

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No. 17-086815

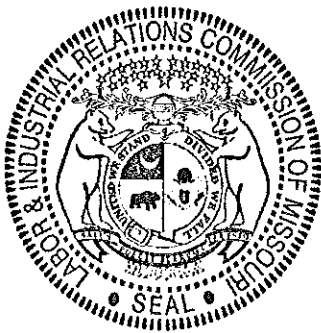
Employee: Brenda L. Britz
Employer: Harley-Davidson Motor Company
Insurer: Hartford Casualty Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated October 3, 2018.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

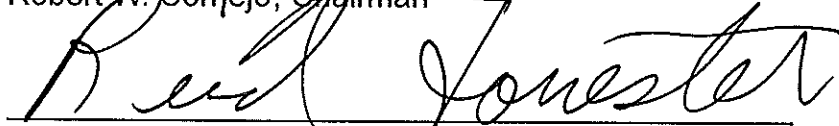
The award and decision of Administrative Law Judge Mark Siedlik, issued October 3, 2018, is attached and incorporated by this reference.

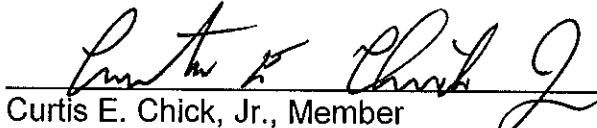
Given at Jefferson City, State of Missouri, this 14th day of February 2019.



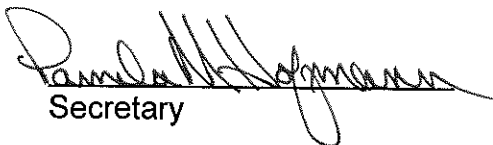
LABOR AND INDUSTRIAL RELATIONS COMMISSION


Robert W. Cornejo, Chairman


Reid K. Forrester, Member


Curtis E. Chick, Jr., Member

Attest:


Secretary

TEMPORARY AWARD

Employee: Brenda L. Britz

Injury No. 17-086815

Dependents: N/A

Employer: Harley-Davidson Motor Co.

Insurer: Trumbull Insurance Company
c/o Gallagher Bassett Services

Hearing Date: July 31, 2018

Record Closed: August 21, 2018

Checked by: MSS/pd

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 6, 2017
5. State location where accident occurred or occupational disease was contracted: Kansas City, Platte 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? Yes
9. Was Claim for Compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee sustained injury to her left shoulder/arm while installing a gas tank that did not fit properly and while forcefully pushing and shoving down on the tank, her arm began to hurt.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left shoulder/arm.

14. Nature and extent of any permanent disability: N/A
15. Compensation paid to date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$700.00
17. Value necessary medical aid not furnished by employer/insurer? To be determined
18. Employee's average weekly wages: \$733.45
19. Weekly compensation rate: \$488.96/\$483.48
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:
22. Second Injury Liability: No.
23. Future requirements awarded: Employer/Insurer are ordered to provide medical treatment necessary to cure and relieve Claimant from injuries sustained to her left shoulder/arm on July 6, 2017.

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of William C. Spooner, Claimant's attorney, for necessary legal services rendered.

- * This case to return to general docket pending final disposition.

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Brenda L. Britz Injury No. 17-086815
Dependents: N/A
Employer: Harley-Davidson Motor Co.
Insurer: Trumbull Insurance Company
c/o Gallagher Bassett Services
Hearing Date: July 31, 2018
Record Closed: August 21, 2018 Checked by: MSS/pd

On July 31, 2018, the parties appeared for a Hardship Hearing. The Claimant, Brenda L. Britz, appeared in person and with counsel, William C. Spooner. The Employer/Insurer appeared through counsel, Michael R. Kauphusman. Post-trial briefs were submitted and the record closed August 21, 2018.

STIPULATIONS

Prior to the Hearing, the parties stipulated to the following:

- 1) On July 6, 2017 ("the injury date"), Brenda L. Britz, was an employee of Harley-Davidson Motor Co., and working subject to the Missouri Workers' Compensation Law;
- 2) The Employer, Harley-Davidson Motor Co., was an employer operating under and subject to the provisions of Missouri Workers' Compensation Law on July 6, 2017, and its liability was fully insured by Trumbull Insurance Company c/o Gallagher Bassett Services.
- 3) The Missouri Division of Workers' Compensation has jurisdiction to hear this claim and that venue is proper in Kansas City, Missouri;
- 4) A Claim for Compensation was filed within the time prescribed by law;
- 5) The Employee notified the Employer of her injuries as required by law;
- 6) Employee's average weekly wage is \$733.45 resulting in a compensation rate for temporary total disability benefits in the amount of \$488.96 and \$483.48 for permanent partial disability benefits.

ISSUES

The parties requested the Division to determine the following issues:

1. There is dispute as to whether the Claimant suffered an injury by accident out of and arising out of the course and scope of employment and whether or not the injury was medically casually related.
2. There is a dispute as to whether the Claimant is entitled to future medical care on account of this work injury.

EXHIBITS

The Employee, Brenda L. Britz, testified in person and offered the following exhibits, all of which were admitted into evidence without objection:

A	Report of Injury	11-13-17
B	Claim for Compensation	12-05-17
C	Answer to Claim for Compensation (Employer/Insurer)	12-20-17
D	Amended Claim for Compensation	02-26-18
E	Amended Answer to Claim for Compensation (Emp/Ins)	03-07-17
F	Dr. Anne R. Rosenthal (report)	01-19-18
G	BTE Technologies	08-07-17 thru 11-09-17
H	Harley-Davidson Motor Company (Clinic)	08-05-17 thru 12-07-17

The Employer/Insurer offered the following exhibits all of which were admitted into evidence without objection:

1.	Report of Suzanne Elton, M.D.	04-25-18
2.	Curriculum Vitae of Suzanne Elton, M.D.	
3.	Risk Factor Analysis	03-06-18
4.	Video Analysis of Job Duties	
5.	Deposition of Mary Fitzpatrick	07-20-18
6.	Deposition of Brenda Britz	02-23-18
7.	Employee Report of Injury	08-05-17
8.	BTE Lifestyle Center Records	
9.	Brett A. Miler, M.D. Records	
10.	Northland Imaging MRI Report	11-16-17
11.	Tomlinson Chiropractic Records	
12.	Direct Medical Care Records	

FINDINGS OF FACT

Based on the above exhibits and the testimony of the Claimant, Brenda L. Britz, this Court makes the following findings:

History

Claimant is a 48-year-old woman (at time of Hearing) and who had a variety of jobs most of her adult life in different industries. Claimant completed high school and graduated in 1987.

Work History

Claimant's relevant work history began in the 1980's for several office-type establishments and did some bartending. Claimant's work history is unremarkable and without noted permanent work-related injuries related to her left shoulder. Claimant began her employment with Harley-Davidson ("Employer") in 2001. Claimant testified that her work duties for Harley-Davidson were daily, numerous and required significant physical capability. Claimant testified that her daily work activities included numerous repetitive daily job tasks using both hands, pushing, jamming, roughly pushing and forcibly using her body weight to maneuver gasoline tanks.

HISTORY OF OCCUPATIONAL DISEASE AND INJURY UP TO AND INCLUDING JULY 6, 2017

Left shoulder/arm

Claimant claims an occupational disease and injury on July 6, 2017 as the result of the repetitive nature of her job duties, including repetitively using both hands, forcibly pushing, and jamming gas tanks onto a motorcycle frame injuring her left shoulder/arm. Prior to July 6, 2017, the Claimant did not have any prior left shoulder pain or problems nor had the Claimant ever received medical care of any kind to her left shoulder or arm. On July 6, 2017, the Claimant was forcibly and roughly jamming a gas tank and dropping all of her body weight to secure a gas tank that was improperly manufactured to get it in the motorcycle frame. Claimant was standing to the left on top of a carrier and awkwardly leaning over with her arms straightened and locked, and while repetitively jamming the gasoline tank down using all of her weight to force the tank onto the frame. Claimant repetitively used her locked arms and shoulders while jamming the gas tank into place. Claimant testified that while she is not sure how many tanks she did, but that it was somewhere between 35-40 tanks, and that each tank required multiple tries with this forceful locked arm jamming while attempting to secure the gas tanks onto the motorcycle frame. Claimant credibly described her work activities, which included this repetitive pushing, jamming, roughly pushing and forcibly using her body weight to maneuver the seized gasoline tank, which became stuck inasmuch as the paint thickness did not allow the gas tank to fit without these repetitive forceful movements.

At the time of Claimant's injuries on July 6, 2017, she testified that she was working in the Dyna Softtail line, now called Softtail line. Claimant testified that her work group puts on the heat shields, front fender, the standoff for the foot rest or floorboard, the air breather, the gas tank, and the seat, and with the seat is also the coil. The Claimant testified that she had previously worked

on the Dyna Softail line through June 2017 and then started on the Softail line, group seven, in July 2017. Claimant testified that the accident occurred on July 6, 2017. Claimant originally stated the accident occurred on June 26, 2017, when filling out her Report of Injury because she had to guess the injury date, but she noted and testified that it occurred after the 4th of July holiday, and was on July 6, 2017. The original Claim for Compensation filed by Claimant reflected August 5, 2017, as this was the date incorrectly reported by the Employer and filed with the Division of Workers' Compensation. The Claimant testified that she was seen in the Lifestyle Center at Harley-Davidson on August 5, 2017. However, the Claimant testified that the first day of the Softail line production started on July 5, 2017, and she was injured on July 6, 2017. The Claim for Compensation was amended to July 6, 2017. The Claimant testified that on July 5, 2017, she worked on front fenders, put the standoffs on for the foot, floorboard or the foot peg depending on the model and did not have any symptoms or pain in her left shoulder. Claimant testified that on July 6, 2017, she installed gas tanks in the morning from 6:00 a.m. until she went to lunch at 11:15 a.m. The Claimant testified that on that day her left shoulder began to hurt as well as the muscle that ran up to the side of her neck. Claimant testified that she installed between 30-45 tanks, which consisted of having to pick the gas tanks up with both hands at about rib level and carry them over to the carrier and step up on the side of the carrier to install the tanks. The Claimant testified that while doing those job duties repetitively all morning, she had to try and jimmy a gas tank and it would not fit. Claimant testified that she stood back and put both hands out and dropped down with all of her weight to try and force the tank on and was unable to get the gas tank on and did it over and over on and off all day. The Claimant testified that Brandon Thomas, a co-worker, was working across from her and he had to help her on and off throughout the day. Claimant testified that she had to continually jimmy the gas tank and rock it back and forth and as it would not fit given the paint thickness. Claimant testified she stood up over the top of it with both hands and slammed it with all of her body weight to try and get it to slide down over the frame. Due to the severity of her shoulder pain, the Claimant testified that after her lunch break, she did not return to installing gas tanks and asked Brandon Thomas to trade with her. The Claimant testified that she switched at that point from installing the gas tanks to the standoffs for the foot rest from that day forward.

Claimant testified that prior to completing an injury report on August 5, 2017, she reported that her shoulder was hurting and complained about it to multiple supervisors. Claimant testified that she was unable to continue to work after about a month and that she had to request to be seen in the medical office due to pain in her left shoulder. The Claimant testified that she told Tom Granger, Ryan Birchler and Jeff Denham that she needed to go to the medical department. Claimant testified that at first she thought that she could just shake it off and work through the pain, but it continued to get worse, so she asked to go to the Lifestyle Center. The Claimant had mentioned on several occasions to Tom Granger, Ryan Birchler and Jeff Denham about the issues she was having with her left shoulder; however, she did not know that she had to specifically request to be seen in the medical department. Claimant testified that a co-worker by the name of Lee had told her that she needed to ask to be seen. Supervisor, Jeff Denham, made the arrangement for the Claimant to be seen at the Lifestyle Center on August 5, 2017.

Claimant was seen in the Lifestyle Center on August 5, 2017, and advised that her left shoulder pain was ongoing, very disabling and getting worse. Claimant was treated through the EIP program at Harley-Davidson, but did not seek any improvement and was referred to orthopedic surgeon, Dr. Brett A. Miller. The Claimant was initially seen by Dr. Brett A. Miller on November

9, 2017, wherein an MRI was ordered of the left shoulder. Following the MRI testing on November 16, 2017, the Claimant followed up with Dr. Brett A. Miller wherein Dr. Miller opined that the Claimant was a candidate for a left shoulder arthroscopy with SLAP repair; however, he felt that the alleged mechanism of injury was not overly common to cause SLAP tears; and therefore, no further treatment was authorized by the Employer. Due to continued left shoulder issues, complaints and disabling pain, the Claimant was seen by her own family physician, Dr. Ann Riggs, and prescribed Gabapentin for pain.

CLAIMANT'S CURRENT COMPLAINTS

The Claimant testified about multiple complaints regarding the physical impairments that are attributable to her injury on July 6, 2017. The Claimant testified that she continues to experience ongoing and progressive significant left shoulder pain. Claimant testified that just extending her left arm straight out in front of her causes pain. Claimant testified that over reaching of her left arm in front causes pain and that she cannot do anything overhead. The Claimant testified that she has problems with bras that hook in the back. Claimant testified that she has problems with washing her hair and brushing the top with her left arm. In fact, the Claimant testified that she cut her hair off because she cannot brush it. Claimant testified that it is also hard to sleep. In addition, the Claimant testified that her pain level is usually around a two to three; however, sometimes out of habit and not thinking if she does any of the aforementioned activities, her pain level is a seven to eight. Claimant testified her shoulder pain is only getting worse. The Claimant testified that her pain in the left shoulder is constant, but is more intense during and after work because she is probably doing things that she should not be doing. Claimant testified that she also has a burning pain. The Claimant testified that even lifting weight like a milk jug to put into the refrigerator causes pain. Claimant also testified that she is left-handed so it is natural for her to try and do things with her left arm and tried to catch herself and stop in order to not hurt herself any worse. Claimant also testified that she has strength and range of motion issues. The Claimant testified that she cannot walk her dog because the dog pulls on the leash. Claimant testified that she uses her right hand for a lot of things now. Claimant testified that she cannot ride her motorcycle. The Claimant testified that her left shoulder injury has caused significant disruption of her family and home responsibilities, recreation, social activity, occupation, self care and life support activities.

EXPERT SUMMARIES

Dr. Anne R. Rosenthal

On January 19, 2018, Dr. Anne R. Rosenthal performed an independent medical examination of Claimant with regard to an alleged repetitive injury to the Claimant's left shoulder on July 6, 2017. Dr. Anne R. Rosenthal used to be the medical doctor at Harley-Davidson for several years.

The Claimant told Dr. Anne R. Rosenthal that she alleged occupational cumulative injuries to her right shoulder as the result of her repetitive job activities required in her employment. Dr. Anne R. Rosenthal noted that the Claimant's repetitive work injury of July 6, 2017, which included using both hands and dropping all of her body weight to get a gas tank to fit. Dr. Anne R. Rosenthal also noted the Claimant was leaning over and jamming the tank down using all of

her weight to force the tank onto the frame, and repetitively worked on approximately 35-40 gas tanks.

After review of medical records and examination, Dr. Anne R. Rosenthal opined that the Claimant had a work related left should labral tear and needed to be treated by an experienced shoulder surgeon and undergo a left shoulder arthroscopy to address the left labral tear, and that the exact surgery will be dependent on what is seen at the time of the shoulder arthroscopy. In addition, Dr. Anne R. Rosenthal recommended therapy to follow. It was also Dr. Anne R. Rosenthal's opinion that the Claimant needed restrictions of no lifting, pushing or pulling with the left arm and no use of the left arm at or above the shoulder.

Dr. Anne R. Rosenthal opined that the forceful motion that Claimant was performing to install the gas tanks was akin to falling on an outstretched hand, which is a known mechanism for causing labral tears and that Claimant's work related injury on July 6, 2017, was the mechanism that caused the left shoulder labral tear. Dr. Anne R. Rosenthal believed that Claimant's job duties at Harley-Davidson was the prevailing factor in causing her injury, medical treatment and resultant disability. Dr. Anne R. Rosenthal also used the incorrect date of August 5, 2017, instead of using the amended claim date of July 6, 2017.

Dr. Brett A. Miller

The Claimant was referred to and initially seen by Dr. Brett A. Miller on November 9, 2017, at the request of Employer. Dr. Brett A. Miller noted that there was a chance of a partial thickness rotator cuff tear given that there was minimal trauma to Claimant's shoulder, but continued to ache and hurt and ordered an MRI. An MRI was completed on November 16, 2017, at Northland Imaging wherein the impressions was that of, "Possible subtle type II SLAP tear. Correlate for symptoms of such. MR arthrogram can be obtained to better assess for labral tear as indicated." After review of the MRI, Dr. Brett A. Miller diagnosed Claimant with a left shoulder type II SLAP tear and felt she was a candidate for a left shoulder arthroscopy with SLAP repair. The same diagnosis as Dr. Anne R. Rosenthal. However, Dr. Brett A. Miller opined that the Claimant's alleged mechanism of injury was not overly common to cause SLAP tears and that it was generally a more forceful traumatic event such as a fall on an outstretched arm or grabbing a rail and losing footing while maintaining the body weight through the upper extremity. Dr. Brett A. Miller noted it was safe for Claimant to remain on full duty and demonstrated some stretching exercises that she needed to continue to perform on a daily basis so that she would not develop adhesive capsulitis which would further complicate her shoulder problem.

Suzanne G. Elton, MS OTR/L CPE

Claimant was seen by Dr. Suzanne G. Elton on April 25, 2018, for an Independent Medical Examination on behalf of the Employer. Dr. Suzanne G. Elton diagnosed Claimant with arm pain. Dr. Suzanne G. Elton did not believe that Claimant's work duties were the prevailing factor in the development of her shoulder and arm symptoms and that the incident of four hours of pushing a gas can down onto a bike frame did not fit with a SLAP tear or other shoulder injuries. Dr. Suzanne G. Elton further noted that Claimant's exam did not suggest a symptomatic SLAP tear or a rotator cuff tear or any other discreet injury to the arm although Dr. Suzanne G. Elton did note pain and ROM deficits. Dr. Suzanne G. Elton opined that the MRI did not show significant abnormalities

and based on those findings, would expect the shoulder to respond to NSAIDS, exercises and time. Dr. Suzanne G. Elton did not feel that Claimant would require or benefit from future medical or prescriptive needs related to her work injury nor required work restrictions.

Mary Fitzpatrick, Board Certified Ergonomist

Mary Fitzpatrick, ergonomic expert, was asked to perform an ergonomic analysis, including mechanism of injury of Claimant by Jamie Senner, an adjuster with Gallagher Bassett. The onsite analysis took place on March 6, 2018, at Harley-Davidson. Claimant participated in the evaluation. Ms. Fitzpatrick had the Claimant simulate the alleged incident, but did not know the exact bike or style of bike that the Claimant was working on when the alleged incident occurred on July 6, 2017. Ms. Fitzpatrick testified that she was unable to measure the exact force that Claimant used while attempting to install the faulty gasoline tanks. Ms. Fitzpatrick testified that the tanks that she did observe being installed were not the same type as those used by Claimant. Ms. Fitzpatrick stated that she was not hired to go to Harley-Davidson to look at what caused the Claimant's injury, but instead, the risk. Ms. Fitzpatrick testified in cross-examination that she was not providing a causation opinion was simply looking at risk. Ms. Fitzpatrick did not know the model of bike that the Claimant was operating on July 6, 2017, or the type of gas tank or brackets that were being used and which were defective. Ms. Fitzpatrick did not test any gas tanks that had paint coating and bracket sizes used of the same type that injured the Claimant. Ms. Fitzpatrick did not measure any of the force necessary to use on the defective gas tanks and it is relevant that she did not take the exact force measurements needed with the faulty gas tanks. The pictures provided with Ms. Fitzpatrick's report, including the videotape were not of the same kind or with the same force which the Claimant had to use in the installation of the defective gas tanks on July 6, 2017. Ms. Fitzpatrick opined that Claimant's alleged acute shoulder injury from installing a fuel tank at work was analyzed specific to the risk factors involving shoulder SLAP tears. Ms. Fitzpatrick opined that it was questionable that the occupational exposures resulted in the development of Claimant's symptoms and resulting diagnosis of Type II SLAP tear when comparing objective physical data surrounding the alleged incident with epidemiological research/etiology of injury.

RULINGS OF LAW

As the first two issues in this matter are inter-related, I will address both of them together.

The first issue to be determined is whether Claimant sustained an occupational disease arising out of and in the course of Claimant's employment for Employer and the second issue is whether Claimant's injuries and continuing complaints, as well as any resultant disability are medically causally connected to her alleged occupational disease at work on July 6, 2017. The criteria for compensability of an injury by occupational disease are set forth in § 287.067, which provides in relevant part that:

1. In this chapter the term "**occupational disease**" is hereby defined to mean, unless a different meaning is clearly indicated by the context, 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 to 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.

2. Any injury or death by occupational disease 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.

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.

Additionally, under **Mo. Rev. Stat. § 287.067.1 (2005)**, occupational disease is defined as “an identifiable disease arising with or without human fault out of an in the course of the employment.” Further, under **Mo. Rev. Stat. § 287.067.3 (2005)**, “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.” That section then defines “prevailing factor” as “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” It continues, “Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of the day-to-day living shall not be compensable.”

Chapter 287 does not require a claimant to establish, by a medical certainty, that his or her injury was caused by an occupational disease in order to be eligible for compensation. *Vickers v. Missouri Department of Public Safety*, 283 S.W.3d 287, 295 (Mo. App. 2009). Occupational diseases are required over time, not injuries caused by a specific event during a single work shift. *Young v. Boone Electric Cooperative*, 462 S.W.3d 783, 796 (Mo. App. S.D. 2015).

In *State ex rel. KCP&L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14 (Mo. App. W.D. 2011), the court found that the “Workers’ Compensation Law distinguishes between two general categories of compensable injuries: (1) injuries by accident; and (2) injuries by occupational disease.” *Id.* at 18. In *KCP&L*, the Western District scrutinized the amendments to § 287.067, which define the standards for compensability of occupational disease. The court noted that the legislature eliminated the cross reference between § 287.067 and § 287.020. The *KCP&L* court explained that the elimination of the cross reference to § 287.020 resulted in a stand-alone compensability standard for occupational disease claims in § 287.067, independent of § 287.020. *Id.* at 24-25. The court reasoned that the creation of an independent compensation scheme for occupational disease provided further evidence of the legislature’s intent to remove occupational

disease from the narrow definition of “accident.” *Id.* Accordingly, the Western District concluded that occupational disease is not an “accident” within the meaning of Chapter 287 and, therefore, the exclusivity provision for accidental injuries or death does not apply to claims for injuries by occupational disease. *Id.* 29-30. In 2013, the Eastern District also took up the same issue in *Amesquita*, 408 S.W.3d at 299, reaching the same conclusion as the court in *KCP&L*. Therefore, the unequal exposure requirement for injury is not a part of the occupational disease requirement.

Finally, an employee must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” *Kelly v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43, 48 (Mo. App. E.D. 1999). Finally, the court in *Kelly v. Banta* noted “where opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible.” *Id.*

Based on the Claimant’s credible testimony and the competent, credible and persuasive testimony of Dr. Anne R. Rosenthal, orthopedic surgeon, who examined the Claimant, I find the Claimant has met her burden of proving the presence of an occupational disease that arose out of and in the course of her employment for the employer on July 6, 2017. I further find that she has met her burden of proof to show that her left shoulder injury is medically causally related to her employment for employer.

In order to meet her burden of proof in this matter, Claimant first needed to present credible evidence on her own behalf regarding the nature of her work activities for the employer and the onset of her complaints and problems that occurred on July 6, 2017. I find that she has. I find that prior to July 6, 2017, the Claimant never had medical treatment to her left shoulder. I find the Claimant credibly described her work activities that day while working for the employer, which included her repetitively using both hands and dropping all of her body weight to secure a gas tank that was improperly manufactured to get it in the motorcycle frame. Claimant was standing to the left and on top of a carrier and awkwardly leaning over with her arms straightened and locked, and while jamming the gasoline tanks down using all of her weight to force the tank onto the frame, she repetitively used her locked arms and shoulders while jamming the gas tank into place. Claimant testified that while she is not sure how many tanks she did on July 6, 2017, but that it was somewhere between 35-40 tanks, and that each tank required multiple tries with this forceful locked arm jamming while attempting to secure the gas tanks onto the motorcycle frame. Claimant credibly described her work activities, which included this repetitive pushing, jamming, roughly pushing and forcibly using her body weight to maneuver the ceased gasoline tank, which became stuck inasmuch as the paint thickness did not allow the gas tank to fit without these forceful movements. I find that after the Claimant performed these tasks for approximately four hours and given that she suffered immediate discomfort credible. The Claimant reported her problems to other employees while at lunch that same day, and after notifying her Supervisor, was taken off this station given the pains he was experiencing in her left shoulder. I find the Claimant’s testimony credible that after July 6, 2017, up until August 5, 2017, when the Claimant went to the medical department at Harley-Davidson that she complained that her left shoulder was hurting on multiple occasions to Tom Granger, Ryan Birchler and Jeff Denham. There is no evidence provided by the Employer to dispute this. Claimant testified, and I find persuasive, that when she was finally told by Mr. Denham that she was sent to the medical office. The records from the Lifestyle Center, including the Employee’s Report of Injury, document that on August 5, 2017, the Claimant discussed the problems with her left shoulder with the nurse at the Lifestyle Center and related the physical aspects of attempting to install the gas tanks on July 6, 2017. The

Claimant's deposition testimony about the wrong date of incident is understandable in that I find the Claimant was attempting to guess a date of her injury when she first went to the medical department. I find that the accident and incident information on the Employer's Report of Injury to be consistent with her trial testimony notwithstanding the incorrect date of onset. The Claimant was treated by the Harley-Davidson medical clinic for approximately a month and then referred to Dr. Brett A. Miller. Dr. Brett A. Miller noted the same description of injury and began treatment the Claimant, but later, was unsure on the medical cause of her injury and medical treatment was discontinued. Nevertheless, the Claimant describes contemporaneous reporting to at least three different supervisors followed by a Report of Injury, which describes with consistency the same mechanism of injury. I find having no direct evidence to dispute the Claimant's testimony with regards to the performance of her repetitive work activities on July 6, 2017, that the Employer failed to impeach or otherwise contradict the Claimant's credible testimony and the nature of her work activities that day.

In addition, in order for Claimant to meet her burden of proof with regards to whether or not she sustained an accident or occupational disease, the Claimant next needs to offer competent, credible and persuasive medical testimony to support her contention that her work activities on July 6, 2017, for the Employer resulted in an occupational disease that caused her left shoulder injury. To meet her burden of proof, the Claimant offered the opinion of Dr. Anne R. Rosenthal. I find that the Claimant has met her burden of proving the presence of an occupational disease that arose out of and in the course of her employment for the Employer on July 6, 2017. I further find that Claimant has met her burden of proof to show that her left labral tear is medically causally related to her employment for the Employer. (Both Dr. Anne R. Rosenthal and Dr. Brett A. Miller agree on the diagnosis.) Dr. Anne R. Rosenthal opined that the Claimant's work related injury of July 6, 2017, was the prevailing factor in causing her injury, medical treatment and resultant disability. I find the Claimant's unusual work activity on July 6, 2017, which included forceful pushing, jamming and slamming activities were competent to result in accumulative injury. Claimant developed progressive pain in her left shoulder forcing the Claimant to seek treatment after approximately 30 days of discomfort.

The Employer offered the opinions and medical testimony of Dr. Suzanne G. Elton who opined that the Claimant's left shoulder injury was not work related given that Dr. Suzanne G. Elton's opinion "a SLAP tear or other shoulder injury could not result in a SLAP tear or a rotator cuff tear or any other discrete injury to her arm." I do not find Dr. Suzanne G. Elton's conclusions persuasive. Dr. Suzanne G. Elton did not have an alternate opinion or explanation regarding the prevailing factor of the Claimant's occupational disease to her left shoulder other than to suggest that the Claimant did not have a work related injury to her left shoulder. Dr. Suzanne G. Elton's opinion regarding the prevailing factor and the Claimant's left shoulder are insufficient and inconclusive. Having considered both opinions and reviewing them in the light with the rest of the medical treatment records, I find the opinions and testimony of Dr. Anne R. Rosenthal more competent, credible and persuasive than the contrary opinions of Dr. Suzanne G. Elton in this case.

In addition, I do not find the ergonomic expert, Mary Fitzpatrick, to be credible or persuasive. Ms. Fitzpatrick testified that she did not have any documentation (other than her report) when testifying and was "going on memory." Ms. Fitzpatrick testified that she had the Claimant simulate the alleged incident, but did not know the exact bike or style of bike that the Claimant was working on when the alleged incident occurred on July 6, 2017. Ms. Fitzpatrick

testified that she was unable to measure the exact force that Claimant used while attempting to install the faulty gasoline tanks. Ms. Fitzpatrick testified that the tanks that she did observe being installed were not the same type as those used by Claimant. Ms. Fitzpatrick stated that she was not hired to go to Harley-Davidson to look at what caused the Claimant's injury, but instead, the risk. Ms. Fitzpatrick testified in cross-examination that she was not providing a causation opinion was simply looking at risk. I find it notable that Ms. Fitzpatrick did not know the model of bike that the Claimant was operating on July 6, 2017, or the type of gas tank or brackets that were being used and which were defective. I also find Ms. Fitzpatrick's opinion to be unpersuasive given that she did not test any gas tanks that had paint coating and bracket sizes used of the same type that injured the Claimant. Ms. Fitzpatrick did not measure any of the force necessary to use on the defective gas tanks and I find it relevant that she did not take the exact force measurements needed with the faulty gas tanks. With no exact force measurements used or simulated, I do not find Ms. Fitzpatrick's opinion to be credible. The pictures that were reviewed by the Court, including the videotape are also not persuasive given that the gas tank installation depicted in the photographs and video do not demonstrate any defect and were not of the same kind or with the same force which the Claimant had to use in the installation of the defective gas tanks on July 6, 2017. I find Ms. Fitzpatrick's conclusions inconsistent and not persuasive.

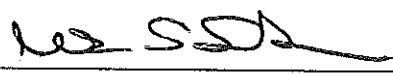
Therefore, I find the Claimant met her burden of proof when considering her testimony, the contemporaneous medical records, her reporting of her problems, the fact that she was taken off of the same job and not allowed to return, as well as the testimony of Dr. Anne R. Rosenthal. The Claimant, in addition to her testimony, needed to offer competent, credible and persuasive medical testimony to support her contention that her work activities on July 6, 2017, for the Employer resulted in an occupational disease that caused her left shoulder injury and symptoms. I further find treatment to the left shoulder to be necessary in order to cure and relieve the Claimant of the effects of her injury, and hereby order the Employer/Insurer to provide medical treatment.

CONCLUSION

Claimant sustained a compensable work-related injury on July 6, 2017, to her left shoulder/arm all of which arose out of and in the course of her employment for the Employer and which were medically causally connected to it. Benefits shall be awarded as stated above.

Compensation is awarded and subject to a lien in the amount of 25% of all payments in favor of William C. Spooner, Spooner & Perkins, P.C. for necessary legal services.

I certify that on 10-3-18,
I delivered a copy of the foregoing award
to the parties to the case. A complete
record of the method of delivery and date
of service upon each party is retained with
the executed award in the Division's case file.

Made by: 

Mark Siedlik
Administrative Law Judge
Division of Workers' Compensation

By: 

