

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

Injury No.: 08-123162

Employee: Bill Wengler

Employer: Nomax, Inc.

Insurer: New Hampshire Insurance Co. – Chartis 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 13, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued December 13, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 31st day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Bill Wengler¹ Injury No.: 08-123162
Dependents: N/A Before the
Employer: Nomax, Inc. **Division of Workers'**
Compensation
Additional Party: N/A Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: New Hampshire Insurance Co.-
Chartis Claims, Inc.
Hearing Date: September 16, 2010 Checked by: SC

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 Theurer an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged October 7, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis 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? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant alleged he developed a herniated cervical disc from repetitive work activities.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged cervical spine injury, body as a whole
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? \$0.00

¹ Division Workers' Compensation records show the Claimant's name as "Bill Wangler" however he testified that his name is "Bill Wengler." The record will be adjusted to reflect Mr. Wengler's testimony.

Employee: Bill Wengler

Injury No.: 08-123162

17. Value of necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: \$369.72

Weekly compensation rate: \$246.48 - Permanent Partial Disability and Temporary Total Disability

20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: NONE

TOTAL: NONE

23. Future requirements awarded: NONE

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

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: James Parrot

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Bill Wengler	Injury No.:	08-123162
Dependents:	N/A		Before the
Employer:	Nomax, Inc.		Division of Workers'
			Compensation
Additional Party:	N/A		Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	New Hampshire Insurance Co.- Chartis Claims, Inc.	Checked by:	SC

STATEMENT OF THE CASE

A hearing was held at the Missouri Division of Workers' Compensation (DWC), St. Louis office at the request of Bill Wengler (Claimant), on September 16, 2010, pursuant to Section 287.450 RSMo (2005).² Claimant seeks medical treatment. Attorney James Parrot represented Claimant. Attorney Hugh O'Sullivan represented Nomax, Inc. (Employer) and New Hampshire Insurance Company c/o Chartis Claims, Inc. (Insurer). Venue is proper and jurisdiction lies with the DWC. The record remained opened until September 23, 2010 for Employer to submit Exhibit 2, which was submitted on September 20, 2010. The Second Injury Fund is not a party to the case.

Claimant's Exhibits A-I and Employer's Exhibits 1 and 2 were admitted without objection. Any notations contained in the Exhibits were present when admitted. Any objections contained in the depositions but not sustained in this award are overruled.

STIPLATIONS

The parties stipulated that on or about October 7, 2008:

1. Claimant was employed by the Employer in St. Louis County in Missouri;³
2. Claimant and Employer operated under the Missouri Compensation Law;
3. Insurer fully insured Employer's liability;
4. A Claim for Compensation was timely filed;
5. Claimant's average weekly wage was \$369.72, resulting in a compensation rate of \$246.48 for both Temporary Total Disability (TTD) and Permanent Partial Disability (PPD);
6. Employer paid no TTD or medical benefits; and
7. If Claimant does not prevail, the parties request a final award

² All references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

³ All references in this award to the Employer also include the insurer.

ISSUES

Parties identified the following issues for disposition:

1. Did Employer receive proper notice of an alleged work injury?
2. Is Claimant's disc herniation at C5-C6 medically and causally related to his work activities?
3. Is Employer liable for medical expenses totaling \$2,144.90?
4. Is Employer liable for past TTD totaling \$6,162.00 from April 1, 2010 to the present totaling for 25 weeks?
5. Is Employer liable for future medical care?
6. If causation is not found, what is the nature and extent of Employer's liability, if any, for PPD?

SUMMARY OF DECISION

Claimant gave proper notice of an alleged work injury but did not meet his burden to show his work activities were the prevailing factor that caused a herniated disc at C5-C6, and the need for treatment. All other issues are moot.

SUMMARY OF EVIDENCE

1. At the time of the hearing, **Claimant** was 53 year old, five feet six inches tall, and married for nearly 29 years. Claimant lives with his wife and two grandchildren. Claimant has smoked a pack of cigarettes a day for the past 30 years.
2. In June 1995, Claimant worked through a temporary agency on an assembly line, as a machine operator with no history of cervical injuries at that time.
3. Around 2004, Employer hired Claimant as a printer through an employment agency. Claimant worked on three printing machines; the value cloth, flat pack, and the vista-shem/clean machines. Claimant's testimony regarding the operation of the machines is discussed below:
4. Claimant was assigned mainly to either the flat pack or value cloth machine which he operated the entire day. Claimant worked 40 hours a week, five days a week, 8-1/2 hours per day, with two 15 minute breaks and one 30 minute lunch. His maximum exposure to any machine was 7.5 hours per day. There was no limit on Claimant's ability to walk around, get a drink or turn off the machine during a shift.
5. Claimant testified **Exhibit B** accurately reflects the setup of the value cloth machine he operated. Claimant took the photos of the work station. Exhibit B shows the cushioned chair, with adjustable height. He controlled the height of the chair and his distance from the machine. To print cloths Claimant reached his arms up to the right, looked up and took a stack of 100 cloths out of the box located on a table and set them on the platform

to be printed at chest level. A pink ball lowered to the ink tray in front of Claimant and printed cloths. Claimant completed 15 to 20 boxes of value cloths per shift. The value cloth machine operated by foot pedal or an automatic switch.

6. A box of 100 value cloths weighed less than a pound, and an individual cloth is essentially weight less.
7. After printing, Claimant reached up to pull the cloth off the machine, one at a time, with both hands, reached forward to pull them apart, and restack cloths on a lower platform. He looked down to restack as neatly as possible. He repeated the process every couple of seconds, thousands of times per day. Claimant reached over and placed stacks of completed cloths into the original package.
8. Between October 2007 and October 2008, Claimant testified he completed between 1,500 and 2,000 value cloths per day. Ms. Theurer, Claimant's supervisor, expected 2,000 to 3,000 value cloths to be stamped per shift.
9. He worked both machines as needed. He may work on the value cloth a week, and then not work for a while. Claimant believed the value cloth contributed to his neck problems.
10. Claimant photographed **Exhibit C** which demonstrates the flat pack machine Claimant operated, with boxes on the left and right, and a cushioned, adjustable chair on rollers. The flat pack is a contact lenses holder. The chair was an adjustable height and could be moved as needed to produce the required flat packs. The cardboard box on the left was at his mid abdomen, adjacent to the wheel, and the wheel was in front of Claimant at his lap. The box to Claimant's right sat near the edge of the wheel. Claimant had control of the height of the chair in relation to the flat pack machine, boxes, and wheel. A box of flat packs weighed six to ten pounds.
11. Claimant placed the box of material on the platform parallel to his left shoulder, turned his head to the left, reached with his left hand, picked up two to seven unprinted flat packs, and placed them on the flat pack wheel, located in front of him about waist high.
12. Claimant turned his head to the right and swept printed flat packs into a box on the floor to his right. He replaced the completed flat packs on the wheel. If flat packs fell on the floor, Claimant picked them up and placed them in the box. He repeated the process all day. Ms. Theurer expected 5,000 to 6,000 printed flat packs per day and sometimes she pushed for 7,000. Before symptoms started, Claimant averaged 4,000 to 5,000 flat packs per day.⁴ He has produced 5,000 to 6,000 flat packs on more than one occasion.
13. Claimant rotated operation of the machines with co-employee Adnan Nalic, who primarily worked the value cloth machine.

⁴ During Claimant's deposition, he testified he was asked to produce 3,000 to 5,000 flat packs per day. However, at hearing he testified that Ms. Theurer increased the amount of flat packs to be prepared after his symptoms developed, but his production remained constant. The Claimant's deposition is not in evidence.

14. The flat packs did not typically become stuck in the machine. The machine ran on an automatic switch. Claimant had no limitation on his ability to turn off the machine, walk, or get a drink, as long as he produced.
15. In mid August 2008 Claimant moved his family from the Swiss Chalet Apartments to a residence on Horn. To obtain sympathy from Ms. Theurer and avoid work, Claimant lied and told Ms. Theurer he fell down the steps while moving a washing machine.
16. In September or October 2008, Claimant began to feel right arm numbness and informed Ms. Thayer about the condition. Claimant worked four years before symptoms began. In the year leading up to his symptoms, Claimant operated the flat pack, value cloth, and vista clean/shem machine.
17. He did not ask for medical treatment and Employer did not provide it. Dr. Aisenstat examined Claimant and diagnosed right arm spasms and elbow tendonitis which he found to be work related.
18. In October 2009, Claimant informed Ms. Theurer that he talked to a lawyer about his right arm. The next day Employer authorized treatment at Concentra. Concentra returned Claimant to normal duty and Employer kept pushing him to work harder.
19. Claimant believed his complaints were caused by repetitive arm movements at work, but not the weight of the items that he produced. However he believed that lifting his arms may have contributed to the herniation of his cervical disc.
20. Claimant testified **Exhibit A** contains two written statements he received from Ms. Theurer stating she turned up the machine speed because it was too slow. Due to pain, Claimant adjusted the speed to produce 4,000 flat packs and 1,500 to 2,000 value cloths. He disagreed with Ms. Theurer that he ran it at the slowest level, but did not know what the lowest speed would be.
21. Claimant's production remained consistent before and after his symptoms. However, production was halted due to ongoing machine problems that required trouble shooting and additional breaks lasting from 30 minutes up to all day.
22. Dr. Solman examined Claimant in October 2009. An MRI revealed a herniated disc of the cervical spine, and Dr. Solman prescribed pain medication. Claimant did not ask Employer to provide medical care and he did not mention his plans to obtain a cervical MRI.
23. In February and March of 2010, Claimant developed severe neck and arm pain and treated several times at the St. Anthony's Urgent Care Center. Claimant worked until the end of March 2010 but stopped work due to increased pain. It hurt to walk and he could not maintain the pace Employer required. However, no doctors advised him to stop work.

24. Claimant testified Employer's DVD does not fairly and accurately reflect his work station.⁵ The flat pack machine operated at a slower pace than Claimant was required to operate it. Also, the box to the left of Ms. Theurer was closer to the front of the wheel than when Claimant operated it. Claimant controlled where the box was located, and could move it as needed.
25. In the DVD, the value cloth machine operated at normal speed, but the seat was higher than the one he used. The stack of value cloths was below head level and showed the appropriate height between the stack of value cloths and where the operator sat.
26. Claimant missed the vista clean machine in the DVD because he was trying to cook while looking at the video. The vista clean machine did not cause neck or arm problems.
27. Claimant had control over his pace with a foot pedal. Claimant adjusted the height of the cushioned seat to reach the foot pedal with his left foot. He could move the chair back and forth and raise the height. Claimant had no overhead work with the flat pack or value cloth machine.
28. Claimant's symptoms have decreased since he stopped working. However he does not believe he can return to work for Employer. He can sit, walk, and drive, but continues to have pain every day.
29. During the hearing I observed Claimant glare at Ms. Theurer with an extremely hard gaze during his entire direct and cross examination.
30. **Ms. Diane Theurer** is the imprint and liquid supervisor for Employer and testified on behalf of Employer. Employer hired Ms. Theurer as a supervisor in August 2006 and she supervised Claimant from August 2006 until he left in March 2010. She operates the same machines Claimant operated and is familiar with Claimant's duties and operation of the machines. Ms. Theurer stands five feet three inches tall. Ms. Theurer gave the following testimony:
31. Claimant started working for Employer through a temporary agency in June 2005 and was hired in May 2006.
32. Ms. Theurer operated the flat pack, value cloth, and vista clean/shem machines, but delegated the vista clean/shem (vista) machine solely to Claimant.
33. Prior to September 2008 Claimant worked 40 hours per week, 7.5 hours per day with a 30 minute lunch break and two fifteen minute breaks during the day. He could move around and change positions as needed during the day. Claimant sat on cushioned, adjustable height swivel desk chairs to operate all three machines.
34. Ms. Theurer assigned machines and the quantities to be produced each day. Prior to 2008, Claimant worked with co-employee Adnan Nalic. During an average week, Claimant operated the vista machine one day a week and either the flat pack or value

⁵ In the video the flat pack machine was set to produce 5,000 a day and later the pace changed to reach 3,000. Claimant did not notice a change in the speed during the video.

cloth machines four days a week. On rare occasions Claimant operated more than one machine per day.

35. Claimant was required to produce between 3,000 and 5,000 flat packs per day. Typically, Claimant produced 4,000 flat packs. If more products were required, Ms. Theurer set up the machine, started to run it, and worked while Claimant took breaks. The year before Claimant's symptoms started, Ms. Theurer also ran the machines two to three times per week.
36. **Exhibits B and C** represent the set up Claimant used for both machines when he worked.
37. Contact lense cases arrive in boxes of 1000 unprinted flat packs. The operation of the flat pack machine involves lifting the box to the stand on the workers' left side. Three flat packs were placed on the wheel in six sections. As the wheel turns, printed product is swept off the right side into a box. Unprinted cases are picked up from the box on the left and inserted onto the wheel in a constant motion with both hands. The movement is called "swiping and putting them on."
38. Ms. Theurer selected three to four flat packs at a time and used both hands to insert them on the wheel, working directly in front of her at lap level. To complete 4,000 flat packs resulted in four boxes of completed product.
39. On August 20, 2010, Attorney O'Sullivan videotaped Ms. Theurer operating the flat pack machine at the rate of 5,000 flat packs per day and later at the rate of 3,000. The second pace represented the speed Claimant normally used to operate the machine.
40. Ms. Theurer did not find the operation of the flat pack machine required a lot of repetitive head turning to the left or right. Once started, the boxes on either side can be reached without looking to the left or right. Operation of the flat pack machine does not involve overhead arm movements. The operator views the table to make sure printing is going smoothly. It is rare to have to adjust a flat pack if the operator can handle the speed.
41. Prior to September 2008 Claimant produced 4,000 to 5,000 flat packs per day. After his symptoms began, production decreased to 3,000 to 4,000 flat packs per day. Ms. Theurer reminded Claimant that 3,000 to 5,000 flat packs were expected.
42. Ms. Theurer operated the value cloth machine with a taller chair because she is shorter than Claimant. Both chairs are cushioned, swivel desk chairs on rollers, with an adjustable height. Claimant used a foot pedal which permitted him to control the speed the printed cloths.
43. For an operator to complete 1,500 to 2,000 cloths required looking to the right to get a new stack of 100 cloths or left to put the completed stack in the box. Claimant looked to the right 15 to 20 times for new stacks. A hundred value cloths weigh about one pound.
44. In the DVD, Ms. Theurer placed cloths on a printing platform at chin level to stack cloths. She compared the height to eating on a high counter top and reaching for a glass, which can be controlled in a chair on rollers.

45. In the DVD, Ms. Theurer operated the value cloth machine with a speed needed to produce 5,000 value cloths. Later, she decreased the speed to 3,000. The last two minutes she operated the vista machine.
46. In August 2008 Claimant informed Ms. Theurer he had fallen down the stairs while carrying a washing machine.
47. In September 2008 Claimant complained of right arm problems. Claimant did not ask for treatment however she sent him to Concentra in November 2009 because he complained every day of neck, back, and arm pain and his production dropped. Ms. Theurer asked Claimant if the fall contributed to his problems but he denied it.
48. She was unaware that Claimant planned to get an MRI or seek treatment on his own. She learned of Claimant's workers' compensation case in January 2010 when she was notified by management. Claimant last worked in March 2010.
49. According to Ms Theurer the DVD of the flat pack, vista, and value cloth machines has not been modified and accurately depicts operation of the machines. Ms. Theurer operated the flat pack machine at the speed of 5,000 flat packs per shift, faster than Claimant's pace of 4,000. Ms. Theurer produced more product than Claimant due to set up, collecting material, and not moving around as much as Claimant.
50. Employer's DVD shows Ms. Theurer operating the flat pack, value cloth and vista machines. I observed Ms. Theurer sit in a cushioned swivel chair on rollers. She sat close to the waist high wheel. Ms. Theurer looked forward 98% of the time. She reached into a box sitting near her on the left, retrieved several flat packs and placed them on the wheel. The box was close enough to reach the flat packs without turning her head, body or chair a lot. She looked to the left several times during the three minute demonstration. The machine stamped the flat packs, and Ms. Theurer removed them with her right hand and placed them in a box located to her right on the floor directly under the wheel. She changed to a slower pace and moved her chair closer to the wheel.
51. Ms. Theurer faced the value cloth machine and sat in a cushioned swivel chair on rollers. Periodically, she picked up a small box from the floor, cut it open and removed a new stack of cloths. Ms. Theurer extended her arms to place cloths on a chest high platform, removed them one at a time and placed them on a waist high platform. Completed stacks were re-boxed and the process was repeated.

Medical Treatment

52. On November 20, 2008, Dr. Aisenstat treated Claimant for right arm and shoulder numbness for the past six weeks.
53. **Joseph P. Homan, M.D.**, examined Claimant at Concentra on October 7, 2009 with right arm complaints from repetitive trauma since October 7, 2008.
54. **Corey G. Solman, M.D.**, examined Claimant on October 21, 2009 with a history of heavy lifting at work. X-rays revealed mild arthritis from C5 to C7. Dr. Solman

diagnosed degenerative disc disease, possible herniated disc, and mild right shoulder subacromial bursitis and impingement. An MRI dated October 24, 2009 revealed spondylitic changes at C4 to C5 and right lateral herniation at C5-C6.

55. **Dwight I. Woiteshek, M.D.**, is a board certified orthopedic surgeon who performed an Independent Medical Examination and testified at the request of Claimant's attorney. In the 1980's Dr. Woiteshek performed back surgery, but he is not a neck surgeon. Dr. Woiteshek is a consultant and is no longer in practice.
56. On February 5, 2010 Claimant gave Dr. Woiteshek a history of repetitive lifting and head movements 3,000 to 4,000 times per day with extended arm movement while seated.
57. Examination revealed numbness to pin prick in the C6 distribution, a positive Spurling's, cervical spine distraction and compression tests, absent right biceps reflex, depressed right triceps reflex, and restricted motion with extension. Dr. Woiteshek diagnosed overuse syndrome of the cervical spine and with spondylitic changes, and opined the use of Claimant's head, neck, and arms repetitively at work caused the conditions.
58. Dr. Woiteshek found Claimant's work activities were the prevailing factor that caused a herniated disc at C5-6. He explained that working with extended arms produced weight and leverage, and placed a load on Claimant's neck.
59. Dr. Woiteshek did not know if Claimant could get up and move about during his shift, the hours he worked, the number of breaks or whether Claimant performed overhead work.
60. Dr. Woiteshek acknowledged that production of multiple products with a single motion would decrease the total number of movements performed during a work shift. Also, working on three machines with different production requirements, would impact Claimant's repetitive exposure.
61. Dr. Woiteshek acknowledged that a swivel chair can prevent looking to the right and left but concluded people would rather move their neck and arms than swivel.
62. Dr. Woiteshek opined Claimant has not reached maximum medical improvement and recommended he see a neurosurgeon, such as Dr. Coyle, for possible surgery.
63. Claimant treated at **St. Anthony's Medical Center** for facial injury and neck pain on February 23, 2010, and was placed on light duty from February 25, 2010 to March 2, 2010. He sought more treatment at the medical center for increased pain on March 21, 2010.

Opinion Evidence

64. **Donald A. deGrange, M.D.**, performed an Independent Medical Examination on September 1, 2010 at the request of Employer's attorney. He reviewed medical records and the Employer's DVD.
65. Claimant gave a history of right arm pain, tingling and numbness to his fingers since November 2008, four years after he was hired. He complained of pain in the jaw, ear, and scalp, and numbness on the right side of his face, and gave no history of assault.

66. Claimant's work history included turning his head three to six thousand times per day and flexing and extending his head two to three thousand times per day.
67. Examination revealed decreased range of motion in all areas, diffuse tenderness to the cervical spine, decreased light touch over the flexor and extensor areas of the forearm, extensor and volar areas of the and fingers.
68. Dr. deGrange found symptom magnification. During the entire examination, Claimant held his neck with his right arm. However, Claimant had no problem moving his head from left to right when he and the doctor were talking. No spasm was found despite complaints of diffuse tenderness. No group of muscles on the right arm appeared weak compared to the unaffected left arm. Dr. deGrange did not find Claimant to be a credible historian based on Claimant's symptoms and physical examination. Nor did he find Claimant's symptoms to be believable.
69. Dr. deGrange diagnosed degenerative disc disease of the cervical spine and a herniated disc at C5-C6.
70. Dr. deGrange concluded Claimant's sensory test results were inconsistent with a herniated disc at C5-C6. Claimant's symptoms were not typical because a cervical disc herniation does not affect the face, jaw, skin of the face, or increase pain with walking.
71. Also, complaints to the entire right arm, forearm, both sides of the hand, and all fingers present a non-anatomic distribution. One nerve cannot generate all those complaints. Multiple nerves are involved; therefore, it is inconsistent for one nerve to reduce sensation to the flexor and extensor nerves of both forearms, the volar aspect of the hand, and all fingers.
72. Dr. deGrange concluded the following factors must be weighed against Claimant's industrial activities to determine the cause of Claimant's cervical condition: 1) Claimant's thirty year history of smoking a pack of cigarettes per day, 2) Severe dental health, 3) Prior severe assault,⁶ 4) Poor general health, 5) Employer's video did not show the extensive repetitive flexion, extension and rotation as reported by Claimant, 6) Falling down stairs carrying a washing machine may cause or aggravate degenerative disc disease and a herniated disc at C5-C6, 7) Manual work, and 8) Cranial damage.
73. Dr. deGrange classified Claimant's work as sedentary and found no connection between Claimant's complaints and his work activities. Dr. deGrange concluded no additional treatment, diagnostic studies or work restrictions were needed as a result of Claimant's work activities, and Claimant sustained no disability.

⁶ Claimant informed Dr. deGrange that he had no prior assaults, however, Dr. deGrange reviewed Claimant's medical records which provided a history of a prior severe assault to his head and face 20 years ago.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the competent and substantial evidence presented during the hearing, observation of the witnesses, and the applicable law of the State of Missouri, I make the following rulings of law:

Claimant gave proper notice

Claimant asserts he gave Employer proper notice of his occupational disease injury. Employer contends Claimant did not provide adequate notice of an alleged occupational disease.

Section 287.420 states in part: “No proceedings for compensation for any occupational disease or repetitive trauma 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 diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.”

On February 6, 2010, Dr. Woiteshek issued an opinion that Claimant’s repetitive work for Employer is the prevailing factor that caused a herniated disc at C5-6 on the right, overuse syndrome of the cervical spine, and the need for treatment. I find the thirty day period of Section 287.420 began to run on February 6, 2010. Claimant gave written notice of his injury to Employer when he filed the Claim for Compensation on November 9, 2009. Because Claimant gave written notice of the time, place and nature of the injury before Dr. Woiteshek’s causation opinion, it is clear that Claimant gave the notice “no later than thirty days after the diagnosis of the condition.”

Claimant’s cervical disc herniation is not medically causally related to his work activities

Claimant asserts the C5-C6 herniated disc was caused by repetitive flexion, extension, and rotation of his head thousands of time each day. Employer contends Claimant’s work did not cause a herniated disc at C5-C6.

Claimant has the burden to prove all essential elements of a claim, including causation. *Decker v. Square D Co.*, 974 S.W.2d 667, 670 (Mo.App. 1998). A claimant's medical expert in an occupational disease case must establish within a “reasonable probability” that the disease was caused by conditions in the work place. *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 902 (Mo.App. 1999) (Citations omitted).⁷ ‘Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt.’ *Thorsen v. Sachs Elec. Co.*, 52 S.W.3d 611, 620 (Mo.App. 2001) (Citations omitted).⁸ Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). (Citations omitted).

⁷ Abrogated on other grounds by *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 41 (Mo. 1995).

⁸ This is one of several cases cited herein that were overruled on an unrelated issue by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected by the decision; therefore no further reference will be made to cases impacted by *Hampton*.

Section 287.067.1 and 3 states:

- 1) **“Occupational disease”** is defined as... an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

- 3) An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure 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. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Drs. Woiteshek and deGrange agree Claimant has a herniated cervical disc at C5-C6 that requires treatment, but they disagree on causation. I find Dr. deGrange’s opinion is more credible than Dr. Woiteshek’s opinion. Dr. Woiteshek no longer practices and referred Claimant to a neurosurgeon because he never performed cervical surgery. Also, he relied on Claimant’s history of three to five thousand lifts and neck movements a day. Dr. Woiteshek did not know when symptoms began, if overhead work was performed, the type of movements needed to operate the machines, the number of hours Claimant worked, breaks taken, or if Claimant could walk around as needed during a shift.

Further, Dr. Woiteshek’s opinion is not persuasive that people do not use swivel chairs to turn because it is easier to move the neck and arms since their feet are on the floor. However, Dr. Woiteshek acknowledged, if a swivel chair was used it would permit movement of the entire body to the right or left. Claimant used an adjustable swivel chair.

Dr. Woiteshek also acknowledged the total amount of movements during a shift could decrease if multiple products were handled at one time. Here, Claimant handled at least four flat packs at one time and Dr. Woiteshek knew the products weighed very little.

On the contrary, Dr. deGrange is a board certified orthopedic surgeon, who performs cervical surgeries on a monthly basis. Dr. deGrange found Claimant to be a poor historian that magnified symptoms and was not believable. Claimant held his neck during the entire examination, but stopped when they talked.

I find Dr. deGrange had a better understanding of Claimant’s work activities and medical condition than Dr. Woiteshek. Dr. deGrange reviewed Employer’s DVD and did not see the extensive head movement Claimant reported.

I find Dr. deGrange credibly opined Claimant’s work activities were not the prevailing factor that caused his cervical condition because Claimant’s physical examination and history are not consistent with cervical disc injury. A cervical disc herniation does not affect the face, jaw, skin of the face, or increase pain with walking. Also, symptoms to the face, arm, forearm, and

fingers involved multiple nerves, and are inconsistent with single disc pathology. Dr. deGrange concluded other factors may contribute to Claimant's condition including prior manual jobs, poor general health, a thirty year history of smoking a pack of cigarettes a day, dental disease, age, cranial damage, and a prior assault.

I find Claimant is not credible. Claimant testified he lied to Employer about falling down the stairs with a washing machine in August 2008 but in September 2008 his complaints began. It is interesting to note Claimant worked without symptoms until a month after he reportedly fell. Dr. Woiteshek conceded Claimant could have waited several months to receive treatment if fell down the steps with a washing machine. Claimant waited two months to seek treatment and did not ask Employer to provide it. Claimant glared at Ms. Theurer during his entire testimony.

I find Ms. Theurer's testimony credible that operation of the machines did not require a lot of repetitive looking to the right or left or up and down, and the DVD supported her testimony. The placement of the boxes permitted her to reach for blank flat packs and swipe completed ones without constantly looking to the right or left. On the value cloth machine she worked directly in front of the machine, waist high to chest level, and the cloths were practically weightless. She used a foot pedal or automatic switch to control output.

Also, Claimant could adjust the boxes to require minimal head movement when printing flat packs. When operating the value cloth machine, the visual focus was the table directly in front of Claimant. Claimant's swiveled chair was cushioned, adjustable, and on rollers, which permitted him to move his entire body if needed. Claimant had two breaks a thirty minute lunch, and no limit on his ability to get up move around and stretch as needed, which according to Ms. Theurer, Claimant did. Once a week Claimant operated the vista/clean machine which did not contribute to his condition and removed him from the other machines. Claimant testified there was down time between 30 minutes and all day with machine break downs, which occurred often.

Based on credible testimony by Dr. deGrange and Ms. Theurer, Employer's DVD, Exhibits of the work stations, medical records, reports, and less than credible testimony by Dr. Woiteshek and Claimant, I find Claimant did not meet his burden to show the cervical herniation at C5-C6 is medically causally related to his work activities with Employer.

Having found no causation, all other issues are moot.

CONCLUSION

Employer received proper notice however; Claimant's cervical disc herniation is not medically causally related to his work activities for Employer.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation