrich represented the Employer and its insurer American Home Assurance Company c/o AIG (07-075959).

Employer/Insurer is asking for a final award. Claimant is requesting a temporary award for medical treatment, TTD benefits, attorney fees and costs.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

Injury No: 07-075959 (June 22, 2007)

The parties stipulated to the following:

1. During the relevant periods of time, Claimant was an employee of employer which was operating subject to the provision of the Missouri Workers' Compensation Law;
2. Venue in St. Louis is proper;
3. Notice was given to the employer; and
4. The claim was timely filed.

Injury No.: 08-012571(January 24, 2008)

The parties stipulated to the following:

1. During the relevant periods of time, Claimant was an employee of employer which was operating subject to the provision of the Missouri Workers' Compensation Law;
2. Venue in St. Louis is proper;
3. Notice was given to the employer; and

4. The claim was timely filed.

ISSUES

Injury No.: 07-075959 (June 22, 2007)

The parties stipulated the issues to be resolved are as follows:

1. Medical causation;
2. Medical care and future care;
3. Attorney fees and costs of litigation; and
4. Nature and Extent of permanent partial disability

Injury No.: 08-012571 (January 24, 2008)

1. Medical causation;
2. Liability for medical treatment; and
3. Nature and Extent of permanent partial disability.

FINDINGS OF FACT

Based on the competent and substantial evidence and my observations of Claimant at trial:

1. Claimant worked at St. Louis Envelope Company for 22 years. On June 22, 2007, while helping move her employer, she sustained a back injury when moving a work station table off of a truck. While attempting to move the table, Claimant felt a pop and immediate pain in her lower back. She continued to work hoping the pain would go away or otherwise resolve on its own. She neither requested nor received medical treatment but the pain persisted and she was sent by Employer to BarnesCare for evaluation. Prior to this incident Claimant had not reported or been treated for low back problems.
2. On June 26, 2007, Claimant was seen at BarnesCare for the incident of June 22, 2007. She complained of low back pain radiating down the right leg. No numbness or tingling was reported and Claimant was prescribed medication and physical therapy. X-rays revealed spurs and degenerative changes to the lumbar spine. She was released to return to work on July 19, 2007 without restrictions. Her final diagnosis was resolved lower back strain and resolved sciatica with no permanency expected.
3. When evaluated at BarnesCare on July 19, 2007, Claimant reported no pain or complaints of low back pain. She was not taking prescription medications and reported doing much better. Her examination was normal and she had full range of motion. Following her release from care Claimant missed no work and had no other medical treatment until January 24, 2008. Claimant's testimony that she continued to have low back and right leg pain after being released from BarnesCare July 19, 2007 is not credible because it is inconsistent with the medical evidence.
4. On January 24, 2008, while at work, Claimant was working with envelopes and labels. It is not clear whether she was bending forward to put labels on boxes or whether she was lifting a box of envelopes. She was unable to straighten up and described the pain as

similar to what she felt when injured in June, 2007. Claimant informed a supervisor of her injury and returned to BarnesCare for evaluation on February 12, 2008.

5. On February 12, 2008, Claimant was evaluated for low back pain. A course of treatment similar to what was followed after the June, 2007 incident was initiated. Medication and physical therapy were again prescribed along with light duty. She was discharged from treatment on February 26, 2008. X-rays revealed degenerative changes. Claimant was diagnosed with radiculopathy of the right leg and strain of the lower back. On February 19, 2008 she reported doing better with some low back pain and no leg pain. She continued working with light duty restrictions and undergoing physical therapy.
6. When evaluated at BarnesCare on February 26, 2008, Claimant reported doing much better and had full range of motion along with a normal examination. Her diagnosis at this point was resolved radiculopathy of the right leg and resolved strain of the lower back. She returned to regular duties without restrictions.
7. On March 10, 2008, Claimant returned to BarnesCare stating that two days after being released from medical care, while on vacation, her lower back pain returned and it got worse after she returned to work. An MRI revealed a mild disc bulge at L4-5 with associated bilateral ligamentous hypertrophic changes which appear to result in early compromise of the dimensions of the spinal canal and slight narrowing of the right intravertebral foramen. Subtle anterior wedge deformities were noted at T12 and L1 which did not appear acute. Claimant was diagnosed with low back strain and told her condition was not work related.
8. On March 20, 2008, after being released from BarnesCare with no further treatment authorized by the Employer, Claimant went on her own to see Dr. Thomas Lee, who examined her and referred her to another doctor for possible epidurals to the lumbar spine. On March 24, 2008, Claimant received a transforaminal epidural steroid injection. She received another on April 9, 2008.
9. A lumbar discography was performed at Pain Management Services on April 23, 2008 which was markedly positive at L4-5 and L5-S1. Claimant was diagnosed by Dr. Coleman with lumbar degenerative disc disease, L4-L5 disc protrusion, and neuroforaminal stenosis. A lumbar spine CT revealed "diffuse disc bulging asymmetric to the right where there may be a focal right lateral annular tear. At this level there is mild facet disease and ligamentous hypertrophy contributing to stenosis.
10. Claimant returned to Dr. Lee for additional treatment. Surgical treatment was discussed on April 29, 2008 including an anterior lumbar interbody fusion with infuse and anterior lumbar plating.
11. On June 12, 2008, a Claim for Income Protection benefits was completed by Dr. Lee who indicated the diagnosis preventing Claimant from working is L4-5 degenerative disc with stenosis. According to Dr. Lee, this condition was not due to her employment; However, approximately two months later in a letter dated August 25, 2008, Dr. Lee again recommended anterior lumbar interbody fusion for the Claimant and referenced "work

related back pain” in the letter. In this letter he indicates that his “results with interbody fusion *for work related back pain* have been favorable.” (emphasis mine). He does not say the Claimant’s back pain was work related, only that his results with that type of fusion have been favorable. There is no other indication that he is reversing his opinion with regard to medical causation and the Claimant’s condition.

12. Medical treatment was requested from the Employer in December, 2008.
13. On December 11, 2008, Dr. Michael Chabot, an orthopedic spine specialist examined Claimant for the Employer as part of an Independent Medical Examination (IME). Dr. Chabot took Claimant’s history, reviewed medical records, reviewed Claimant’s deposition, and performed a physical examination. He diagnosed degeneration at L4-5 level with spinal stenosis; Diffuse disc filling pattern at L4-5 suggesting advanced degeneration. He diagnosed chronic back pain present greater than three months. He opined her complaints are associated with discogenic disease at the L4-5 level which was causally related to her June, 2007 injury. He noted that her symptoms were most likely aggravated with her work duties in January, 2008. Dr. Chabot opined that Claimant’s “work injury in June 2007 is the prevailing factor in her present complaints” and that she is in need of additional medical treatment not having yet reached MMI. He recommended the fusion procedure at L4-5.
14. Dr. Chabot found nothing on the MRI or x-rays which could be related to either of the two injuries specifically. He noted that internal disc disruption may not show up on an MRI or plain x-rays. Based on the discogram, Dr. Chabot found there was diagnostic evidence of internal disc disruption at L4-5. Based on Claimant’s consistent complaints following the June 2007 injury, Dr. Chabot found that Claimant sustained internal disruption of her disc that is the source of her pain and the reason she needs surgery.
15. On May 27, 2009, Dr. R. Peter Mirkin, an orthopedic surgeon, saw the Claimant at the request of the Employer and its Insurer (AIG) for an Independent Medical Examination. He found the x-rays taken in his office revealed degenerative changes at the L4-5 level. The MRI performed March 10, 2008 revealed no ruptured or herniated disc and revealed findings chronic in nature and not related to either of the work incidents but were common for a person of Claimant’s age and weight. He diagnosed degenerative disc disease, with two lumbar strains, and minimal MRI pathology.
16. Dr. Mirkin does not find the June 22, 2007 injury to be the prevailing factor in Claimant’s low back condition or need for surgery. He further opines that the January 24, 2008 incident was not the prevailing factor in the patient’s chronic degenerative spine disease. Dr. Mirkin does not recommend fusion surgery unless Claimant’s condition deteriorates. He states that Claimant is at MMI with no permanency and the two injuries were mild strains and transient aggravations of her degenerative disc disease with no permanent partial disability directly attributable to those conditions.
17. Dr. Chabot also found evidence of degeneration involving the L4-5 level. He found normal morphology of the discogram at L5-S1 with no evidence of annular tear. There is evidence of lumbar spinal stenosis at L4-5 and diffuse disc-filling pattern at L4-5

suggesting advanced degeneration. He diagnosed chronic low back pain and opined that Claimant's complaints were associated with discogenic disease at L4-5. He opines that Claimant's condition is medically causally related to her injury of June, 2007, and is the prevailing factor in her present complaints.

All doctors' opinions are given with a reasonable degree of medical certainty. Dr. Mirkin's testimony is more credible and consistent with the evidence.

RULINGS OF LAW

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

The Claimant's current injury and related symptoms and complaints are not caused by a work-related injury occurring on either June 22, 2007 or January 24, 2008. Claimant is currently at MMI for her work related injuries which consisted of low back strains that resolved in the usual course. Claimant is not awarded attorney's fees and costs in this matter because Employer did not unreasonably defend the action.

The word "accident" as used in this chapter shall mean 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. An injury is not compensable because work was a triggering or precipitating factor. §287.020.2 RSMo.

In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. §287.020.3(1)

An injury shall be deemed to arise out of and in the course of the employment only if: (a) it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. §287.020.3(2)(a)(b).

The provisions of the chapter shall be strictly construed and the evidence shall be weighed impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts. §287.800.1

The claimant bears the burden of proving all essential elements of a Workers' Compensation Claim, including the causal connection between the accident and the injury. *Grime v. Altech Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D. 2002) (overruled in part by

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 226 (Mo. 2003); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo. 1968). While the claimant is not required to prove the elements of the claim on the basis of “absolute certainty,” he must at least establish the existence of those elements by “reasonable probability.” See *Anderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App.E.D. 1999); see also *Shelton v. City of Springfield*, 130 S.W.3d 30, 38 (Mo.App. S.W. 2004).

In cases involving medical causation, which is not within the common knowledge or experience, the claimant must present medical or scientific evidence showing the cause and effect relationship between the complained of condition and the asserted cause. See *McGrath v. Satellite Sprinkler Systems, Inc.*, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo.App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one parties expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant’s expert. *George v. Shop-n-Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo.App. E.D. 1993); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo.App. 1986).

Injury Number 07-075959
Medical Causation (June 22, 2007)

The evidence shows that on June 22, 2007, Claimant had a sudden onset of pain in her lower back while moving a table in the performance of her work duties. Claimant had no prior back complaints and her pain has continued since the accident even with care and treatment to cure and relieve the effects. There is a dispute between two expert medical opinions presented at the hearing. Dr. Chabot found the work incident of June 2007 to be the prevailing factor causing the present condition, symptoms, complaints, and need for treatment. He found Claimant had sustained an internal disc disruption caused by the June, 2007 incident. This is less credible than Dr. Mirkin’s opinion because he does not address why it is the prevailing factor given the fact that the two sprains had resolved within four to six weeks of their occurrence. The MRI and discogram were not performed until after the injury on January 24, 2008 so it is not clear how Dr. Chabot can be certain that the incident of June, 2007 is the prevailing factor.

Claimant did not seek additional medical treatment after her release from BarnesCare on July 19, 2007. She reported no pain and was taking no prescription medication as of that date. She had a normal exam and full range of motion. At this point her low back strain was resolved but she continued to have symptoms related to chronic degenerative disc disease.

Dr. Mirkin does not attribute the degenerative disc disease found on the x-rays and MRI to be causally related to the June 22, 2007 injury. Dr. Mirkin did not recommend surgery based on the minimal findings on clinical examination and diagnostic tests. Dr. Chabot recommended surgery based on the result of the discogram and post-discogram CT scan only because of some indication that there was internal disc disruption that did not and could not appear on the MRI.

Claimant did have degenerative disc disease but there was no history of lower back complaints prior to the June 22, 2007. The degenerative disease was not symptomatic. The June

22, 2007 incident triggered the symptoms of her preexisting condition which persisted even after the strain/sprain had resolved. There is no evidence to support a finding of permanent partial disability attributable to the June 22, 2007 injury.

Claimant had an accident in June of 2007 which resulted in a strain/sprain to her lower back. This injury resolved with no permanency. Her ongoing symptoms are attributable to her chronic low back pain and degenerative disc disease which was not caused by her work accident. This chronic condition is the prevailing factor in Claimant's ongoing symptoms and is the primary cause in both the condition and any permanent disability. The accident triggered the injury and symptoms for which Claimant now requests surgery.

Future Medical Treatment and TTD (June 22, 2007)

Claimant is in need of further medical treatment and seeks that care to relieve her symptoms. If she was awarded medical care she could also receive temporary total disability benefits. Dr. Lee and Dr. Chabot both recommend treatment including surgical intervention. The low back strain is compensable but fully resolved with no permanency. The degenerative condition and chronic low back pain is not compensable because it did not arise in and out of the course of Claimant's employment. Any need for additional medical treatment in this case is attributable to Claimant's preexisting condition of degenerative disc disease. Future medical treatment and TTD is therefore denied.

Attorney's Fees and Cost of Litigation

If the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. §287.560 RSMo. (2005). To award attorney fees and costs the issue must be clear and the offense egregious. I do not find that there is a clear issue of unreasonable defense or that the offense in denying the claim generally or the medical treatment specifically was egregious.

Dr. Lee, seen by Claimant when further treatment was denied by the employer, recommended further medical treatment. On December 11, 2008, an IME was performed by Dr. Chabot at the request of Mr. Palombi and Employer/Hartford Insurance. Dr. Chabot recommended surgery to correct Claimant's degenerative disc disease. This goes to the issue in the case regarding causation and liability. The Employer retained reasonable defenses to the issue of liability including causation. The employer/insurers' defense of this case is not found to be without merit. It was based on medical records and the expert medical testimony of Dr. Mirkin. Even if Employer was held liable for treatment, it is not found that they acted with egregious offense in denying medical treatment. Request for attorney fees and cost of litigation is denied.

Injury Number 08-012571
Medical Causation (January 24, 2008)

Claimant again sustained a strain/sprain at work on January 24, 2008 while in the course and scope of her duties. The strain was treated in the same way as her earlier strain in June, 2007

and again it resolved with no permanency. Claimant however continues to experience pain from a preexisting chronic low back condition and degenerative disc disease. This is not a new condition but a continuation of her preexisting non work related condition. Any benefits to which the employee may or may not be entitled are addressed in the award on Injury Number 07-075959 with the injury date June 22, 2007. All claims for benefits under this injury number are denied.

Based on these findings, the stipulations of the parties and the admission of Employer insurer AIG that it provided coverage for Claimant on June 22, 2007, Twin City Fire Insurance Company is dismissed as a party from this claim.

CONCLUSION

I find Claimant has not met her burden of proving the injuries occurring on June 22, 2007 and January 24, 2008 resulted in an injury that arose out of and in the course of employment as they were not the prevailing factor in causing the medical condition and disability. There is no award for medical care or treatment and no award of attorney fees or costs of litigation. The low back strains/sprains resolved with no permanency so there is no permanent partial disability awarded herein.

Date: _____

John A. Tackes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

Naomi Pearson
Division of Workers' Compensation

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

Injury No.: 08-012571

Employee: Deborah Vitale

Employer: St. Louis Envelope Company/Fowler Envelope, Missouri Envelope, LLC

Insurer: Twin City Fire Insurance Company

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 4, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John A. Tackes, issued December 4, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8th day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Deborah Vitale	Injury No.:	08-012571
Dependents:	N/A		Before the
Employer:	St. Louis Envelope Company		Division of Workers'
Additional Party:	N/A		Compensation
Insurer:	Twin City Fire Insurance Company		Department of Labor and Industrial
Hearing Date:	August 31, 2009		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	JAT

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? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: January 24, 2008
5. State location where accident occurred or occupational disease was contracted: St. 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? Yes
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: Working with a box of envelopes
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$1,763.75

Employee: Deborah Vitale

Injury No.: 08-012571

- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: \$596.00
- 19. Weekly compensation rate: \$397.30/\$389.04 (TTD/PPD)
- 20. Method wages computation: Stipulated Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: NONE

Unpaid medical expenses:

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A , for Claimant's lifetime

22. Second Injury Fund liability: Open

N/A weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits N/A

Permanent total disability benefits from Second Injury Fund:

weekly differential () payable by SIF for weeks beginning

and, thereafter, for Claimant's lifetime

N/A

TOTAL:

\$0.00

23. Future requirements awarded: NONE

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Stephen W. Thurmer.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Deborah Vitale Injury Nos.: 07-075959 & 08-012571

Dependents: N/A

Employer: St. Louis Envelope Company

Additional Party: N/A

Insurers: Twin City Fire Insurance Company ; and
American Home Assurance Co.
c/o AIG Domestic Claims Inc.

Hearing Date: August 31, 2009

Checked by: JAT

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

INTRODUCTION

A hearing was held on the above captioned matter was held August 31, 2009 at the Division of Workers' Compensation Office in the St. Louis, Missouri with Administrative Law Judge John Tackes presiding. The court reporter was Lori Sanders CCR. Attorney Stephen Thurmer represented the Claimant. Attorney John Palombi represented the Employer and its insurer Twin City Fire Insurance Company (08-012571); John Dietrich represented the Employer and its insurer American Home Assurance Company c/o AIG (07-075959).

Employer/Insurer is asking for a final award. Claimant is requesting a temporary award for medical treatment, TTD benefits, attorney fees and costs.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

Injury No: 07-075959 (June 22, 2007)

The parties stipulated to the following:

1. During the relevant periods of time, Claimant was an employee of employer which was operating subject to the provision of the Missouri Workers' Compensation Law;
2. Venue in St. Louis is proper;
3. Notice was given to the employer; and
4. The claim was timely filed.

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The parties stipulated to the following:

1. During the relevant periods of time, Claimant was an employee of employer which was operating subject to the provision of the Missouri Workers' Compensation Law;
2. Venue in St. Louis is proper;
3. Notice was given to the employer; and

4. The claim was timely filed.

ISSUES

Injury No.: 07-075959 (June 22, 2007)

The parties stipulated the issues to be resolved are as follows:

1. Medical causation;
2. Medical care and future care;
3. Attorney fees and costs of litigation; and
4. Nature and Extent of permanent partial disability

Injury No.: 08-012571 (January 24, 2008)

1. Medical causation;
2. Liability for medical treatment; and
3. Nature and Extent of permanent partial disability.

FINDINGS OF FACT

Based on the competent and substantial evidence and my observations of Claimant at trial:

1. Claimant worked at St. Louis Envelope Company for 22 years. On June 22, 2007, while helping move her employer, she sustained a back injury when moving a work station table off of a truck. While attempting to move the table, Claimant felt a pop and immediate pain in her lower back. She continued to work hoping the pain would go away or otherwise resolve on its own. She neither requested nor received medical treatment but the pain persisted and she was sent by Employer to BarnesCare for evaluation. Prior to this incident Claimant had not reported or been treated for low back problems.
2. On June 26, 2007, Claimant was seen at BarnesCare for the incident of June 22, 2007. She complained of low back pain radiating down the right leg. No numbness or tingling was reported and Claimant was prescribed medication and physical therapy. X-rays revealed spurs and degenerative changes to the lumbar spine. She was released to return to work on July 19, 2007 without restrictions. Her final diagnosis was resolved lower back strain and resolved sciatica with no permanency expected.
3. When evaluated at BarnesCare on July 19, 2007, Claimant reported no pain or complaints of low back pain. She was not taking prescription medications and reported doing much better. Her examination was normal and she had full range of motion. Following her release from care Claimant missed no work and had no other medical treatment until January 24, 2008. Claimant's testimony that she continued to have low back and right leg pain after being released from BarnesCare July 19, 2007 is not credible because it is inconsistent with the medical evidence.
4. On January 24, 2008, while at work, Claimant was working with envelopes and labels. It is not clear whether she was bending forward to put labels on boxes or whether she was lifting a box of envelopes. She was unable to straighten up and described the pain as

similar to what she felt when injured in June, 2007. Claimant informed a supervisor of her injury and returned to BarnesCare for evaluation on February 12, 2008.

5. On February 12, 2008, Claimant was evaluated for low back pain. A course of treatment similar to what was followed after the June, 2007 incident was initiated. Medication and physical therapy were again prescribed along with light duty. She was discharged from treatment on February 26, 2008. X-rays revealed degenerative changes. Claimant was diagnosed with radiculopathy of the right leg and strain of the lower back. On February 19, 2008 she reported doing better with some low back pain and no leg pain. She continued working with light duty restrictions and undergoing physical therapy.
6. When evaluated at BarnesCare on February 26, 2008, Claimant reported doing much better and had full range of motion along with a normal examination. Her diagnosis at this point was resolved radiculopathy of the right leg and resolved strain of the lower back. She returned to regular duties without restrictions.
7. On March 10, 2008, Claimant returned to BarnesCare stating that two days after being released from medical care, while on vacation, her lower back pain returned and it got worse after she returned to work. An MRI revealed a mild disc bulge at L4-5 with associated bilateral ligamentous hypertrophic changes which appear to result in early compromise of the dimensions of the spinal canal and slight narrowing of the right intravertebral foramen. Subtle anterior wedge deformities were noted at T12 and L1 which did not appear acute. Claimant was diagnosed with low back strain and told her condition was not work related.
8. On March 20, 2008, after being released from BarnesCare with no further treatment authorized by the Employer, Claimant went on her own to see Dr. Thomas Lee, who examined her and referred her to another doctor for possible epidurals to the lumbar spine. On March 24, 2008, Claimant received a transforaminal epidural steroid injection. She received another on April 9, 2008.
9. A lumbar discography was performed at Pain Management Services on April 23, 2008 which was markedly positive at L4-5 and L5-S1. Claimant was diagnosed by Dr. Coleman with lumbar degenerative disc disease, L4-L5 disc protrusion, and neuroforaminal stenosis. A lumbar spine CT revealed "diffuse disc bulging asymmetric to the right where there may be a focal right lateral annular tear. At this level there is mild facet disease and ligamentous hypertrophy contributing to stenosis.
10. Claimant returned to Dr. Lee for additional treatment. Surgical treatment was discussed on April 29, 2008 including an anterior lumbar interbody fusion with infuse and anterior lumbar plating.
11. On June 12, 2008, a Claim for Income Protection benefits was completed by Dr. Lee who indicated the diagnosis preventing Claimant from working is L4-5 degenerative disc with stenosis. According to Dr. Lee, this condition was not due to her employment; However, approximately two months later in a letter dated August 25, 2008, Dr. Lee again recommended anterior lumbar interbody fusion for the Claimant and referenced "work

related back pain” in the letter. In this letter he indicates that his “results with interbody fusion *for work related back pain* have been favorable.” (emphasis mine). He does not say the Claimant’s back pain was work related, only that his results with that type of fusion have been favorable. There is no other indication that he is reversing his opinion with regard to medical causation and the Claimant’s condition.

12. Medical treatment was requested from the Employer in December, 2008.
13. On December 11, 2008, Dr. Michael Chabot, an orthopedic spine specialist examined Claimant for the Employer as part of an Independent Medical Examination (IME). Dr. Chabot took Claimant’s history, reviewed medical records, reviewed Claimant’s deposition, and performed a physical examination. He diagnosed degeneration at L4-5 level with spinal stenosis; Diffuse disc filling pattern at L4-5 suggesting advanced degeneration. He diagnosed chronic back pain present greater than three months. He opined her complaints are associated with discogenic disease at the L4-5 level which was causally related to her June, 2007 injury. He noted that her symptoms were most likely aggravated with her work duties in January, 2008. Dr. Chabot opined that Claimant’s “work injury in June 2007 is the prevailing factor in her present complaints” and that she is in need of additional medical treatment not having yet reached MMI. He recommended the fusion procedure at L4-5.
14. Dr. Chabot found nothing on the MRI or x-rays which could be related to either of the two injuries specifically. He noted that internal disc disruption may not show up on an MRI or plain x-rays. Based on the discogram, Dr. Chabot found there was diagnostic evidence of internal disc disruption at L4-5. Based on Claimant’s consistent complaints following the June 2007 injury, Dr. Chabot found that Claimant sustained internal disruption of her disc that is the source of her pain and the reason she needs surgery.
15. On May 27, 2009, Dr. R. Peter Mirkin, an orthopedic surgeon, saw the Claimant at the request of the Employer and its Insurer (AIG) for an Independent Medical Examination. He found the x-rays taken in his office revealed degenerative changes at the L4-5 level. The MRI performed March 10, 2008 revealed no ruptured or herniated disc and revealed findings chronic in nature and not related to either of the work incidents but were common for a person of Claimant’s age and weight. He diagnosed degenerative disc disease, with two lumbar strains, and minimal MRI pathology.
16. Dr. Mirkin does not find the June 22, 2007 injury to be the prevailing factor in Claimant’s low back condition or need for surgery. He further opines that the January 24, 2008 incident was not the prevailing factor in the patient’s chronic degenerative spine disease. Dr. Mirkin does not recommend fusion surgery unless Claimant’s condition deteriorates. He states that Claimant is at MMI with no permanency and the two injuries were mild strains and transient aggravations of her degenerative disc disease with no permanent partial disability directly attributable to those conditions.
17. Dr. Chabot also found evidence of degeneration involving the L4-5 level. He found normal morphology of the discogram at L5-S1 with no evidence of annular tear. There is evidence of lumbar spinal stenosis at L4-5 and diffuse disc-filling pattern at L4-5

suggesting advanced degeneration. He diagnosed chronic low back pain and opined that Claimant's complaints were associated with discogenic disease at L4-5. He opines that Claimant's condition is medically causally related to her injury of June, 2007, and is the prevailing factor in her present complaints.

All doctors' opinions are given with a reasonable degree of medical certainty. Dr. Mirkin's testimony is more credible and consistent with the evidence.

RULINGS OF LAW

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

The Claimant's current injury and related symptoms and complaints are not caused by a work-related injury occurring on either June 22, 2007 or January 24, 2008. Claimant is currently at MMI for her work related injuries which consisted of low back strains that resolved in the usual course. Claimant is not awarded attorney's fees and costs in this matter because Employer did not unreasonably defend the action.

The word "accident" as used in this chapter shall mean 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. An injury is not compensable because work was a triggering or precipitating factor. §287.020.2 RSMo.

In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. §287.020.3(1)

An injury shall be deemed to arise out of and in the course of the employment only if: (a) it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. §287.020.3(2)(a)(b).

The provisions of the chapter shall be strictly construed and the evidence shall be weighed impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts. §287.800.1

The claimant bears the burden of proving all essential elements of a Workers' Compensation Claim, including the causal connection between the accident and the injury. *Grime v. Altech Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D. 2002) (overruled in part by

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 226 (Mo. 2003); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo. 1968). While the claimant is not required to prove the elements of the claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." See *Anderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App.E.D. 1999); see also *Shelton v. City of Springfield*, 130 S.W.3d 30, 38 (Mo.App. S.W. 2004).

In cases involving medical causation, which is not within the common knowledge or experience, the claimant must present medical or scientific evidence showing the cause and effect relationship between the complained of condition and the asserted cause. See *McGrath v. Satellite Sprinkler Systems, Inc.*, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo.App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one parties expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop-n-Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo.App. E.D. 1993); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo.App. 1986).

Injury Number 07-075959
Medical Causation (June 22, 2007)

The evidence shows that on June 22, 2007, Claimant had a sudden onset of pain in her lower back while moving a table in the performance of her work duties. Claimant had no prior back complaints and her pain has continued since the accident even with care and treatment to cure and relieve the effects. There is a dispute between two expert medical opinions presented at the hearing. Dr. Chabot found the work incident of June 2007 to be the prevailing factor causing the present condition, symptoms, complaints, and need for treatment. He found Claimant had sustained an internal disc disruption caused by the June, 2007 incident. This is less credible than Dr. Mirkin's opinion because he does not address why it is the prevailing factor given the fact that the two sprains had resolved within four to six weeks of their occurrence. The MRI and discogram were not performed until after the injury on January 24, 2008 so it is not clear how Dr. Chabot can be certain that the incident of June, 2007 is the prevailing factor.

Claimant did not seek additional medical treatment after her release from BarnesCare on July 19, 2007. She reported no pain and was taking no prescription medication as of that date. She had a normal exam and full range of motion. At this point her low back strain was resolved but she continued to have symptoms related to chronic degenerative disc disease.

Dr. Mirkin does not attribute the degenerative disc disease found on the x-rays and MRI to be causally related to the June 22, 2007 injury. Dr. Mirkin did not recommend surgery based on the minimal findings on clinical examination and diagnostic tests. Dr. Chabot recommended surgery based on the result of the discogram and post-discogram CT scan only because of some indication that there was internal disc disruption that did not and could not appear on the MRI.

Claimant did have degenerative disc disease but there was no history of lower back complaints prior to the June 22, 2007. The degenerative disease was not symptomatic. The June

22, 2007 incident triggered the symptoms of her preexisting condition which persisted even after the strain/sprain had resolved. There is no evidence to support a finding of permanent partial disability attributable to the June 22, 2007 injury.

Claimant had an accident in June of 2007 which resulted in a strain/sprain to her lower back. This injury resolved with no permanency. Her ongoing symptoms are attributable to her chronic low back pain and degenerative disc disease which was not caused by her work accident. This chronic condition is the prevailing factor in Claimant's ongoing symptoms and is the primary cause in both the condition and any permanent disability. The accident triggered the injury and symptoms for which Claimant now requests surgery.

Future Medical Treatment and TTD (June 22, 2007)

Claimant is in need of further medical treatment and seeks that care to relieve her symptoms. If she was awarded medical care she could also receive temporary total disability benefits. Dr. Lee and Dr. Chabot both recommend treatment including surgical intervention. The low back strain is compensable but fully resolved with no permanency. The degenerative condition and chronic low back pain is not compensable because it did not arise in and out of the course of Claimant's employment. Any need for additional medical treatment in this case is attributable to Claimant's preexisting condition of degenerative disc disease. Future medical treatment and TTD is therefore denied.

Attorney's Fees and Cost of Litigation

If the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. §287.560 RSMo. (2005). To award attorney fees and costs the issue must be clear and the offense egregious. I do not find that there is a clear issue of unreasonable defense or that the offense in denying the claim generally or the medical treatment specifically was egregious.

Dr. Lee, seen by Claimant when further treatment was denied by the employer, recommended further medical treatment. On December 11, 2008, an IME was performed by Dr. Chabot at the request of Mr. Palombi and Employer/Hartford Insurance. Dr. Chabot recommended surgery to correct Claimant's degenerative disc disease. This goes to the issue in the case regarding causation and liability. The Employer retained reasonable defenses to the issue of liability including causation. The employer/insurers' defense of this case is not found to be without merit. It was based on medical records and the expert medical testimony of Dr. Mirkin. Even if Employer was held liable for treatment, it is not found that they acted with egregious offense in denying medical treatment. Request for attorney fees and cost of litigation is denied.

Injury Number 08-012571
Medical Causation (January 24, 2008)

Claimant again sustained a strain/sprain at work on January 24, 2008 while in the course and scope of her duties. The strain was treated in the same way as her earlier strain in June, 2007

and again it resolved with no permanency. Claimant however continues to experience pain from a preexisting chronic low back condition and degenerative disc disease. This is not a new condition but a continuation of her preexisting non work related condition. Any benefits to which the employee may or may not be entitled are addressed in the award on Injury Number 07-075959 with the injury date June 22, 2007. All claims for benefits under this injury number are denied.

Based on these findings, the stipulations of the parties and the admission of Employer insurer AIG that it provided coverage for Claimant on June 22, 2007, Twin City Fire Insurance Company is dismissed as a party from this claim.

CONCLUSION

I find Claimant has not met her burden of proving the injuries occurring on June 22, 2007 and January 24, 2008 resulted in an injury that arose out of and in the course of employment as they were not the prevailing factor in causing the medical condition and disability. There is no award for medical care or treatment and no award of attorney fees or costs of litigation. The low back strains/sprains resolved with no permanency so there is no permanent partial disability awarded herein.

Date: _____

John A. Tackes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

Naomi Pearson
Division of Workers' Compensation