Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 06-110840

Employee: Allen Alcorn

Employer: Tap Enterprises, Inc.

Insurer: Travelers Insurance

Date of Accident: Alleged April 14, 2006

Place and County of Accident: Alleged Howell County, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 12, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret Ellis Holden, issued September 12, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25th day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

Effective August 28, 2005, the legislature changed two portions of the Missouri Workers' Compensation Law applicable to the case at hand. Those provisions read in pertinent part as follows:

Section 287.420. 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, 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.

Section 287.800.1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

The decision in this matter hinges on whether we are to apply these changes retroactively to the facts of this case. Employee began working for employer on January 31, 2004. Employee was young and had not suffered from any substantial back ailments prior to this time. His job for employer entailed lots of repetitive heavy lifting and moving.

Employee began experiencing back pain within weeks after beginning his work for employer. He first sought medical help on approximately February 17, 2004. Employee told the physicians at that time that the pain had been occurring for a couple of weeks. He had "no knowledge of injury to [his] back but has been doing a lot of heavy lifting with his new job as a truck driver" for employer.

As early as May 2004, employee learned from an MRI that his pain was due to herniated disks in his back. Under the new version of §287.420, employee would have been required to give employer notice of his occupational injury not later than 30 days after receiving this diagnosis. The new law did not exist, though, until August 2005. Thus, the question is whether it should be retroactively applied to employee's claim and, consequently, allowed to extinguish his right to proceed with his claim (since he did not provide timely notice and since the strict construction change would place the burden on employee to show no prejudice to employer).

The general rule is that "[p]rospective application of a statute is presumed unless the legislature evidences a clear intent to apply the amended statute retroactively, or where the statute is procedural in nature." *Lawson v. Ford Motor Co*., 217 S.W.3d 345, 349 (Mo. App. E.D. 2007). Case law shows that the applicable statutory changes are not merely procedural -- they are substantive. Those rights which are substantive and cannot be applied retroactively are generally defined as laws that "take away or impair rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past." *Smart v. Mo. State Treasurer,* 916 S.W.2d 367, 369 (Mo.App. S.D. 1996) (citations omitted).

As evidenced in the case at hand, employee had already sustained a repetitive motion injury as early as 2004. Under the law in existence at that time, his occupational injury did not have to be reported to employer. See *Endicott v. Display Technologies, Inc.,* 77 S.W.3d 612, 615 (Mo. 2002). The application of amended §287.420 to this case would require employee to do something (report to employer) he did not know and was not required to do at the time. Thus, it created new obligations and duties. Application of

amended §287.420, as well as §287.800.1, to this case would cause employee to forfeit a right to claim compensation that he had under the old law. Thus, it took away his established rights. Clearly, then, the change is more than merely procedural and should not be applied retroactively.

I find this case analogous to *Great Southern Savings and Loan Association v. Payne*, 771 S.W.2d 940 (Mo.App. S.D. 1989). In that case, a couple named Payne had acquired real estate sold by the county collector to pay for delinquent taxes. After acquiring that property at public sale, the law was changed to require such purchasers to send written notice to certain parties within a specified period of time. Failure to do so under the new law resulted in the loss of the purchaser's rights to the property. In ruling that this new law was substantive and could not be applied retroactively, the court stated, "Laws . . . which provide for penalties and forfeitures in case of noncompliance, are always given prospective application. *Id*. at 943.

Similarly, in the case at hand, employee's failure to comply with the new notice provision resulted in the forfeiture of his rights. Thus, as indicated in the above decision, such law should be given prospective application only.

Under the law that existed as of the time that employee's injuries first arose, employee established that he had a work-related occupational injury and was entitled to compensation. He should not be foreclosed from asserting his rights to compensation because of laws enacted after-the-fact. Since the majority's decision holds otherwise, I must respectfully dissent from that decision.

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John J. Hickey, Member

AWARD

Employee: Allen Alcorn Injury No. 06-110840

Dependents: N/A

Employer: Tap Enterprises, Inc.

Additional Party: N/A

Insurer: Travelers Insurance

Hearing Date: 6/18/07 Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? NO
2. Was the injury or occupational disease compensable under Chapter 287? NO
3. Was there an accident or incident of occupational disease under the Law? NO
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? N/A

- Did employer receive proper notice? NO

- 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? N/A

10. Was employer insured by above insurer? YES

11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A

12. Did accident or occupational disease cause death? NO Date of death? N/A

- Part(s) of body injured by accident or occupational disease: N/A

14. Nature and extent of any permanent disability: N/A

- Compensation paid to-date for temporary disability: 0

16. Value necessary medical aid paid to date by employer/insurer? O

- Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: N/A

- Weekly compensation rate: N/A

20. Method wages computation: N/A

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: 0

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

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

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

22. Second Injury Fund liability: Yes No X Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: NONE

Permanent total disability benefits from Second Injury Fund:
weekly differential (0) payable by SIF for 0 weeks, beginning N/A
and, thereafter, for Claimant's lifetime

Total: SEE AWARD

23. Future requirements awarded: NONE

Said payments to begin N/A 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:

RANDY ALBERHASKY

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Allen Alcorn Injury No. 06-110840

Dependents: N/A

Employer: Tap Enterprises, Inc.

Additional Party: N/A

Insurer: Travelers Insurance

Hearing Date: 6/18/07 Checked by: MEH

The parties appeared before the undersigned administrative law judge on June 18, 2007, fora temporary hardship hearing. The claimant appeared in person represented by Randy Alberhasky. The employer and insurer appeared represented by Steven Prosperi. Memorandums of law were filed by July 20, 2007.

The parties stipulated to the following facts. On or about April 14, 2006, Tap Enterprises, Inc. was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Travelers Insurance. On the alleged injury date of April 14, 2006, Allen Alcorn was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. The parties agree that the employee's contract of employment was made in Missouri and the parties agree to venue in Howell County, Missouri. No temporary disability benefits have been paid to the claimant. The employer and insurer have paid no medical benefits. The attorney fee being sought is 25%.

ISSUES:

1. Whether the claimant sustained an occupational disease which arose out of the course and scope of employment.

2. Whether the claimant gave the employer proper notice.
3. Whether the claimant's Claim for Compensation was filed within the statute of limitations.
4. Whether the occupational disease caused the injuries and disabilities for which benefits are being claimed.
5. Whether the employer is obligated to pay past medical expenses.
6. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
7. What is the proper rate.
8. Any temporary total benefits owed to the claimant.

FINDINGS OF FACT:

The main issue in this case is whether the claimant sustained an injury to his back as an occupational disease due to repetitive trauma as the result of heavy lifting at work. Also at an issue is how the new law addressing occupational disease, which went into effect on August 28, 2005, applies to this injury.

The employer does business as Cummings Tools. They are in the business of selling tools by traveling around the United States and setting up daily sales events at different locations. They load the tools into semi-trucks and travel to various locations such as trade shows. They set up displays for one to two days and sell tools. When they arrive at a location, the tools are manually unloaded from the trucks and set up for display. Inventory is carried on the trucks and items are delivered as they are sold. After the sale, the trucks are manually reloaded.

The claimant worked for employer as part of one of these traveling groups. As a truck driver, he would drive the truck from location to location as well as be responsible for loading and reloading the items. This took approximately 2 – 4 hours a day. The tools and boxes weighed between 40 to 300 pounds. The claimant typically worked 17 days on the road and 17 off. Of the time he worked he would work 12 – 15 hours consecutively.

The claimant went to work for the employer on February 1, 2004. Prior to this there is no evidence that claimant had any back problems, nor had he sought medical treatment for his back. Shortly before going to work for the employer, the claimant went to Burton Creek Medical Clinic on January 24, 2004, complaining of vomiting for 14 hours. He did not report back pain.

During the first three weeks he worked he noticed back pain. There was no identifiable event associated with this; rather he felt it was due to the general heavy nature of his job. The claimant did not report an injury to the employer. Upon returning home, he sought medical treatment on his own and went to the Burton Creek Medical Clinic on February 17, 2004, complaining of back pain. The history given in the medical records as "the onset of pain has been sudden and has been occurring in a persistent pattern for two weeks. The course has been increasing and occurs more in the early morning. The pain I characterized as a dull ache. The pain is described as being located in the lower back. The symptoms are aggravated by lying down." The records also state that the claimant had "no knowledge of injury to back but has been doing a lot of heavy lifting with his new job as a truck driver." Claimant was prescribed medications.

On February 24, 2004, claimant went to Ozark Medical Center emergency room with complaints of back pain "onset 3 weeks worse today." The claimant specifically denied any injury. He was again prescribed medication and told to avoid strenuous injury. The next day the claimant returned to the Burton Creek Medical Clinic complaining of back pain that was precipitated by nothing. He had stiffness but no radiculopathy. He was given Darvocet and instructed to follow-up.

On April 19, 2004, he returned with complaints of persistent low back pain, increasing for 3 months. He had a positive straight leg test. An MRI of the lumbar spine was performed in May 2004 which showed degenerative disc disease form L3 to S1 with a large disc herniation at L3-4 on the right with an annular tear and mass effect on the nerve root and a smaller left sided disc herniation at L4-5, which might be affecting the nerve root. The claimant was referred to Dr. Green for evaluation.

The claimant did not see Dr. Green until 2006. Claimant testified that this was because he did not have insurance or means to pay for treatment. The claimant did not report this injury to the employer.

He continued to work, and testified that he had general discussions with his superior, including his immediate supervisor, Allen Hatch, regarding his back complaints. He testified that he did not know what was causing his back complaints and had not been told that they were work-related.

Allen Hatch testified that the claimant worked under his supervision for approximately one year. He said that when claimant worked under him he had no problems with doing his job and made no complaints about his back. Claimant was still able to do all the lifting when he last worked with Mr. Hatch. Claimant continued to work there under other supervisors. Mr. Hatch said that after he was no longer claimant's supervisor, claimant did complain of his

back hurting but he could not remember when. He said that after claimant became a manger he still worked hard. Claimant testified that he told a subsequent supervisor, Mr. Halligan, of his back pain and that he was on medications for it.

Claimant continued to lift at work. He testified that he had persistent back pain. In the fall of 2005 claimant was promoted to manager. At this time his lifting and unloading increased as he felt he needed to compensate for some other employees.

The claimant testified that he last worked on April 14, 2006. He had a phone conversation with Gina Pratt, who was in the Human Resources department, on April 14, 2006, where he requested medical leave for surgery to his back. He testified that he told her it was from work. In his deposition he testified that he never told her it was work-related. He said they discussed insurance paying for the surgery. He also said she told him they would continue to pay him base pay. Claimant did not return to work for the employer. He was terminated approximately 1 – 1 ½ weeks later for shortages.

Following the MRI of May 2004, claimant did not receive any medical treatment for his back until he returned to Burton Creek Medical Clinic on April 19, 2006, with low back pain. At that time he also complained of radiculopathy. The records state, "present – back pain (has been working for Cummins tools lifting a lot of machinery and doing fine) and radiculopathy (down left leg at times (not hurting today) just wants referral.) Pt wants to know if he can go see Dr. Green again – he went about a year ago and didn't have insurance and they told him to come back when he did have it." He had a negative straight leg test.

Claimant went to Dr. Green on May 4, 2006. This appears to be his initial visit. He reported back pain, "chronic, intermittent problem with an acute exacerbation. The event that precipitated this pain was job-related repetitive lifting of stock. He states the current episode started 2 years ago with progressive worsening of symptoms." An MRI dated May 30, 2006, showed a mild disc bulge at L2-3; a right posterior disc protrusion at L4-5, similar to the 5/19/04 MRI; left paracentral annular tear unassociated with disc protrusion at L4-5, which was new; and grade I spondylolisthesis at L5-S1 most likely due to L5 spondylolysis and associated with posterior disc bulge or pseudo bulge.

Claimant filed a claim on June 15, 2006, in which he requested medical treatment. In his original claim he states a date of injury of January 31, 2004, claiming injury to the back, spine, both shoulders, both feet and both legs by exposure to repetitive lifting, bending, and squatting. The employer filed a report of injury, and a timely answer was filed. An amended claim was filed on November 9, 2006, alleging a date of injury of April 14, 2006. It named the parts of the body injured as back, spine, both shoulders, both feet, and both legs, in that the employee was exposed to repetitive lifting, bending and squatting. Claimant again requested additional medical treatment. A timely answer was again filed.

Dr. David Paff examined the claimant on September 25, 2006. The claimant told Dr. Paff that "he never reported it to his employer and was not sent to a physician by the employer." The first physician to find the claimant's condition work-related was Dr. Paff. In his report he stated that the work exposure at employer through April 2006 was the prevailing factor causing the problem. He recommended additional treatment including physical therapy, injections and possible surgery. He put the claimant on a 20 pound lifting restriction and said he had not reached maximum medical improvement.

EMG studies were conducted on the lower extremities in September 2006, showing normal findings but possible involvement of the S1 level. On October 2, 2006, claimant went to the emergency room at Ozark Medical Center complaining of back pain. A CT myelogram of the cervical and lumbar spine performed in December 2006 showed unremarkable findings for cervical but a small anterior extradural defect at the L4-5 level with a disc protrusion at L5-S1 and a protrusion at L3-4.

Dr. Paff issued several subsequent additions to his report correcting a typographical error and explaining that review of subsequent records did not change his opinion. In his deposition he said that the work exposure he attributed to the injury is the heavy lifting claimant did. He felt that the repetitive trauma exposure was during the early part of his job in 2004.

On January 31, 2007, Dr. Jeffery Woodward evaluated the claimant. He found that the claimant's duties were not the prevailing factor in causing the employee's condition. He stated, "The medical records document lumbar pain onset anywhere from late January to mid-February 2004 which is not sufficient time at work to constitute repetitive strain causation. The initial lumbar pain could have resulted from the 14 hour persistent vomiting illness noted in medical records. Based on review of all information available today, in my opinion within a reasonable degree of medical certainty, a work related injury was NOT the prevailing cause of the patient's lumbar condition."

In February 2007 the claimant underwent 3 weeks of physical therapy which did not improve his condition.

On April 3, 2007, a right sided L3-4, left sided L4-5, and bilateral L5-S1 hemilaminotomy/discectomy was performed. He was taken off work for six weeks then placed on light duty restrictions.

Claimant testified that before the surgery he could not sit for long trips, he could not pick up his 4 year old daughter, or yard work. He had problems bending, standing, sitting for long periods and could not drive long distances.

Claimant testified that the surgery stopped his pain and weakness in his legs. He still has back pain. He could not stand for long before the surgery but can stand for a few hours now. At present, he has problems with heavy lifting, bending, stooping, and squatting.

Since leaving the employer, he has worked odd jobs for a tree service. He raked leaves and cleaned up after trees were cut. He has worked approximately 50 hours total. He has not sought any other employment. He does not think he could do the work required by his old job for employer; he does think he could do fast food. He was released from treatment two weeks before the hearing and said he is ready to start looking for work. He has not found work yet.

The claimant testified that he was hired at the rate of $100 per day with a commission of 5.25% of profit over $15,000, to be split between crew members. He testified that in 2005 he made just under $40,000. Hesaid he made just under $13,000 in 2006.

CONCLUSIONS OF LAW:

This claim was tried based on an amended claim for occupational disease changing the date of injury to the last date he worked for the employer, April 14, 2006. This changed the claim from an alleged injury date in 2004, under the old law, to an injury date after August 2005, and therefore clearly within the new statute governing occupational disease and the notice requirements would apply.

Section 287.420 RSMo, effective August 28, 2005, states:

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

The amended statute also provides that the law is to be strictly construed.

In this case, the claimant was diagnosed with the herniated disc in February 2004. The claimant alleges to have told Mr. Hatch that he hurt his back, but cannot pinpoint when. He also said that he was no longer his supervisor when he told him. He did not give notice in writing. He claims to have told Gina Pratt on the phone on April 14, 2006, but contradicted this testimony in his deposition when he said he did not tell her. He did not give any written notice at this time. The first evidence of written notice is his claim which was filed June 15, 2006, more than thirty days after his last exposure and approximately 28 months after he was diagnosed. He told Dr. Paff when he saw him that he never told the employer that his back injuries were workirelated.

The claimant did not give notice at the time of his diagnosis, at the time the new law went into effect, or within thirty days of his last exposure. The claimant has presented no evidence that the employer was not prejudiced by the lack of written notice.

Strictly construing the statute, I find that the claimant failed to give timely notice and failed in his burden of showing a lack of prejudice to the employer from the lack of notice. Therefore, claimant's claim is denied. As a result of this ruling all other issues are moot.

Date: 9-12-07

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative *Law Judge*
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker

Jeffrey W. Buker
Director
Division of Workers' Compensation