

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award of Administrative Law Judge  
by Separate Opinion)

Injury No.: 07-079817

Employee: Lenora Washington

Employer: St. Anthony's Medical Center

Insurer: Self-insured

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we affirm the award of the administrative law judge by separate opinion. The award and decision of Administrative Law Judge John A. Tackes, issued July 30, 2010, is attached solely for reference and is not incorporated by this decision.

**Preliminaries**

The seven issues stipulated at the hearing were: (1) whether employee sustained an accident; (2) whether the accident is compensable under Chapter 287; (3) whether the alleged accident arose out of and in the course of employment; (4) notice; (5) medical causation; (6) temporary total disability; and (7) the nature and extent of permanent disability.

The administrative law judge found the following: (1) employee did not provide proper notice to employer of her alleged injury of May 16, 2007, and employer was prejudiced as a result; (2) employee failed to prove she sustained an accident on May 16, 2007; (3) employee failed to meet her burden on the issue of medical causation; and (4) all other issues are moot.

Employee submitted a timely Application for Review with the Commission alleging the administrative law judge erred because: (1) the award is against the weight of the evidence; (2) employee gave both written and oral notice of the injury; (3) there was no prejudice to employer; (4) all of the evidence is that there was an accident; (5) all of the credible medical evidence is that there was a medical causal relationship; (6) certain records do not lend themselves to the employee saying there was no accident; (7) credibility assessments should not have been made adversely to employee because she was a model employee; and (8) the employee testified she reported her injury to the people who were supposed to know, and the employer failed to have those people testify, and thus there is proof of notice.

For the reasons set forth in this award and decision, the Commission affirms the award of the administrative law judge by separate opinion.

**Findings of Fact**

Employee previously sustained work injuries on February 21, 1996, March 21, 1998, and January 26, 1999. Employee was familiar with workers' compensation injuries and

Employee: Lenora Washington

- 2 -

knew she had to report any work injury to a supervisor. Employee alleges that on May 16, 2007, while pulling a gurney bed with another nurse, she struck a doorway and felt pain in her neck and right upper extremity. Employee started an incident report but did not finish it. The incident report was ultimately completed on June 22, 2007, with references to a tuberculosis exposure on May 16, 2007, and contains no mention of an injury to employee's neck or right upper extremity on that date. Employee did not request treatment from employer for her neck and right upper extremity complaints. Instead, she sought treatment on her own in November 2007 and eventually underwent a cervical fusion surgery on December 1, 2007.

Employee testified she could not remember ever telling a supervisor that she thought she hurt her neck and right upper extremity on May 16, 2007. Employee testified she told the people who worked at the "ACC desk," but acknowledged that these people are not supervisors. Employer presented employee's supervisor, Katherine Udina, Ms. Udina's supervisor, Ora Wood, and employer's workers' compensation coordinator, Lisa Holzem, who each testified that they were unaware until after employee's surgery of employee's claim that she suffered a work injury to her neck and upper right extremity on May 16, 2007. We find these witnesses credible. We find that employee did not tell a supervisor about her alleged injuries.

### **Conclusions of Law**

Section 287.420 RSMo deals with the notice an injured employee must provide to her employer and provides, in pertinent part, as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

The purpose of the foregoing section is to give the employer a timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo. App. 2000), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003). The statute sets forth six requirements: (1) written notice, (2) of the time, (3) place, and (4) nature of the injury, and (5) the name and address of the person injured, (6) given to the employer no later than thirty days after the diagnosis of the condition. *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 828 (Mo. App. 2009).

We conclude that employee did not provide employer with a written notice that meets the requirements of § 287.420 RSMo. An incident report exists, but it contains no mention of any injury to employee's neck or right upper extremity, and it was not completed by employee until more than 30 days had passed from the alleged date of accident. Thus, we proceed to the question whether employee demonstrated that employer was not prejudiced by her failure to provide written notice.

Employee: Lenora Washington

- 3 -

The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. If the employer does not admit actual knowledge, the issue becomes one of fact. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer.

However, when the claimant does not show either written notice or actual knowledge, the burden rests on claimant to supply evidence and obtain the Commission's finding that no prejudice to the employer resulted. If no such evidence is adduced, we presume that the employer was prejudiced by the lack of notice because it was not able to make a timely investigation.

Soos, 19 S.W.3d at 686 (citations omitted).

It is well settled that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652, 654-55 (Mo. App. 1994). But we have found that employee did not tell a supervisor about her injuries, and that employer did not have actual knowledge that employee claimed to have sustained injuries to her neck and right upper extremity on May 16, 2007.

Employee points to the evidence that it was not uncommon for employer to get half-completed incident reports or occasionally even lose completed reports, arguing that nothing out of the ordinary occurred here and thus employee's failure to provide notice should be excused. We are not persuaded. There are a number of reasons why employer might have occasionally received half-completed reports or lost reports. It appears that employee invites us to assume that employer's workers' compensation procedures were administered in a careless or casual fashion, and thus employee should be excused for her failure to complete the report, but we decline to so speculate, and in any event, we fail to see the connection to the question whether employer was prejudiced given the circumstances of this particular case. Apart from her argument that the incomplete report and her interaction with the people at the ACC desk should constitute actual notice, employee fails to identify any other evidence to show employer was not prejudiced, and we can find no other evidence adduced or supplied by employee that so demonstrates. Accordingly, we will presume that employer was prejudiced.

Employee sought treatment and proceeded to surgery on her own. Employer was deprived of the chance to provide immediate treatment in order to minimize the effects of the work injury, and was also deprived of the opportunity to secure a contemporary evaluation of the nature and extent of the injuries employee suffered in the alleged accident. In a case such as this, where accident is at issue and the parties contest whether employee's injuries resulted from degenerative processes or a traumatic event,

Employee: Lenora Washington

- 4 -

we cannot say that employer was not prejudiced when it was deprived of the opportunity to promptly investigate the circumstances of the alleged event.

Given the foregoing, we conclude that employer was prejudiced by employee's failure to provide written notice.

**Conclusion**

Based on the foregoing, the Commission concludes that employee did not provide employer with the notice required under § 287.420 RSMo and that employer was prejudiced as a result. Accordingly, employee's claim for benefits is denied. All other issues are moot.

Given at Jefferson City, State of Missouri, this 20<sup>th</sup> day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

William F. Ringer, Chairman

---

Alice A. Bartlett, Member

---

John J. Hickey, Member

Attest:

---

Secretary

## FINAL AWARD

Employee: Lenora Washington Injury No.: 07-079817  
Dependents: N/A Before the  
Employer: St. Anthony's Medical Center **Division of Workers'**  
**Compensation**  
Additional Party: SIF<sup>1</sup> Department of Labor and Industrial  
Relations of Missouri  
Insurer: Self Insured Jefferson City, Missouri  
SCO Corporate Claims Management Center  
Hearing Date: April 28, 2010 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? 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 16, 2007 (alleged)
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? 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:  
Claimant alleges that she felt pain when pulling a bed through a doorway while transporting a patient from his hospital room to the operating room.
12. Did accident or occupational disease cause death? No
13. Part(s) of body allegedly injured by accident or occupational disease: Neck and upper right shoulder alleged.
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? Unknown<sup>2</sup>

Employee: Lenora Washington

Injury No.: 07-079817

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$454.07
- 19. Weekly compensation rate: \$302.71/\$302.71
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: None
- Unpaid medical expenses: \$0.00
- 0 weeks of temporary total disability (or temporary partial disability)
- 0 weeks of permanent partial disability from Employer

22. Second Injury Fund liability: None (Dismissed)

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: Frank J. Niesen

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

Employee:	Lenora Washington	Injury No.:	07-079817
Dependents:	N/A		
Employer:	St. Anthony's Medical Center		
Additional Party:	SIF <sup>3</sup>		
Insurer:	Self Insured SCO Corporate Claims Management Center		
Hearing Date:	April 28, 2010	Checked by:	JAT

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

**INTRODUCTION**

On April 28, 2010, a hearing in this Matter was held in the City of St. Louis at the Division of Workers' Compensation by Administrative Law Judge John A. Tackes. Lenora Washington personally appeared and testified. Attorney Frank J. Niesen, Jr., represented Claimant. Attorney Christopher Archer represented the Employer, St. Anthony's Medical Center. Three witnesses testified for Employer. The Second Injury Fund was dismissed on the record.

Claimant offered eight exhibits (A-H); Employer offered three exhibits (1-3). The exhibits were admitted to the record without objection. All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

**STIPULATIONS**

The parties stipulated prior to hearing that the Missouri Division of Workers' Compensation has jurisdiction to hear this matter; Venue in the City of St. Louis is proper; Claimant's average weekly wage is \$454.00 resulting in a compensation rate of \$302.71 for both temporary total benefits (TTD) and permanent partial disability (PPD); Employer paid no TTD or medical benefits referable to this claim. The parties stipulate that if TTD is awarded, the period at issue for such temporary total disability benefits is November 26, 2007 to January 2, 2008.

**ISSUES**

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

1. Notice
2. Accident
3. Medical causation
4. Nature and extent of TTD benefits, and
5. Nature and extent of PPD benefits.

## FINDINGS OF FACT

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

### *Live Testimony*

1. Claimant, **Lenora Washington**, was born June 27, 1956, and currently lives in Lake St. Louis, Missouri. Prior to her employment with Employer, St. Anthony's Hospital, she worked as a waitress, as a trainer with the disabled, and as a housekeeper in housekeeping at Deaconess Hospital. In 1998, she began work at St. Anthony's in housekeeping. After two years in central supply she began work in the O.R. Department as a nurse aide transporting patients from place to place within the hospital. Claimant believes that the injury relevant to this claim was incurred while in the course and scope of her duties on May 16, 2007. Claimant was working for Employer that day and did transport a patient from his room to the operating room.
2. On May 16, 2007, Claimant worked the first shift which lasted from 6:00 a.m. to 2:30 p.m. That morning she and another nurse aide moved a patient from his room to surgery using a bed designed for large patients. While maneuvering the bed through a doorway, the bed struck a door jam. Claimant was on the outside of the room pulling the bed and felt pain in her neck, right arm, and finger. After the move, Claimant went to the ACC desk to initiate the process by which an injury would be reported. The ACC desk is the designated location where a report of injury would be made. Claimant began but did not complete the incident report because she was called away to perform her duties as a nurse aide. Claimant left the form at the ACC desk incomplete, unsigned, and undated. After returning to work, Claimant forgot about the incident report and never returned on her own to resume the process.
3. In November, 2007 Claimant saw Dr. Paul Young and had an MRI performed. On December 1, 2007, Claimant had cervical fusion surgery recommended by Dr. Young. Claimant attended post surgery physical therapy and was off about four weeks and returned to work on January 2, 2008. She was assigned new hours after her return to work. Currently Claimant complains that she cannot comb her hair because it hurts to lift her arm for long periods. She favors her left side over the right at work in order to minimize pain. She no longer goes fishing.
4. In 2002 Claimant saw David B. Fagan M.D. for a right shoulder injury that occurred at work while transporting a patient. She was seen by Dr. Young and was prescribed medication but no physical therapy and continued working. She took pain medication as needed prior to the primary injury.
5. Prior to May 16, 2007, Claimant reported work related injuries to Employer on March 21, 1998 and January 26, 1999. She was familiar with the required procedure to report an injury and in fact had exercised the process at least twice while working for Employer.
6. On June 22, 2007, a report of injury was completed because of exposure to tuberculosis (TB) at the hospital on May 16, 2007. Claimant was identified as one of the employees

possibly exposed to TB that day by a patient. The report of injury completed on June 22, 2007 and signed by Claimant that day was the form initially begun by Claimant on May 16, 2007 but never finished. The form was presented to the Claimant by Employer and marked with TB exposure by Employer as the reason for the report having been completed.

7. Claimant had received an annual PPD for TB as recently as September 19, 2006. She was tested for TB on June 22, 2007 and scheduled to return for a PPD follow up on August 8, 2007. From May 16, 2007 to June 22, 2007 Claimant did not complain to her supervisor of pain in her arm. Claimant had not completed the form she began on May 16, 2007 until that form it was used by Employer for the TB exposure. There is no evidence that Claimant referenced her alleged injury on May 16, 2007 when she signed the report or that she requested any treatment from Employer contemporaneous to her signing the report or receiving TB testing in connection with the report.
8. **Katherine (Kathy) Udina** testified at the hearing on behalf of Employer. In May, 2007, Ms. Udina was Manager of Nursing Resources and Claimant's supervisor. She had regular, daily contact with Claimant from May, 2007 to December, 2007. At no point during this time did Claimant tell Ms. Udina of a work related injury to her neck. Ms. Udina was aware of the time taken off by Claimant for surgery in December 2007 because the work schedule was changed to account for Claimant's absence during this time. Claimant did not inform Udina that her injury or need for surgery was potentially work related.
9. **Ora MaeWood** is employed by Employer as Director of Surgical Services and has known Claimant for years. Ms. Wood is the supervisor of Kathy Udina. She had contact with Claimant approximately one time per week but not more frequently than that. No work related injury was reported to Ms. Wood by Claimant in 2007. Ms. Wood first became aware of Claimant's medical problems referable to the cervical spine and shoulder when Claimant had surgery in December 2007. Ms. Wood was not aware that the need for surgery was possibly related to a work injury until the summer of 2008. Ms. Wood did not speak with Claimant between May, 2007 and November 2007 regarding Claimant's complaints of neck or arm problems.
10. **Lisa Holzem**, a nine year employee and workers' compensation coordinator testified that notice was not received by Employer from Claimant regarding the alleged injury until a workers' compensation claim was filed in December, 2007.

#### *Division Records*

11. Records of the Division admitted into evidence show that Claimant has a history of work related injuries dating back to 1996. A report of injury was prepared reflecting that at midnight on January 1, 2001, Claimant felt pain in her back while pushing food carts. The Employer, St. Anthony's Medical Center was notified of this alleged strain to the upper back (thoracic area) on September 22, 2003. The workers' compensation claim was denied by the Employer/Insurer in a letter to Claimant dated December 1, 2003.

12. On February 23, 1996, a report of injury was prepared that indicated on February 21, 1996 at 6:30 p.m., Claimant strained her low back lifting boxes while working for a previous employer. Claimant received one and one sevenths weeks of TTD benefits in the amount of \$166.86 and returned to work March 4, 1996. Another report of injury was prepared on March 27, 1998 showing Claimant sustained a low back strain while pulling trash and linen as an employee of Deaconess Health Services.
13. Finally, on February 2, 1999, a report of injury was completed for an injury on January 26, 1999, for back pain from putting bed pad on a bed and feeling a "pop" in Claimant's back while working in housekeeping for St. Anthony's.

*Medical Evidence and Expert Opinions*

14. In 2002, Dr. David B. Fagan treated Claimant for problems with her shoulder and pain in the base of her neck radiating down her arm. On July 23, 2002, Dr. Fagan saw Claimant for complaints of pain in her shoulder and neck. He documented positive impingement sign and negative supraspinatus test of her shoulder. An x-ray revealed decreased disk space at the C5-6 level and loss of cervical lordosis. An x-ray of the right shoulder revealed Type II acromion. Physical therapy was suggested.
15. Medical records from the Microsurgery and Brain Research Institute, P.C. (MBRI) indicate that on June 30, 2003, Claimant was seen for complaints of pain in the right side of her neck down to her hands. The problem she complained of originated the prior year and Claimant denied being involved in any kind of injury. The symptoms affected her right shoulder, right hand and little finger. She complained of weakness and numbness in her right wrist.
16. On June 30, 2003, Dr. Young treated Claimant for complaints of right middle neck pain radiating to the right shoulder, arm, forearm, hand, and little finger. According to the records, the symptoms had begun about a year before without any initiating factors. Claimant described her pain as intermittent and worsening.
17. In July 2003, an MRI of the cervical spine revealed a 2-3 mm central spur at C4-5; a central disk protrusion and spurring at C5-6 (3-4 mm); no abnormality at C6-7; and a 2 mm spur central and right parasagittal at C7-T1. No abnormalities were noted on the cervical x-rays obtained the same day. Claimant was diagnosed with cervical stenosis.
18. St. Anthony's Employee Health and Wellness Nursing Notes, dated June 22, 2007, indicate Claimant presented with a history of TB exposure on May 16, 2007. An employee report of injury signed June 22, 2007, reports suspected TB exposure.
19. On November 26, 2007, Claimant completed a Comprehensive Health History/Review of Systems at St. Anthony's Medical Center where she was seen for pain in the upper right side of her neck. She indicated on this form that she had been seen in 2003 for this problem and the problem has gotten worse. She indicated further that she had not been involved in an injury referable to the current complaint. On the form, Claimant simply wrote "no" in response to the question of whether or not she was involved in some kind

of injury referable to the current complaint. There are two other questions to which the “no” answer could arguably have been addressed. An answer in the negative to the other two questions however is incongruous and simply does not make sense.

20. The other questions asked on the form near where the Claimant wrote “no” are “When did your problem begin?” and “Is it constant, or does it ‘come and go’?” Claimant’s answer on the form “no” does not make sense with either of the other two questions asked on that section of the form, i.e. “When did your problem begin?” or “Is it constant, or does it ‘come and go’?” If her answer was intended to mean the pain does not come and go, then she failed to answer the question of whether an injury was associated with her complaints. I find that she intended to say what is clearly marked on the form, i.e. there was no injury referable to the current complaint.
21. On November 26, 2007, Claimant was seen by Dr. Young for a cervical stenosis follow-up visit. Claimant went to Dr. Young and complained of shooting pain in her neck and right shoulder. She complained that the symptoms were worsening and now included headaches. A second cervical spine MRI was performed revealing congenitally small spinal canal, moderate degenerative spinal canal stenosis, severe degenerative spinal canal stenosis, C4-5, C5-6, and C6-7. A possible healed linear fracture through the inferior right lateral aspect of the C5 vertebral body was noted. No bone marrow edema pattern was noted suggesting chronicity. Dr. Young recommended she have cervical fusion surgery.
22. On December 1, 2007, Claimant had elective anterior cervical decompression discectomy following a diagnosis of cervical spondylosis at C4-5 and C5-6. She was released from the hospital post surgery on the same day. Dr. Young opined that Claimant sustained an injury at work on May 16, 2007 while transporting a patient using a hospital bed designed for obese patients.
23. **Russell C. Cantrell, M.D.**, saw Claimant for an Independent Medical Evaluation (IME) on June 29, 2009 referable to an alleged injury on May 16, 2007. He reviewed a report of injury dated June 22, 2007 indicating “exposure to TB” transporting patient to surgery. For the evaluation, Dr. Cantrell reviewed an evaluation by Dr. Paul Young dated November 26, 2007. Claimant had previously been seen in that office in 2003 for similar problems. She reported to Dr. Young’s office that the symptoms had worsened since 2003 and there was no injury involved in her present complaints.
24. Dr. Cantrell performed a physical examination and took a medical history from Claimant. He diagnosed neck pain, status post two-level discectomy and fusion caused by a combination of congenital and degenerative abnormalities. Dr. Cantrell did not relate either condition to an incident on May 16, 2007. He further opined that the work activities were not the prevailing factor in the cause of her diagnosis. He opined no acute injury was sustained on May 16, 2007 and no future treatment was recommended. Dr. Cantrell’s testimony is credible.
25. Claimant had several diagnostic tests reflected in her records. These include an x-ray, an MRI (cervical and low back), myelogram, and CAT scan. She had an MRI of the cervical

spine in 2003 and 2007. A radiologist noted a possible healed fracture to the anterior right lateral aspect of the T2-5 vertebral body that was chronic. Dr. Cantrell noted there was suggestion of nerve root impingement in her cervical spine prior to and subsequent to May, 2007, but the radiologist makes no note of any nerve root compression in the MRI of November 2007. Claimant was seen by two evaluating physicians and told both of them that she sustained an injury on May 16, 2007; however, she denied having sustained an injury when seen by her treating physician.

26. Dr. Cantrell opined that Claimant has neck pain post cervical spine discectomy and fusion but that her work with Employer is not a substantial factor in the cause of her diagnosis. He opines a combination of congenital and degenerative abnormalities. No indication of an acute injury sustained May 16, 2007 leading to the onset of the complaints. Medical records suggest similar symptoms in her neck and right upper extremity long predating the primary injury. Medical records post May 16, 2007 do not reflect a May 16, 2007 injury with the exception of Dr. Musich's IME. Dr. Cantrell puts Claimant at MMI with no further treatment for the alleged injury of May 16, 2007 and no PPD referable to that incident.
27. On May 13, 2008, *Thomas F. Musich, M.D.* examined Claimant for the purpose of providing an independent medical evaluation (IME) at the request of Claimant. He reviewed medical records, reports, took a history, took a physical examination, and based on a reasonable degree of medical certainty opined that Claimant suffered acute trauma on or about May 16, 2007 during the course and scope of her employment. This trauma he opined is the prevailing factor in the development of severe and incapacitating cervical pain and cervical radiculopathy requiring surgical intervention. Dr. Musich opines the May, 2007 trauma is causally related to Claimant's persistent posttraumatic complaints resulting in 40% PPD of the BAW referable to multilevel cervical disc pathology. He opines 20% PPD BAW to pre-existing cervical symptomology. He finds the disabilities to be a hindrance or obstacle to employment or re-employment. Further, the combination of the pre-existing injuries creates a disability greater than the simple sum of the disabilities.

### **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:

Claimant has the burden of proof to establish the elements of her claim for benefits. In order to reach the issue of the nature and extend of the TTD and PPD benefits, Claimant must show by a preponderance of the evidence that a workplace injury resulted from an accident arising out of and in the course of her employment for which proper notice was given. Failure to give timely notice is not fatal to the claim if the failure did not prejudice the employer.

Under §287.420, no proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after

the accident, unless the employer was not prejudiced by failure to receive the notice. 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.

Claimant initiated the notice process but failed to complete it in any substantive or meaningful way. There is no evidence that Employer lost or misplaced the document. In fact, Employer was able to utilize the incomplete document over a month later when it appeared Claimant had been exposed to TB by a patient. A non-specific, undated, unsigned report is not a report of injury. The document was perfected at the request of Employer when it came to Employer's attention that Claimant may have been exposed to TB.

Notice is to be given to the employer as soon as practical, but not later than 30 days after the accident. The purpose of §287.420, RSMo, is to give the employer timely opportunity to investigate the facts pertaining to whether the accident occurred and, if so, to give the employee medical attention to minimize the disability. *Dunn v. Hussman Corporation*, 892 S.W.2d 676, 681 (Mo.App., 1994). The written notice may be circumvented if the claimant makes a showing that the employer is not prejudiced by the lack of such notice. *Id.* Claimant has the burden of showing that the employer was not prejudiced. *Hannick v. Kelly Temporary Services*, 855 S.W.2d 497, 499 (Mo.App., 1993). A prima facie case of no prejudice is made if claimant can show the employer had actual knowledge of the injury. *v. Jewish Hospital*, 854 S.W.2d 82, 85 (Mo.App., 1993).

Missouri Courts have held that no prejudice exists where the evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact finder. *Willis*. A partially completed report is not "actual notice". Testimony provided by three witnesses for Employer agree that Employer was unaware of any injury alleged to have occurred by Claimant at work on May 16, 2007. This agrees with Claimant's statement in November, 2007 on the medical form which indicated Claimant was not involved in any kind of injury referable to her current complaint.

It is the burden of the Employee to produce competent and substantial evidence that timely notice was provided to the Employer. Where neither written notice nor actual knowledge on the part of the Employer is shown by the Employee, the burden rests on him to supply evidence and obtain a commission's finding that no prejudice to the Employer resulted. *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498 (Mo.App., 1968).

"Where...the employer does not admit that he had actual knowledge the issue becomes one of fact; if the employee produces substantial evidence that the employer had such knowledge he thereby makes a prima facie showing of want of prejudice, and the burden of bringing forth evidence to prove he was prejudiced shifts to the employer. But §287.420 places the burden of proof upon the claimant to produce competent and substantial evidence that the written notice was given...; and where neither written notice or actual knowledge is shown by a claimant the burden rests on him to supply evidence and obtain the Commission's finding that no prejudice to the employer resulted. 425 S.W.2d 498, 503-504 (internal citations omitted).

Notice enables the Employer to “protect himself by prompting investigation of the accident and treatment of the injury.” *Reichert v. Jerry Reece, Inc.*, 504 S.W.2d 182 (Mo.App., 1973). Where the employee fails to adduce evidence of lack of prejudice, the Court will “presume that the Employer was prejudiced by the lack of notice because it was not able to make a timely investigation.” *Soos v. Mallinckrodt Chemical Co.*, 19 S.W.3d 683, 686 (Mo.App. 2000). Claimant continued to work post May, 2007. She was treated by Employer for TB exposure during the summer of 2007 and never sought treatment or requested treatment for the alleged incident in May.

In November Claimant sought care for her neck and shoulder through her primary physician and a surgeon with whom she had previously been treated. Claimant was examined, diagnosed, went through treatment including surgery and had physical therapy all without notice to Employer that her injuries were allegedly work related. I find that Claimant did not provide proper notice to Employer of her alleged injury on May 16, 2007. Employer had no ability to direct the care or treatment prior to the conclusions of physical therapy post surgery. For these reasons, Employer was clearly prejudiced by Claimant’s failure to provide notice.

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. Likewise, the term “injury” is defined by statute 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).

Other than Claimant’s testimony and the circumstantial inference from the incomplete report of injury, there is no objective evidence of an injury sustained by Claimant on May 16, 2007. While it is true that Claimant identifies an unexpected traumatic event by time and place of occurrence producing symptoms, the symptoms either resolved or did not produce the objective quality necessary by statute. Claimant has a history of cervical spine and neck pain which predates and postdates May 16, 2007. The evidence presented does not show that the date alleged produced a particular compensable injury. Claimant has failed to prove there was a compensable accident that occurred on May 16, 2007.

Finally, Medical causation must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. *Shelby v. Trans World Airlines*, 831 S.W.2d, 221, 222 (Mo.App. W.D. 1992). Questions

regarding causation or issues of fact are to be decided by the Commission. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 589 (Mo.App. 1999).

The burden is on the Employee to prove not only that an accident occurred and that it resulted in an injury, but also that there is a medical causal relationship between the accident, the injury and the medical treatment for which he is seeking compensation. *Smart v. Chrysler Corporation*, 851 S.W.2d 62, 64 (Mo.App. 1983). In order to prove a medical causal relationship between the alleged accident and medical condition, the Employee must offer competent medical testimony to satisfy his burden of proof. *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200 (Mo.App. 1991). Medical causation, not within common knowledge or experience, must be established by scientific or medical evidence showing a cause and effect relationship between the complained of condition and the asserted cause. *Id.* Claimant’s alleged accident occurred nearly six months before treatment was sought. The medical causal relationship between the described accident in May and the surgery for degenerative spinal canal stenosis in December has not been established by competent and substantial evidence. Medical opinions drawing such a connection are not credible or persuasive.

### Conclusion

On the issues of notice, accident, and medical causation related to the alleged injury on May 16, 2007, Claimant has failed to meet her burden of proof and Employer is not held liable for benefits. Having so ruled, other issues before the Court are moot.

Date: \_\_\_\_\_

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

A true copy: Attest

\_\_\_\_\_

Naomi Pearson  
*Division of Workers' Compensation*

<sup>1</sup> The Second Injury Fund was dismissed on the record April 28, 2010.

<sup>2</sup> Employer hospital is self insured. All medical costs associated with Claimant’s injury were paid by the insurer.

<sup>3</sup> The Second Injury Fund was dismissed on the record April 28, 2010.