

FINAL AWARD DENYING COMPENSATION
(Affirming Awards and Decisions of Administrative Law Judge
with Supplemental Opinion)

Injury Nos.: 98-173711
98-173712

Employee: Mark Barnes

Employer: Knapheide Truck Equipment Co.

Insurer: Continental Western Insurance Co.

Dates of Accidents: August 5, 1998 and August 27, 1998

Place and County of Accident: Jackson County, Missouri

The above-entitled workers' compensation cases are 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 awards of the administrative law judge are supported by competent and substantial evidence and were made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the awards and decisions of the administrative law judge dated April 29, 2004^[1], and awards no compensation in the above-captioned cases. We issue this supplemental opinion to further explain.

Although the administrative law judge did not specifically state in his awards and decisions that he did not find Employee credible, based on the findings of fact, analysis and conclusions of law, we find that the administrative law judge implicitly found that Employee was not a credible witness. After reviewing the record, we specifically make the finding that Employee was not credible. Employee failed to report a work injury to any of the treating physicians. Employee saw Dr. Morgan on June 2, 1999. He informed Dr. Morgan that he had experienced back pain for 20 years. He filed his claim for compensation on June 11, 1999. He saw Dr. Morgan again on June 14, 1999. Employee still neglected to inform Dr. Morgan that he injured his back at work. He repeated that he had experienced back pain for 20 years. He processed his medical bills through Medicaid despite having filed the claims for compensation. His testimony is not consistent with the treating records. We find Employee did not provide actual notice to Employer of any work injuries. As Employee's testimony, which we do not find credible, is the only evidence that he sustained an accident, we further find that Employee has failed to meet his burden of proof that he sustained an accident on either date.

Additionally, Employee has failed to prove medical causation of any injury related to a work accident even if we were to accept his testimony regarding the accidents and notice. Employee was diagnosed with Grade II Spondylolisthesis for which he underwent a spinal fusion at L5-S1 on October 29, 1998. The causation of his medical condition and need for surgery is not within common knowledge. Expert testimony is needed to establish causation. *Knipp v. Nordyne, Inc.*, 969 S.W.2d 236 (Mo. App. 1998).

Employee failed to submit any expert testimony that causally connected his accidents to his injury. The only medical opinion that discusses causation is in a letter from Dr. Brian Healy dated May 13, 1999. Dr. Healy states that the nature of Employee's work was such that it aggravated his preexisting condition to the point where he had pain. Not only does Dr. Healy fail to mention the work accidents alleged to have occurred on August 5 or 27, 1998, he does not provide any basis or explanation for his opinion as to how Employee's work aggravated the spondylolisthesis. Dr. Healy's opinion is inconsistent with Employee's claims of accident. His opinion may be consistent with a claim of repetitive trauma or occupational disease, but without stating the underlying facts

upon which he based his opinion, his causation opinion is speculative. We do not find his statement credible. We find Employee has failed to meet his burden of proving a causal connection between his work accidents and his injury, even if we assumed that he did sustain an accident or accidents and provided actual notice to employer.

The amended and corrected awards and decisions of Administrative Law Judge Mark S. Siedlik, issued April 29, 2004, are attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12th day of January 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

VACANT
Chairman

Bill I. Foster, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Mark Barnes Injury Nos. 98-173711
Employer: Knapheide Truck Equipment Co.
Insurer: Continental Western Insurance Co.
Additional Party: N/A
Hearing Date: January 30, 2004 Checked by: MSS/abj

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: Alleged August 5, 1998.
5. State location where accident occurred or occupational disease was contracted: Jackson 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? No.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant alleges accident while lifting at work.
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: Alleged back.
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? None.
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$400.00
19. Weekly compensation rate: \$266.67
20. Method wages computation: Agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: -0-

Unpaid medical expenses: N/A

22. Second Injury Fund liability: None.

TOTAL: -0-

23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mark Barnes Injury Nos.: 98-173711

Employer: Knapheide Truck Equipment Co.

Insurer: Continental Western Insurance Co.

Additional Party: N/A

Checked by: MSS/abj

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri, on January 30, 2004. The claimant, Mark Barnes, was represented by his counsel, Mr. Steve Wickersham. The employer/insurer were represented by their counsel, Mr. William Ringer. Claimant alleges injuries of August 5, 1998, while in the employee of Knapheide Truck Equipment Company, an employer in Jackson County, Missouri. Jurisdiction is appropriate in Jackson County pursuant to § 287.110. The employer's Workers' Compensation liability was insured by Continental Western Insurance Company. The parties agreed to an average weekly wage of \$400.00 and compensation rates of \$266.67. There have been no benefits paid to date.

ISSUES

The issues to be resolved are:

1. Accident;
2. notice;
3. arising out of and in the course and scope of employment;
4. medical causation;
5. liability for past medical expense;
6. the need for future medical care;
7. the nature and extent of temporary total disability; and
8. the nature and extent of permanent partial disability.

The claimant is currently 47 years old, who completed the ninth grade and did not obtain a GED. The claimant's work history has been one of physical labor, mostly hands-on jobs and driving. Claimant related no special physical limitations throughout his work life, although he did testify to occasional back pain upon exertion, furnished no specific treatment was ever sought.

The claimant applied to work for Knapheide and was hired, directed to a post-employment physical, and put to work doing hard manual labor. The claimant was told during his work-ordered physical that he had spondylolisthesis, a congenital back defect. The claimant worked at Knapheide for a short period of time, when on August 5th the claimant and a co-worker were moving large spools when the claimant felt his low back snap. The claimant testified he told his foreman he hurt his back and was told to "be careful." The claimant finished that day's work and continued to work with good and bad days over the next few weeks. The claimant requested no treatment during this period. Within three to four weeks the claimant noticed a change in the pain in his back and noticed lingering pain down his legs that remained constant.

The claimant testified he moved to a different job with the employer but suddenly felt he could no longer do the job. The claimant then told his foreman and his co-workers he could not do the job anymore and left the employ of Knapheide.

The claimant's sister made the claimant an appointment with Dr. Ebelke, who felt the claimant needed surgery on his low back. The claimant did not seek treatment for nearly a month, indicating he had no funds for treatment. The claimant was next seen by Dr. Miller, who agreed to be paid as the claimant could afford. The claimant was examined and sent by Dr. Miller to Dr. Heeley, who indicated that the claimant needed surgery to his low back. The claimant came under the care of Dr. Miller and Heeley because he was at that time covered by Medicare for his treatment. The claimant had surgery to his low back, with the insertion of hardware in L4-5.

The claimant continues to treat with Dr. Heeley for pain medication, anti-depressants, and a variety of other medications for his condition. The claimant has difficulty with sleeping, is in constant pain, has difficulty focusing on

tasks, has high blood pressure, and stress. The claimant has applied for jobs but has not yet been released from treatment and employers will not offer him a job without a doctor's release.

The claimant spends his days largely sedentary in nature, testifying he tries to help around the house with laundry or cooking. Claimant cannot walk, sit, or stand for very long without the need to change position. And while the claimant drives, he testified that he stopped five times on his way to Kansas City from Excelsior Springs.

Claimant, upon cross-examination, admitted a prior congenital back condition, spondylolisthesis, but did not find it important to mention to his employer when questioned about prior back problems. The claimant admitted he told his foreman about the August 5th event at work but did not file an accident report and did not request medical treatment. The claimant continued working until the second alleged occurrence on August 27th and again did not request treatment from his employer. The claimant made an appointment with Dr. Ebelke through his sister. When meeting with Dr. Ebelke, the claimant did not mention any work accidents, indicating he would self-pay, and on the doctor's intake form, answered "no" to the question of whether his condition was work related. On other forms the claimant denied a work injury (Claimant's Exhibit F, pp. 19-20). At one point in the medical records the claimant indicated his condition as ongoing for years (Claimant's Exhibit F, p. 16) with no reference to a work injury.

The claimant was told he needed surgery but requested that that treatment be postponed until he could be covered by Medicaid. The claimant thereafter voluntarily quit his job and moved to the Rich Hill area for treatment with Dr. Miller, once the claimant was eligible for Medicaid. In response to Dr. Miller and Dr. Heeley's request for information, the claimant made no mention of a work accident (Claimant's Exhibit G, p. 10). Claimant admits not ever requesting treatment from his employer and not filing a Workers' Compensation claim until after his back surgery and the majority of his treatment had been complete, all covered by Medicaid.

FINDINGS

I find, based on the evidence presented, the claimant's claim for compensation must be denied because the claimant failed to provide timely notice within the provisions of § 287.420. I find Claimant has failed to meet his burden of proof to establish notice to his employer of his alleged injuries and the employer was detrimentally prejudiced by that failure. I further find, having determined the claims are barred for lack of notice, other issues are rendered moot.

The failure to give timely written notice may be excused if the Commission finds either that there was good cause for the failure or that the failure did not prejudice the employer. Claimant testified, as further established by the documentary evidence, that no reporting of an accident took place, no request for treatment was ever made, and in the requests for medical treatment to the doctors and various physicians, no mention of a work-related accident is ever documented. The claimant delayed the treatment to make himself eligible for Medicaid and never reported to a medical provider that he got hurt at work but mentioned only a lifelong congenital problem with his back. I find this failure on behalf of the claimant to the detriment of the employer for their potential liability, for nearly one year after the accident and after surgery to his back was done, surely prejudices the employer's ability to investigate and determine its Workers' Compensation liability. The claimant, in presenting his case, raises the question of whether the filing of the Workers' Compensation claim was an afterthought, done after the completion of treatment.

I find for the reasons set forth above that Claimant's claims for compensation are denied, for the failure to provide notice to the employer in a timely fashion to the prejudice of the employer. Willis v. Jewish Hospital, 854 SW 2d 82 (Mo.App. E.D. 1993) and Messersmiths v. University of Missouri, Columbia/Mt. Vernon Rehabilitation Center, 43 SW 2d 3 (MoBanc 2001).

Date: _____
Mark S. Siedlik

Made by: _____

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Renée T. Slusher
Director
Division of Workers' Compensation

AWARD

Employee: Mark Barnes Injury Nos. 98-173712
Employer: Knapheide Truck Equipment Co.
Insurer: Continental Western Insurance Co.
Additional Party: N/A
Hearing Date: January 30, 2004 Checked by: MSS/abj

FINDINGS OF FACT AND RULINGS OF LAW

2. 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: Alleged August 27, 1998.
5. State location where accident occurred or occupational disease was contracted: Jackson 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? No.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant alleges accident while lifting at work.
12. Did accident or occupational disease cause death? No. Date of death? N/A
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14. Nature and extent of any permanent disability: N/A
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16. Value necessary medical aid paid to date by employer/insurer? None.
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18. Employee's average weekly wages: \$400.00
19. Weekly compensation rate: \$266.67
20. Method wages computation: Agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: -0-
Unpaid medical expenses: N/A
22. Second Injury Fund liability: None.

TOTAL: -0-

23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mark Barnes Injury Nos.: 98-173712
Employer: Knapheide Truck Equipment Co.
Insurer: Continental Western Insurance Co.
Additional Party: N/A Checked by: MSS/abj

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Date: _____ Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Renée T. Slusher
Director
Division of Workers' Compensation

^[1] The administrative law judge issued corrected awards and decisions to reflect that the correct date of issuance was April 29, 2004. The original awards and decisions were inadvertently dated July 29, 2004. We affirm and adopt the corrected awards and decisions.