

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

Injury No.: 08-120390

Employee: Michael Altman
Employer: Gershenson Construction Co.
Insurer: Accident Fund National Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 24, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued November 24, 2010, is attached and incorporated by this reference.

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

AWARD

Employee: Michael Altman

Injury No.: 08-120390

Dependents: N/A

Employer: Gershenson Construction Co.

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

Additional Party: Second Injury Fund (Open)

Insurer: Accident Fund National Insurance Co.

Hearing Date: September 23, 2010

Checked by: MDL

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? 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? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee alleged he injured his back while picking up a concrete form, or sustained an occupational disease
12. Did accident or occupational disease cause death? No
13. Part(s) 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 disability: unknown
16. Value necessary medical aid paid to date by employer/insurer? unknown

Employee: Michael Altman

Injury No.: 08-120390

Issued by DIVISION OF WORKERS' COMPENSATION

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

COMPENSATION PAYABLE

21. Amount of compensation payable: 0

22. Second Injury Fund liability: No

TOTAL: 0

23. Future requirements awarded: None

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael Altman

Injury No.: 08-120390

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Gershenson Construction Co.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Accident Fund National Insurance Co.

Checked by: MDL

PRELIMINARIES

A hearing was held on September 23, 2010 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Michael Altman ("Claimant") was represented by Mr. Andrew Marty. Gershenson Construction Co. ("Employer") and its insurer Accident Fund National Insurance Co. were represented by Ms. Betsy Levitt. Mr. Marty did not request a fee due to the temporary nature of the proceedings.

The parties stipulated that in June and July 2008 Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; and the claim was timely filed. The parties further stipulated Exhibit H, a claim payment report shows that the bills of St. John's Mercy Medical Center and Physicians Anesthesia were mistakenly paid by Employer, and Employer denied the case.

The issues for resolution by hearing are whether Claimant sustained an accident in June, 2008, or an occupational disease on or about July 11, 2008.

SUMMARY OF EVIDENCE

LIVE TESTIMONY

Claimant worked for Employer as a laborer from April, 2008 until October, 2008. During the first week of June, 2008, Claimant was working at a job site repairing a road at the University of Missouri – St. Louis. Claimant's job duties included grading road and preparing it so concrete could be poured. Claimant testified when he bent over to pick up a large concrete form that weighed approximately 100 pounds, he felt a pop in his back and immediate pain. Claimant testified he finished his shift that day, and throughout the day his supervisor Joseph Sanders noticed him limping, and asked him what was wrong. Claimant testified he told him he hurt his back, and Mr. Sanders asked him if he was o.k., and he said yes. Claimant did not seek immediate medical treatment because he thought it would go away.

Claimant testified his pain got worse, and his wife made a doctor's appointment for him. Claimant stated his low back was painful, and he had pain into his left leg. It was a constant

sharp pain, and he began to drag his foot. He had charley horses, all the time, and eventually had to stop working.

Claimant testified on July 11, 2008, he called Charlie, another supervisor, and told him he hurt his back at work and had to take medical leave. Charlie did not fill out an accident report, and did not offer him medical treatment. Claimant testified he did not tell Charlie his work injury was not work related, and did not tell him what day he hurt his back.

Claimant injured his back in 2001 while working for a previous employer. His employer at the time paid for his medical treatment, and he received a settlement of approximately \$20,000.

Claimant testified he never gave Employer written notice of his June 2008 accident, and never asked Employer for medical treatment. Claimant filed his Claim for Compensation on March 11, 2009. Claimant also filed for unemployment benefits, and began receiving them in October, 2008. He stopped receiving unemployment benefits a week before the trial. He also applied for social security disability benefits, but his claim was denied because he indicated he could work on his claim for unemployment benefits.

Mr. Charles Cook a concrete paving superintendant testified on behalf of Employer. Mr. Cook worked for Employer coordinating work crews. Mr. Cook testified he first received notice of Claimant's alleged accident in March 2009 from Gail Cundiff, Employer's office manager. Mr. Cook testified Claimant never told him he hurt his back on the UMSL project. Mr. Cook testified he and Claimant had a conversation in July 2009, and Claimant told him he wasn't coming back to work because of a back injury. Mr. Cook told Claimant to come back to work when he had a doctor's release. Mr. Cook asked Claimant if his injury was work related, and Claimant told him no. Mr. Cook testified if an employee were to report an injury to him he would call Gail Cundiff and complete a report of injury. The employee would then be tested for drugs, and they would question the employee about the injury. Mr. Cook did not report an injury to Gail, and he wasn't told Claimant was alleging a work injury until March 2009. Because he did not know Claimant was alleging a work injury he did not follow any of the normal procedures he would have followed when someone reports a work injury.

Mr. Joseph Sanders, Employer's project foreman testified on behalf of Employer. Mr. Sanders first received notice Claimant injured his back in January or February 2010. Ms. Cundiff called him and informed he needed to have his deposition taken. Claimant never told Mr. Sanders he injured his back at work. Claimant never acted like he hurt his back at the UMSL job site, and Mr. Sanders never saw him limping. Mr. Sanders testified Claimant did not tell him he felt a pop in his back, and he never asked Claimant if he hurt his back. Mr. Sanders testified if an employee says he is hurt, Mr. Sanders would see if he was alright or needed immediate medical attention, and then he would call Gail Cundiff to find out where to send Employee for treatment. He would follow up with a report of injury. Mr. Sanders did not report Claimant's injury or complete a report of injury, because he was never told of any injury.

MEDICAL EVIDENCE

On July 14, 2008, Claimant saw Dr. Schoenwalder, his primary care physician. Claimant gave a history of lower back pain for 4 to 6 weeks, and reported a previous back injury in 2000. Claimant indicated the pain started in his back and shot down his left leg. Claimant stated it hurt to walk and drive. Claimant stated he was unable to work at that time, and that he worked as a concrete laborer. Claimant did not report a work injury. An MRI was performed on July 14, 2008, which revealed lumbar spondylosis most significant at L4-L5 and L5-S1, a disc herniation causing mass effect on the traversing left S1 nerve root with moderate bilateral foraminal narrowing, slightly greater on the left.

Claimant saw Mr. Yoon, a neurosurgeon, on July 28, 2008. Claimant gave a history of lower back pain going on for about six weeks and getting worse. Dr. Yoon recommended surgery, and on July 30, 2008, Claimant underwent an L5-S1 discectomy. Claimant reinjured his back on September 3, 2008 re-herniating the discs, and underwent surgery to repair it on September 10, 2008.

Claimant's attorney referred him to Dr. Robson for an independent medical evaluation on August 12, 2009. Claimant told Dr. Robson that in July 2008, he was working for Employer digging out a road and developed low back pain, left leg pain, numbness, and tingling. Claimant was still complaining of pain following his second surgery. Dr. Robson opined Claimant suffers from post laminectomy instability, and may likely have a recurrent disc herniation L5-S1 on the left side, as well as internal disc derangement at the L4-L5 level. He recommended a CT myelogram to determine if Claimant needs surgery. Dr. Robson opined the need for the current recommended diagnostic testing is solely related to the July 2008 accident, which is the prevailing event in Claimant's development of symptoms and need for treatment.

Employer referred Claimant to Dr. Coyle for an Independent Medical examination on December 2, 2009. Claimant gave a history to Dr. Coyle of injuring his back sometime in June, 2008, although he was not sure of the exact date. He told Dr. Coyle he developed back and leg pain, and continued to work with pain until symptoms became so bad he went to his primary care doctor. Claimant told Dr. Coyle he was shoveling rock at the time of his injury and he felt a pop in his low back accompanied by pain. The pain increased significantly over the next month, and the only reason he went to see his family doctor was because his wife insisted he be evaluated. Dr. Coyle diagnosed post laminectomy syndrome and status post two L5-S1 lumbar disc herniations. Dr. Coyle recommended an MRI. Dr. Coyle opined Claimant sustained an acute L5-S1 lumbar disc herniation in June, 2008, and Claimant's need for treatment is related to this disc herniation and the subsequent two surgeries he has had.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant and the witnesses at hearing, and the application of Missouri law, I find:

Claimant failed to meet his burden of proving he sustained an accidental injury in June 2008 or an occupational disease leading up to July 11, 2008. At hearing, Claimant testified he sustained a specific injury in the first week of June, 2008, when he bent over to pick up a concrete form and felt a pop in his back. Claimant's trial testimony is inconsistent with the

medical records. On July 14, 2008, Claimant told his own primary care physician he had been suffering from low back pain for four to six weeks, and did not mention a work accident of bending over to pick up a concrete form and feeling a pop in his back. Claimant mentioned a prior work injury that occurred in 2000, but did not mention a specific accident that allegedly happened four to six weeks earlier. When Claimant saw Dr. Yoon at the end of July, he again failed to mention a specific work injury. When Claimant saw Dr. Robson in August, he did not mention an incident of bending over to pick up a concrete form and feeling a pop in his back. It wasn't until December that Claimant mentioned an incident where he felt a pop in his back.

Claimant did not fill out a report of injury on the date of the accident, did not give Employer written notice of a work injury, and never asked for treatment, even though he had a previous work injury in 2001.

I find Claimant's testimony is refuted by the overwhelming weight of the evidence including the testimony of Mr. Cook and Mr. Sanders, who denied Claimant told them he injured his back at work. Mr. Cook testified Claimant specifically denied he had a work injury. Both Mr. Cook and Mr. Sanders credibly testified if Claimant had told them he injured his back at work they would have followed Employer's procedures for work injuries.

I find Claimant did not sustain a work related injury in June, 2008. Furthermore, I find Claimant did not sustain an occupational disease leading up to July, 2008. Both Drs. Robson and Coyle opined Claimant sustained a disc herniation in June 2008 as a result of an accident. Both doctors based their opinions on the history Claimant gave them, which I do not find to be credible. In any event, neither doctor diagnosed an injury from an occupational disease. Claimant failed to meet his burden of proving he sustained an occupational disease.

Because I find Claimant did not sustain an accident or occupational disease, the issue of notice is moot.

The claim against the Second Injury Fund is dismissed.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation