

FINAL AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 06-103269

Employee: Danny Whiteley

Employer: City of Poplar Bluff

Insurer: Missouri Rural Services Workers' Compensation Trust
c/o CCMSI

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge (ALJ) dated July 1, 2010.

Preliminaries

The ALJ heard this matter to consider: 1) whether employee sustained an injury by accident arising out of and in the course of his employment; 2) whether employee's cervical spine condition was medically caused by the alleged accident; 3) employer/insurer (employer) liability for past medical expenses; and 4) nature and extent of any permanent disability.

The ALJ found that employee's alleged work accident on October 29, 2006, is not the prevailing factor in causing employee's medical condition. Based on the denial of medical causation, the ALJ deemed all other issues moot. Employee timely filed an Application for Review with the Commission.

The primary issue currently before the Commission concerns whether employee's alleged October 29, 2006, work accident was the prevailing factor in causing his cervical spine condition.

Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the administrative law judge and are hereby adopted and incorporated in this award by the Commission.

Conclusions of Law

First of all, it is important to note that employee is alleging that his accidental injury occurred on October 29, 2006. Therefore, this case falls under the purview of the 2005 amendments to Missouri Workers' Compensation Law.

Section 287.120 RSMo "requires employers to furnish compensation according to the provisions of the Workers' Compensation Law for personal injuries of employees

¹ Statutory references are to the Revised Statutes of Missouri 2006 unless otherwise indicated.

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caused by accidents arising out of and in the course of the employee's employment." *Gordon v. City of Ellisville*, 268 S.W.3d 454, 458-59 (Mo. App. 2008).

Pursuant to § 287.020.3 RSMo, an "injury" is defined to be "an injury which has arisen out of and in the course of employment." Section 287.020.3 RSMo further states that:

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.

In this case, employee injured his neck on October 29, 2006, while attempting to wash the inside of the windshield of his patrol car. The ALJ found that this alleged work accident is not the prevailing factor in causing employee's medical condition. We disagree.

The ALJ heavily relied on employee's previous workers' compensation claim settlement and his chiropractic records in denying employee's current claim for benefits. After reviewing employee's previous workers' compensation settlement, his chiropractic records, and the ALJ's findings of fact regarding the same, the Commission reaches a different determination.

Employee's previous workers' compensation settlement stemmed from a motor vehicle accident that occurred on or about July 15, 2002. This accident involved a suspect who intentionally drove his car into the back of employee's patrol car. It is important to note that the ALJ included in her "Findings of Fact" that although employee's compromise settlement agreement for this claim listed "back, neck and shoulders" as the parts of the body that were injured in the accident, there was never an MRI taken nor any injury or permanent disability diagnosed to employee's cervical spine or neck with regard to this accident. There was an MRI scan taken of employee's thoracic spine down to L3 and employee was given a 20% permanent partial disability rating of the body as a whole at the level of the thoracic spine, but no medical evidence suggested that employee suffered a *cervical* spine injury. Employee testified that his neck may have been a little sore after that accident, but his injury and all of his treatment was to the thoracic spine. In fact, employee denied any preexisting injuries, of any kind, to his neck or cervical spine before his October 29, 2006, accident.

The ALJ also included in her "Findings of Fact" that the extensive medical records of Dr. Tinsley go all the way back to 1979, but noted that none of the medical records prior to October 29, 2006, reference employee's neck or cervical spine. This corroborates employee's aforementioned testimony.

With regard to employee's chiropractic records, which span from May 25, 2001 to February 11, 2008, and include 51 recorded visits, there are only two references to either stiffness or discomfort in employee's neck. These complaints occurred in 2001 and 2003. The first noted "stiffness" in his neck and lumbar spine, and the second noted "discomfort in his right mid-back" and "discomfort in his right neck." There are no subsequent entries in Dr. Rushin's (employee's chiropractor) records in the remaining

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three years before his accident that make any reference to problems employee was having with his neck or cervical spine.

Dr. Cantrell, employer's medical expert, even agreed that employee's neck was basically asymptomatic and that employee was not having any neck pain before his October 29, 2006, accident. Dr. Cantrell also agreed that both he and Dr. Tinsley diagnosed employee with an acute cervical strain superimposed on cervical degenerative disc disease, and that there is no medical evidence of employee receiving any kind of treatment for neck pain prior to this accident. Finally, Dr. Cantrell conceded that the cervical sprain/strain was a "new injury," and had the October 29, 2006, accident not occurred, employee would not have needed medical treatment at that time.

Despite the aforementioned, Dr. Cantrell still concluded that the events of October 29, 2006, are not the prevailing factor in the cause of employee's medical condition. Dr. Cantrell opined that employee has a 5% permanent partial disability of the body as a whole referable to his cervical spine complaints, 4% of which he attributes to preexisting pathology, and 1% of which he attributes to a diagnosis of a cervical strain referable to the October 29, 2006, accident.

Dr. Musich, on the other hand, found that the work trauma of October 29, 2006, is the prevailing factor in the development of acute and severe right neck pain which required extensive evaluation and aggressive conservative treatment. Dr. Musich opined that as a result of the October 29, 2006, accident, employee has suffered 20% permanent partial disability of the body as a whole rated at the cervical spine.

It is worth noting that although Dr. Cantrell does not believe that October 29, 2006, accident is the prevailing factor in causing employee's medical condition, he still attributes 1% of employee's permanent partial disability to said accident.

We find that the overwhelming weight of the evidence suggests that the October 29, 2006, accident was the prevailing factor in causing employee's cervical condition. Any finding to the contrary is not supported by competent and substantial evidence.

With regard to the nature and extent of employee's permanent partial disability, however, we find that despite Drs. Musich and Cantrell's ratings, a more accurate assessment of employee's permanent partial disability resulting from the October 29, 2006, accident is 7.5% of the body as a whole rated at the cervical spine. We base this finding on a thorough review of employee's testimony, all of the medical evidence and opinions, and the record as a whole.

For the foregoing reasons, we find that the October 29, 2006, accident was the prevailing factor in causing employee's cervical spine condition. As a result, we find that employee shall be awarded past medical expenses and permanent partial disability benefits.

Award

The parties stipulated that employee's temporary total disability rate is \$656.10 and his permanent partial disability rate is \$376.55.

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Employee did not miss any work as a result of the injuries suffered from the October 29, 2006, accident. For this reason, we do not award any temporary total disability benefits.

We award from employer to employee \$5,740.67 for his past medical expenses.

As stated above, we find that employee sustained 7.5% permanent partial disability to his body as a whole rated at the cervical spine as a result of the October 29, 2006, accident. Therefore, we award from employer to employee permanent partial disability benefits of \$11,296.50.²

The parties stipulated that employer overpaid employee's mileage for his trip to the medical examination by Dr. Cantrell by inadvertently sending two mileage checks for the same trip. Therefore, in accordance with the parties' stipulation, we find that employer is entitled to a credit in the amount of \$123.26.

Jack H. Knowlan, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Maureen Tilley, issued July 1, 2010, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 22nd day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

² 30 x \$376.55 = \$11,296.50.

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Danny Whiteley

Injury No. 06-103269

Dependents: N/A

Employer: City of Poplar Bluff

Additional Party: Second Injury Fund

Insurer: Missouri Rural Services Workers' Compensation Insurance Trust c/o CCMSI

Hearing Date: March 30, 2010

Checked by: MT/rf

SUMMARY OF FINDINGS

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? N/A
5. State location where accident occurred or occupational disease contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment?
N/A
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 happened or occupational disease contracted: N/A

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to date for temporary total disability: None.
16. Value necessary medical aid paid to date by employer-insurer: None.
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$984.15
19. Weekly compensation rate: \$376.55
20. Method wages computation: By agreement.
21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

FINDINGS OF FACT AND RULINGS OF LAW

On March 30, 2010 the employee, Danny Whiteley, appeared in person and with his attorney, Jack Knowlan, for a hearing for a final award. The employer was represented at the hearing by its attorney, Paul Huck. The Second Injury Fund was not present. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. On or about October 29, 2006, the City of Poplar Bluff (“employer”) was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was duly qualified as a self insured employer through the Missouri Rural Services Workers' Compensation Insurance Trust c/o CCMSI.
2. On or about October 29, 2006, Danny H. Whiteley was an employee of the City of Poplar Bluff, and was working under the provisions of the Missouri Workers' Compensation Act.
3. The employer had notice of the employee's alleged accident.
4. The employee's claim for compensation was filed within the time allowed by law.
5. The employee's average weekly wage was \$984.15. The employee's rate of compensation is \$656.10 for temporary total disability and \$376.55 for permanent partial disability.
6. No medical bills were paid by the employer.
7. No temporary total disability payments were made by the employer.
8. The employer overpaid the employee's mileage for the employee's medical examination by Dr. Russell Cantrell by sending two mileage checks for the same trip, and the employer is entitled to a credit against any amount awarded in the amount of \$123.26.

ISSUES

1. Accident
2. Medical Causation
3. Previously Incurred Medical Expenses
4. Permanent Partial Disability and Disfigurement

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Dr. Thomas Musich 8/29/08 IME Report
- B. Tinsley Medical Clinic Medical Records (10/22/79 to 9/23/09)
- C. Rushin Chiropractic Center Medical Records (5/25/01 to 2/11/08)
- D. Ozark Foothills Industrial Medical Clinic Medical Records (7/9/02 to 11/29/07)
- E. Poplar Bluff Regional Medical Center Medical Records (11/20/06 to 3/24/07)
- F. Ozark Physical Therapy Medical Records (12/12/06 to 12/15/06)
- G. Correspondence Regarding Notice and Denial of Treatment
 - G 1 - 10/30/06 memo from Chief Whiteley notifying Employer of accident
 - G 2 - 11/10/06 note from Mary Ivy of Poplar Bluff Police Department
 - G 3 - 11/9/06 letter from CCMSI to Chief Whiteley denying treatment
- H. Medical Bill Summary and Medical Bills
 - H 1 - Medical Bill Summary
 - H 2 - Medical Bills from Ozark Foothills Industrial Medical Clinic
 - H 3 - Medical Bills from Poplar Bluff Regional Medical Center
 - H 4 - Medical Bills from Ozark Physical Therapy
- I. Motor Equipment Policy
- J. Vehicle Equipment Safety Checklist
- K. Wage Verification and Rate Calculations
- L. Claim for Compensation and Report of Injury
- M. Dr. Raymond Cohen 1/20/05 IME Report (Injury No. 02-070425)
- N. Stipulation for Compromise Settlement (Injury No. 02-070425)
- O. Attorney Contract

Employer's Exhibits:

- 1. Form 1 Report of Injury dated 10/30/06
- 2. Employee's Statement dated 10/30/06
- 3. Approved Stipulation in Injury No. 02-070425 dated 12/28/05, including rating report of Dr. Raymond Cohen dated 1/20/05
- 4. Pleadings and Order of Dismissal with Prejudice in Injury No. 05-105837
- 5. Rushin Chiropractic Center office notes dated 5/21/01 – 2/11/08
- 6. Ozark Foothills Industrial Medicine office notes dated 10/30/06 – 11/1/06
- 7. Tinsley Medical Clinic dated 1/26/99 – 5/29/08
- 8. Deposition of Dr. Russell C. Cantrell dated 9/2/09 with attached Curriculum Vitae and report dated 1/14/09

At the request of the employer's attorney, the administrative law judge has taken administrative/judicial notice of the workers' compensation file for this claim under injury number 06-103269.

FINDINGS OF FACT

General Information

- The employee was born on February 9, 1947, and was 63 years old at the time of the hearing.
- The employee graduated from high school, attended junior college, and completed various law enforcement courses.
- Prior to his employment with the City of Poplar Bluff, the employee spent several years as a rodeo professional riding bulls and participating in other events. He also worked in a family salvage business and was a reserve officer for the Butler County Sheriff's Department.
- The employee is the Chief of Police for the City of Poplar Bluff. He started with the Poplar Bluff Police Department in June of 2000, and has worked as the Chief of Police since that date. His job duties with the police department include some patrol duties, maintaining the budget, and overseeing the Poplar Bluff Police Department. He typically works from 7:00 or 8:00 in the morning until 7:00 or 8:00 in the evening, and generally works 7 days a week, including Sundays.

October 29, 2006 Accident

- On Sunday, October 29, 2006, the employee had finished patrolling a designated high crime rate area, and had gone to a car wash to clean his patrol car. The employee was attempting to wash the inside of the windshield on his patrol car when he injured his neck. The injury occurred when the employee was standing outside of his patrol car on the driver's side of the car with the front door open. The employee was leaning inside the car and reaching with a rag to clean the windshield behind the steering wheel. The employee stated that this required him to get his head and neck in an unusual position. He stated that as he extended his arm with the rag to clean the windshield, he felt a tearing sensation in his neck. The employee stated that he had an immediate onset of pain on the right side of his neck, and later developed a muscle spasm that caused a visible knot on the right side of his neck.
- The employee reported his accident and the resulting injury to his neck on Monday, October 30, 2006 by typewritten note. A Report of Injury was prepared on October 30, 2006, and submitted to the "Administrator" on the following day.
- The employer initially authorized the employee to get treatment at the Ozark Foothills Industrial Clinic with Dr. Tinsley. On November 9, 2006, however, the employer notified the employee that it was denying his claim, and advised him that he would have to use his personal insurance to obtain treatment.

Cleaning of patrol cars

- The employee testified that it was important for Poplar Bluff Police Officers to keep their patrol cars clean and the windows washed for several reasons. Having clean patrol cars is important for the image of the City, but having clean windows is also important for safety reasons. If the windshield is dirty or has a film on the inside of the windshield, it can create a "glare" and impair visibility, especially at night. The employee also noted that it is critical for police officers to be able to see and observe things clearly when they are

driving their patrol cars. The Police Department has a policy against smoking in the patrol cars to help avoid this problem.

- The Police Officers with the Poplar Bluff Police Department are responsible for keeping their patrol cars “as clean and uncluttered as possible” (Motor Vehicle Policy, Employee’s Exhibit I). The officers have a “Vehicle Equipment Safety Checklist” that requires them to periodically check the equipment and other listed items on their patrol cars. One of the categories on the check list is “Windshield (CLEAN)” (Employee’s Exhibit J).
- Higher ranking officers or supervisors with the Poplar Bluff Police Department are assigned their own patrol car. Other patrol officers share a patrol car with two officers using each car. The officers are generally expected to wash their patrol cars and clean the windows at the end of each shift. The employee testified that, depending on the weather, he normally washed his patrol car and cleaned the windows one or more times each week.
- To assist the police officers with this responsibility the employer has a designated area at the police station where the officers wash their patrol cars and clean their windows. The City of Poplar Bluff furnishes water, a commercial vacuum cleaner and all the supplies needed to wash and clean the patrol cars.
- The employee testified that the patrol cars driven by the Poplar Bluff Police Officers are generally cleaner than cars driven by the general public because they wash the cars and clean the windshields more frequently than most car owners.
- When the employee cleans the inside of his windshield, it requires him to reach with his hands and get his head and neck in an unusual position.
- The City of Poplar Bluff will not pay for the patrol cars to be cleaned.
- On cross-examination, the employee stated that he drives an unmarked car which he is allowed to drive to and from home and work. He also stated that he was no longer on patrol while stopped at a public car wash and went home immediately following the onset of his pain. He further stated that he was not using Department materials or equipment to clean his car. He was not performing any Vehicle Equipment Safety Checklist at the time. He used his own money for the coin-operated car vacuum that day. He did not slip, trip or fall and was not lifting anything heavy at the time his pain began.

Medical Treatment of Neck

- The employer initially authorized the employee to get treatment at Ozark Foothills Industrial Medicine Clinic in Poplar Bluff. The employee saw Nurse Practitioner Amy Robertson on Monday, October 30, 2006. The employee gave a history that “I was washing my window and felt a pull on the right side of my neck”. The nurse noted he had extremely limited range of motion of the cervical spine, and had a “right trap and cervical spasm”. Her assessment was an acute cervical spasm, and she prescribed Skelaxin, Flexeril and therapy.
- Later that day, the employee went to see Dr. Austin R. Tinsley at Tinsley Medical Clinic. Dr. Tinsley noted that the employee had been to the Industrial Clinic with severe neck pain and spasms, and requested an injection for pain. Dr. Tinsley gave the employee a Toradol injection and stated “I have observed the spasm of the cervical paravertebral group, and it is severe”. Dr Tinsley suggested he “double up” the dose of Hydrocodone.

- The employee returned to Dr. Tinsley at the Industrial Clinic on November 1, 2006. Dr. Tinsley noted it was a “follow up of a cervical strain, sustained while he was cleaning a window on the inside of his car while on duty”. The employee told Dr. Tinsley that the Toradol injection and therapy helped until he had a spasm the night before that “felt like a tazor or worse”. The Skelaxin and Flexeril were not helping the spasms, and the employee felt like he needed something to help him rest. Dr. Tinsley noted he could rotate his head approximately 45 degrees either way, but it hurt more when he rotated to the left due to the pain referred to the right side. Dr. Tinsley’s “Impression” was “1. Acute cervical strain and I suspect some pre-existing cervical DJD noting multiple trauma sustained when riding bulls. No sign of disc at this time”.
- Dr. Tinsley ordered an MRI of the employee’s cervical spine on November 10, 2006. The radiology report of Dr. George Landyman from Poplar Bluff Medical Partners states the following “Impression”:
 1. Extensive degenerative disc disease.
 2. Slight straightening of the curve.
 3. Disc and spurs at C3-4 creating thecal sac compression as well as what appears to be some nerve root encroachment on the exiting left foramen.
 4. Small central disc at C6-7 creating only minimal thecal sac compression.
 5. No evidence of spinal stenosis.
- The employee returned to see Dr. Tinsley at the Tinsley Medical Clinic on November 13, 2006 with complaints of “persistent neck pain”. The employee reported some dysesthesia in the second and third fingers of his right hand, but he had good sharp/dull discrimination. He reported that physical therapy had not helped, and he felt worse the day after therapy. Dr. Tinsley reviewed the findings of the MRI, and noted that the employee’s pain was exacerbated by rotating his head. The employee felt that the spasms were improved. Dr. Tinsley’s “Impression” was “Acute cervical strain, superimposed on severe cervical disc disease, post traumatic from multiple injuries in the past”. Dr. Tinsley’s “Plan” was “warm moist packs, DC non-steroidals”.
- The employee stated that Dr. Tinsley had treated him for several injuries he suffered from bull riding, but he had no prior injuries or treatment for his neck.
- On November 20, 2006, the employee saw Dr. Tinsley again and reported persistent, worsening neck pain. Dr. Tinsley referred the employee to Dr. Yuli Soeter, who is a pain management specialist at Poplar Bluff Regional Medical Center.
- The employee’s first pain management session with Dr. Soeter was on November 20, 2006. The employee gave Dr. Soeter a history of his accident and described the pain he had in the paracervical region as “a hot stake”. The Hydrocodone he was taking was not providing any significant relief, and he described his pain as “constant and sharp”. The employee told Dr. Soeter that “anything seems to make it worse” and Dr. Soeter noted that he had “lost the range of motion completely”. The employee rated his neck pain at that time as an 8 or 9 out of 10. During her examination, Dr. Soeter noted that the employee had significant tenderness along the upper cervical spine region, and the pain was more severe on the right paracervical region. Dr. Soeter determined he had multiple trigger points in that area. Dr. Soeter’s “Assessment” was: 1. Cervical disc displacement, without myelopathy, 2. Right occipital nerve neuralgia, and 3. Spinal enthesopathy, right paracervical region. Dr. Soeter’s “Plan” and treatment on November 20, 2006 included:

1. Cervical epidural injection, 2. Trigger point injection, and 3. Right occipital nerve block.

- The employee returned to Dr. Soeter on November 27, 2006 for an additional epidural injection and trigger point injections. The employee reported 20% pain relief from the first round of injections, but still had significant pain in the paracervical region with multiple trigger points. Dr. Soeter's assessment was "cervical disc displacement, without myelopathy and paracervical enthesopathy". Dr. Soeter noted that the employee had not missed work and was still working as the Chief of Police.
- The employee's final treatment with Dr. Soeter occurred on December 4, 2006. He reported more improvement from the cervical epidural injections, and his pain was localized in the bilateral occipital area. Dr. Soeter prescribed physical therapy to increase his range of motion, and gave the employee a third round of cervical epidural and trigger point injections. The employee indicated that Dr. Soeter told him that there was not much else that could be done for his neck unless he wanted to consider surgery. The employee did not want surgery. Although her December 4, 2006 record indicates the employee was scheduled to return to the clinic in one month, there is no record of an additional visit, and the employee said he did not think he went back due to other health problems.
- The employee's final visit with Dr. Tinsley for his neck also occurred on November 4, 2006. Dr. Tinsley noted that "his neck pain is much better, but he feels his neck is weak". Dr. Tinsley recommended some range of motion and isometric exercises. Dr. Tinsley's exam revealed "much less spasm, no dysesthesias, otherwise normal except some pain at extremes". The employee explained that he still had severe pain at the extremes of his range of motion.
- The employee's treatment for his neck pain concluded with three physical therapy sessions at Ozark Physical Therapy on December 12, 14, and 15 of 2006.

Unrelated Health Problems

- In November and December of 2006 the employee was having more serious health problems that included weight loss, fatigue, fever, abdominal pain and anemia. He was eventually diagnosed with endocarditis, which is a bacterial infection of the heart, and a mitral valve prolapse. The employee was treated with I.V. antibiotics and surgery at St. Luke's Hospital in St. Louis.
- The employee also developed a blood clot and cerebral hemorrhage in March of 2007, and was treated in Memphis, Tennessee. The employee recovered from both of these illnesses and returned to work.

Current Symptoms and Limitations

- The employee still has pain on the right side of his neck in the area where the knot or spasm was located. He has constant pain, but it is not always bad. If he does anything that requires him to leave his head and neck in a fixed position for very long, his neck pain gets worse. Examples of activities that make his neck pain worse include using a computer, driving a car, and reading. He can do these activities for an hour before he has to take a break and do something else. He noted that he does all of these activities as a regular part of his job.

- The employee rated his pain at a 6 or 7 out of 10 at its worst. On a normal day, he rated his neck pain in the range of 2 to 4 out of 10.
- The employee relieves the pain in his neck by taking Motrin daily and Hydrocodone occasionally. He also does pressure point treatments that were suggested by Dr. Soeter.
- The employee's neck injury has made it more difficult for him to sleep. He uses a special pillow to keep his head in a certain position, and he has to sleep on his side to avoid aggravating his neck.
- The employee does not have pain down either arm, and he no longer has numbness or tingling in his right hand.

Lost Time from Work

- The employee did not miss work and is not making any claim for temporary total disability.

Medical Bills

- The employee identified the medical bills introduced as Employee's Exhibit H-2, H-3 and H-4. He also identified the Medical Summary introduced as Employee's Exhibit H-1.
- The employee testified that the charges included in the summary and the corresponding medical bills were related to treatment for his neck after his October 29, 2006 accident. None of the bills that are included in the summary have been paid by the employer.
- After the employer authorized his first visit with the Industrial Clinic and Dr. Tinsley, the employer denied that his injury was work related and would not authorize additional treatment. This refusal to provide treatment was confirmed by a November 9, 2006 letter from Cannon Cochrane Management Services (Employee's Exhibit G-3).
- The medical treatment he received after the denial was paid either by the employee or by his health insurance.
- The total amount of the related medical bills as described in the medical summary is \$5,740.67.

Injuries Prior to the Employee's October 29, 2006 Accident

- During his bull riding career, the employee had several significant injuries that included fractured ribs; fractures to his tibia, fibula and ankle; an injury to his right arm; and an injury to his left shoulder.
- The employee had several work injuries during his employment with the police department. He had an injury to his hand that was treated with no claim filed. The employee had three claims for left shoulder injuries, with a total of three surgeries. Two of those claims were settled and one was dismissed.
- On or about July 15, 2002, the employee was in a motor vehicle accident. A suspect intentionally drove his car into the back of the employee's patrol car. A claim was filed under injury number 02-070425. The employee was represented by attorney John Albright on that claim. Both the claim and the compromise settlement agreement for this claim list "back, neck and shoulders" as the parts of the body that were injured in the July 15, 2002 accident. The compromise settlement agreement for injury number 02-070425 was based on approximately 6% of the body as a whole related to the neck, back and shoulders.

- The employee recalls signing that agreement, but does not agree that he suffered any injury to his neck as a result of that accident. He stated that his neck may have been a little sore, but his injury and all of his treatment was to the mid back or thoracic spine.
- Dr. Tinsley stated in a record dated June 23, 2003, that the employee had a “whiplash type injury” from an “old workers comp injury”. An MRI ordered by Dr. Tinsley on September 13, 2002 described the employee’s diagnosis as “constant back pain following MVA”. The MRI was a scan of the thoracic spine to L3, and did not include the cervical spine.
- The employee’s attorney for the motor vehicle accident claim obtained a medical report from Dr. Raymond Cohen dated January 20, 2005. Dr. Cohen gave a diagnosis of “Moderately severe thoracic myofascial pain disorder”. Dr. Cohen gave a “20% whole person disability at the level of the thoracic spine. He did not diagnose any injury or assign any disability to the employee’s cervical spine or neck.
- The employee denied any pre-existing injuries to his neck or cervical spine before his October 29, 2006 accident. He did not have any accidents at home or work that involved his neck, and he did not recall receiving any treatment or taking medication for his neck before his work accident.
- The extensive medical records of Dr. Tinsley go back to 1979, and there are no references to the employee’s neck or cervical spine before October 29, 2006.
- The records of the employee’s Chiropractor, Jack Rushin, indicate the employee made fairly regular visits for adjustments from 2001 through the date of the employee’s accident. The employee’s primary complaint was discomfort in his low back. (Employee’s Exhibit C). Although the employee had periodic adjustment to his lumbar, thoracic, and cervical spine, the employee stated that these adjustments were done to his whole spine regardless of his complaints.
- Out of approximately 51 treatment records of Dr. Rushin, there are only two records that indicate the employee had any complaints or symptoms in his cervical spine. The first is dated May, 25, 2001, and states the employee had “stiffness in lumbosacral spine and neck” (Employee’s Exhibit C, page 3). The second record is dated September 12, 2003, and states that the employee “still has discomfort in right mid back”. “Furthermore, he remarked of discomfort in his right neck” (Employee’s Exhibit C, page 42). Less than one month later on October 10, 2003, the employee reported to Dr. Rushin that “pain in neck has been doing better, no pain at this time since last visit” (Employee’s Exhibit C, page 42). The employee did not recall these records, but agreed that he did receive adjustments that included his cervical spine.
- During the three years before his October 29, 2006 accident, the employee indicated that, with the exception of occasional stiffness, he did not have any symptoms in his neck. He did not have muscle spasms in his neck before his accident, and his neck did not bother him or affect his ability to do his job before his October 29, 2006 accident. The employee agreed that he had an immediate onset of symptoms after his work accident. He also agreed that he may have some pre-existing degenerative conditions in his cervical spine, but he was not aware of any problems.

Medical and Vocational Testimony

Thomas F. Musich, M. D.

- Dr. Thomas F. Musich evaluated the employee on August 29, 2008. Dr. Musich's medical history indicated the employee noted severe, gripping, burning pain in his right neck following a work related injury on October 29, 2006. He noted that "Chief Whiteley was cleaning his patrol car when he was leaning into the car in a very awkward position and stretched his entire body while leaning to the right attempting to clean the inner windshield". Dr. Musich stated "Chief Whitely describes severe unrelenting right neck pain following the above noted trauma" (Employee's Exhibit A).
- After providing a detailed review of the employee's medical treatment, Dr. Musich described the employee's current complaints and limitations as follows: Presently, Chief Whiteley complains of constant right paracervical pain at a level of 8-9 out of 10 aggravated by sitting at a computer for extended periods of time over 90 minutes, sleeping in one position over several hours, driving in an auto greater than 90 minutes, or any prolonged positioning of the cervical spine greater than 90 minutes. Chief Whiteley also complains of increased right neck pain with flexion and right cervical rotation and right cervical lateral flexion. This patient denies any complaints consistent with myelopathy, or upper extremity cervical radiculopathy.
- Dr. Musich also provided a detailed medical history that included the employee's various surgeries, and unrelated health problems. Other than one medical record of Dr. Rushin in September of 2003, Dr. Musich found no history of any pre-existing problems with the employee's neck or cervical spine.
- Dr. Musich's physical examination revealed straightening of the normal cervical lordosis; focal subjective pain to palpation over the right paracervical musculature with spasm palpable; a loss of 20% cervical extension; and a loss of 25% right cervical rotation and right cervical lateral flexion due to end range pain. Dr. Musich also noted several trigger points over the medial trapezius and right paracervical musculature.
- Under the heading "Impression", Dr. Musich reached the following conclusions regarding the primary injury:

"It is my opinion, based on a reasonable degree of medical certainty that Danny Whiteley suffered significant work related trauma on or about October 29, 2006 during the course and scope of his employment by the City of Poplar Bluff Police Department. It is my medical opinion that the work trauma of October 29, 2006 is the prevailing factor in the development of acute and severe right neck pain which required extensive evaluation and aggressive conservative treatment. It is my medical opinion that the work trauma of October 29, 2006 is causally related to this patient's persistent post traumatic neck symptoms due to symptomatic cervical disc displacement, right occipital nerve neuralgia and symptomatic spinal enthesopathy of the right paracervical region. It is also my medical opinion that Chief Whiteley has suffered a permanent partial disability of 20% of the person as a whole

secondary to the work trauma of October 29, 2006. It is also my medical opinion that this patient should continue to participate in a home exercise program and refrain from activities that severely and adversely affect his post traumatic symptoms.”

Russell C. Cantrell, M.D.

- Dr. Russell C. Cantrell evaluated the employee on January 14, 2009. Dr. Cantrell wrote a report dated January 14, 2009, and his deposition was taken on September 2, 2009.
- Dr. Cantrell’s medical history indicates “Mr. Whiteley reports that on October 29, 2006, he had taken his patrol car to a car wash and was leaning through the open driver’s door using his left hand to support his body weight as he leaned in the car to clean the interior of the windshield with his outstretched right hand”. “He reports that in doing so he felt the sudden onset of pain complaints in the right side of his neck, after which he began to have muscular spasms in the right side of his neck.
- Dr. Cantrell provided a brief summary of the employee’s medical treatment after his accident. Dr. Cantrell then discussed the employee’s past medical history, and included a reference to the prior motor vehicle accident in which the employee’s patrol car was rear ended at a high speed.
- Dr. Cantrell’s physical examination indicated the employee had an active range of motion of his cervical spine with the exception of mild limitations in cervical extension. Dr. Cantrell noted the employee “reported subjective complaints of discomfort in the right neck at the end ranges of left side bending, left rotation and cervical extension”. He also stated “Palpation of his cervical paraspinal musculature reveals no palpable spasms, although he does report tenderness to palpation in the right upper cervical paraspinal musculature”.
- Dr. Cantrell stated that many of the employee’s chiropractic treatments were considered routine adjustments. He also stated that on most occasions adjustments were performed to the cervical spine as well as the thoracic and lumbar spine in 2002 and 2003. He also stated that it is noteworthy that on multiple occasions throughout chiropractic treatment over the course of several years, are identified limitations in range of motion at the C3 and C4 level which appear to be consistent with the radiographic abnormalities of degeneration at C3-4.
- Dr. Cantrell reviewed the treatment records and diagnostic studies related to the employee’s October 29, 2006 accident, and then offered the following conclusions:
“Noting Mr. Whiteley’s settlement for disability regarding his involvement in the motor vehicle accident in 2002 in which he received settlement for his neck, back and shoulders, considering numerous chiropractic visits from 2001 through 2006 in which he was noted to have earlier complaints of stiffness in his cervical spine or more commonly findings of limitations in mobility of his C3 and C4 segments of the cervical spine, and considering the rather innocuous mechanism of injury as described by Mr. Whiteley on October 29, 2006, it is my opinion within a reasonable degree of medical certainty, that the events of October 29, 2006,

are not the prevailing factor in the cause of his medical condition for which he received extensive treatment, including a series of epidural steroid injections, trigger point injections and occipital nerve blocks. It is not unreasonable to believe that his description of activities performed on October 29, 2006 may have served as a contributing factor to a diagnosis of a cervical strain superimposed on pre-existing degenerative disc disease within his cervical spine, the findings on the cervical MRI scan from November 10, 2006, in my opinion do not represent any acute objective pathology but rather represent a progressive degenerative process, not uncommonly seen in an individual of Mr. Whiteley's age. This opinion is further supported by the chiropractic findings on multiple occasions between 2001 and 2006 of limitations in mobility of the C3 and C4 segments of Mr. Whiteley's cervical spine."

"It is my opinion that Mr. Whiteley has a five percent (5%) permanent partial disability of the person as a whole referable to his cervical spine pain complaints, four percent (4%) of which I would relate to pre-existing degenerative pathology, and one percent (1%) of which I would relate to a diagnosis of a cervical strain referable to October 29, 2006."

"It is lastly my opinion that it is equally likely that Mr. Whiteley may have experienced similar onset of pain complaints if he were engaged in similar activities of washing a vehicle outside the scope of his employment."

APPLICABLE LAW

- Revised Missouri Statute Section 287.020.3 states that 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.
- The burden is on the employee to prove all material elements of the employee's claim. *Melvies v Morris*, 422 S.W.2d, 335(Mo.App.1968). The employee has the burden of proving that not only the employee sustained an accident that arose out of and in the course of employment, but also that there is a medical causal relationship between the accident and the injuries and the medical treatment for which the employee is seeking compensation. *Griggs v A.B. Chance Company*, 503 S.W.2d 697(Mo.App.1973).

RULINGS OF LAW:***Issue 1. Medical Causation***

On October 30, 2006, the employee saw Dr. Austin R. Tinsley at Tinsley Medical Clinic. The medical records reflect that the employee had been a patient of Dr. Tinsley since October of 1979. Dr. Tinsley noted that the employee had been to the Industrial Clinic with severe neck pain and spasms, and requested an injection for pain. Dr. Tinsley gave the employee a Toradol injection and stated "I have observed the spasm of the cervical paravertebral group, and it is severe". Dr. Tinsley suggested he "double up" the dose of Hydrocodone. On November 1, 2006, the employee saw Dr. Tinsley again. On that day, Dr. Tinsley's "Impression" was "1. Acute cervical strain and I suspect some pre-existing cervical DJD noting multiple trauma sustained when riding bulls. No sign of disc at this time".

The employee returned to see Dr. Tinsley at the Tinsley Medical Clinic on November 13, 2006 with complaints of "persistent neck pain". The employee reported some dysesthesia in the second and third fingers of his right hand, but he had good sharp/dull discrimination. He reported that physical therapy had not helped, and he felt worse the day after therapy. Dr. Tinsley reviewed the findings of the MRI, and noted that the employee's pain was exacerbated by rotating his head. The employee felt that the spasms were improved. Dr. Tinsley's "Impression" was "Acute cervical strain, superimposed on severe cervical disc disease, post traumatic from multiple injuries in the past".

Although the employee stated that Dr. Tinsley did not ever treat him for injuries to his cervical spine, the employee had a previous Workers' compensation case that listed his neck as a body part that was injured. Both the claim and the compromise settlement agreement for this claim list "back, neck and shoulders" as the parts of the body that were injured in the July 15, 2002 accident. The compromise settlement agreement for injury number 02-070425 was based on approximately 6% of the body as a whole related to the neck, back and shoulders.

The employee was also evaluated by Dr. Musich and Dr. Cantrell. Dr. Musich opined that the work trauma of October 20, 2006 is the prevailing factor in the development of acute and severe right neck pain which required extensive evaluation and aggressive conservative treatment. He also opined that the work trauma of October 29, 2006 is causally related to this patient's persistent post traumatic neck symptoms due to symptomatic cervical disc displacement, right occipital nerve neuralgia and symptomatic spinal enthesopathy of the right paracervical region. He further opined that the employee suffered a permanent partial disability of 20% of the person as a whole secondary to the work trauma of October 29, 2006.

Dr. Cantrell opined that the events of October 29, 2006, are not the prevailing factor in the cause of the employee's medical condition for which he received extensive treatment, including a series of epidural steroid injections, trigger point injections and occipital nerve blocks. He also stated that it is not unreasonable to believe that the employee's description of activities performed on October 29, 2006 may have served as a contributing factor to a diagnosis of a cervical strain superimposed on pre-existing degenerative disc disease within his cervical spine. He stated that in his opinion, the MRI scan does not represent any acute objective pathology but rather

represent a progressive degenerative process, not uncommonly seen in an individual of the employee's age. He stated that this opinion is further supported by the chiropractic findings on multiple occasions between 2001 and 2006 of limitations in mobility of the C3 and C4 segments of the employee's cervical spine.

After reviewing all of the evidence, including Dr. Tinsley's medical records (the employee's physician since 1979), the employee's previous Workers' Compensation settlement to his neck and the employee's chiropractic records, I find that the employee did not meet his burden of proof on the issue of causation. Furthermore, based on all of the evidence presented, I find that the causation opinion of Dr. Cantrell is more credible than the causation opinion of Dr. Musich.

I find that the employee's cervical injuries sustained on October 29, 2006 are not medically causally related to the employee's alleged work accident. I also find that the employee's alleged work accident on October 29, 2006 is not the prevailing factor in causing the employee's medical condition.

Based on the denial of medical causation, all other issues are moot and will not be ruled upon. Furthermore, the primary claim has been denied. Based on this denial, there is not a valid Second Injury Fund Claim. Therefore, the Second Injury Fund claim is denied.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Danny Whiteley

Injury No. 06-103269

Date: _____

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Person
Division of Workers' Compensation