

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

Injury No.: 03-122966

Employee: Jack Bell

Employer: Consolidated Personnel/
CPC Logistics Inc.

Insurer: Ace American Insurance Company

Date of Accident: December 1, 2003

Place and County of Accident: St. Louis 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. We have reviewed the evidence, read the briefs of the parties and considered the entire record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated October 26, 2005. The award and decision of Administrative Law Judge Linda J. Wenman is attached hereto solely for reference.

The dispositive issue is whether or not the employee sustained an injury due to an accident arising out of and in the course of employment. Section 287.120.1 RSMo. The administrative law judge concluded that the employee did sustain injury due to an accident arising out of and in the course of his employment. The Commission disagrees with this conclusion and reverses the award.

I. Principles of Law

The instant appeal does not present a novel issue to the Commission. If the facts and evidence presented by the employee are deemed to be credible, trustworthy and persuasive, the administrative law judge or the Commission could find that there was an injury due to an accident arising out of and in the course of employment. On the other hand, if the facts and evidence presented in behalf of the employer are more believable, persuasive, credible and worthy of belief, the administrative law judge or the Commission can find that there was no injury due to an accident arising out of and in the course of employment. Simply stated, which party presented the more credible, believable and trustworthy factual evidence?

The Commission reviews the record, and, where appropriate, it will also determine the credibility of witnesses and the weight of their testimony, resolve any conflicts in the evidence, and reach its own conclusions on factual issues independent of an administrative law judge. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228 (Mo. App. S.D. 2003).

The ultimate determination of credibility of witnesses rests with the Commission. The Commission should take into consideration the credibility determinations made by an administrative law judge. However, the Commission is not bound to yield to an administrative law judge's findings, including those relating to credibility, and the Commission is authorized to reach its own conclusions. The law only requires the Commission to take into consideration the credibility determinations of an administrative law judge and not

give those determinations deference. *Kent v. Goodyear Tire and Rubber Co.*, 147 S.W.3d 865 (Mo. App. W.D. 2004).

A decision made by an administrative law judge in a workers' compensation proceeding does not in any way bind the Commission and in fact, the Commission is free to disregard an administrative law judge's findings of fact. *Bell v. General Motors Assembly Div.*, 742 S.W.2d 225 (Mo. App. E.D. 1987).

II. Facts

Employee was hired by employer in the capacity of a shuttle driver. Employee's job duties entailed driving motor vehicles from the St. Louis Ford Motor Company staging area to a designated shipping area/parking area for eventual transportation of the vehicles to various points of destination. Employee's work hours were 6:00 p.m. to 2:30 a.m.

Employee's version of the alleged accident at trial was: He began work at 4:00 p.m. on December 1, 2003; at approximately 8:00 p.m., after driving a vehicle from the staging area to the shipping area, employee injured his back while exiting the vehicle; his left foot slipped and employee described a fall between the front seat of the vehicle and the dashboard; there were no witnesses; employee felt the injury was insignificant; he did not report the injury that evening or the next day; and he finished his work shift at 2:30 a.m.

The following morning, December 2, 2003, employee was in pain and felt like there was a "knife in the middle of my back"; employee telephoned the office of his personal physician, Dr. Boyd, and Dr. Boyd was able to "work him in" that very day; part of the treatment rendered by Dr. Boyd on December 2, 2003, consisted of lumbar spine x-rays and excusing employee from work for approximately one week commencing December 1, 2003; employee indicated to Dr. Boyd that he was hurt at work and that employee felt great prior to going to work December 1, 2003.

Subsequently, when Dr. Boyd had an opportunity to review the lumbar spine x-rays, and note some possible abnormalities and/or pathology, employee reported an injury to the employer by forwarding a fax to the employer December 3, 2003; the facilities operations manager of the employer, Tom Moore, received the fax transmission reporting the alleged injury to the employer, and followed up with the employee via a telephone conversation which the employee taped; the telephone conversation occurred after Dr. Boyd had suggested to the employee that he may have sustained a compression fracture of the lumbar spine.

Upon being notified of the injury, employee was sent to Dr. Raskas and subsequently Dr. Chabot, as these two physicians were the selected authorized treaters of the employer; employer also arranged for a nurse case manager, Ms. Kay Hall, to monitor the employee's case/injury; and employee received workers' compensation benefits through approximately November 24, 2004, at which time benefits were ceased and terminated by the employer, based upon its investigation of the alleged accident.

The evidence proffered by the employer revealed several inconsistencies and conflicting accounts when compared and contrasted with the evidence proffered in behalf of the employee.

The employee's time records/work manifest record of December 1, 2003, reveal employee clocked in for work at 5:56 p.m. and left work 2:30 a.m., the following morning, December 2, 2003, which is in contrast with his inexplicable testimony that he began work at 4:00 p.m.

Prior to reporting to work on December 1, 2003, employee telephoned the office of his personal physician, Dr. Boyd, informing Dr. Boyd that he believed he had pulled a muscle and his left lower back was hurting badly; and he requested Dr. Boyd to prescribe a pain medication; in response to the telephone call initiated by the employee on December 1, 2003, Dr. Boyd prescribed a prescription for lortab, which is composed of

acetaminophen (Tylenol) and hydrocodone, a narcotic medication that is prescribed for pain; on December 1, 2003, the office of Dr. Boyd telephoned the prescription into a pharmacy in Godfrey, Illinois, where the employee resides, and the pharmacy in Godfrey, Illinois, filled the prescription for hydrocodone as prescribed by Dr. Boyd at 3:56 p.m. on December 1, 2003, which was approximately two hours before the employee reported for work, although employee testified at the trial that he reported to work at 4:00 p.m.

Employee during cross-examination at trial, testified that he felt "great" when he reported to work December 1, 2003; that the only problem he had experienced with his low back was fatigue and that his back was fine as far as he knew when he reported to work December 1, 2003; these answers contradicting his testimony on direct examination that he needed pain pills from Dr. Boyd prior to going to work on December 1, 2003, because of a back ache or his hips, bones and joints were aching.

The employer further elicited during cross-examination that when employee's deposition was taken October 2004, employee indicated that in addition to feeling "great" upon arriving to work on December 1, 2003, no doctor had ever given him a prescription for back pain before his alleged accident occurring December 1, 2003.

Employee further admitted on cross-examination that he worked his entire scheduled shift until 2:30 a.m. without reporting any type of injury to his supervisor or his co-workers although he had ample opportunity to do so; and employee admitted that no one witnessed the alleged accident resulting in his alleged injury.

The employee did not report an injury on December 1, 2003 or on December 2, 2003, even though he did not work December 2, 2003, and could have contacted his supervisor, Tom Moore, or left a message for Mr. Moore on either his office phone or cell phone.

Employee did see Dr. Boyd on Tuesday, December 2, 2003, but the appointment had been scheduled prior to reporting to work December 1, 2003, and the appointment was not obtained after he awakened on December 2, 2003, as he testified at the hearing; and the office of Dr. Boyd did not "work him in" as he testified on direct examination.

Dr. Boyd's handwritten and dictated treatment records dated December 2, 2003, are absent any history of a work injury or onset of severe symptoms that morning, as employee described in his direct testimony; directly to the contrary, Dr. Boyd's handwritten treatment record of December 2, 2003, gives the following history: "low back-pain x [?/?] weeks after working on cars".

In addition to the handwritten note, Dr. Boyd dictated a note on December 2, 2003; the dictated note of Dr. Boyd indicates the employee pulled his back out about a week or so previously when he was pulling some kind of part out of a car, although Dr. Boyd wasn't sure about the details; at the hearing, the employee and Tom Moore both testified that the employee did not work on cars or pull parts out of cars in the course of his employment, and the employee admitted that he maintained and performed minor repairs on all of his family vehicles.

On December 2, 2003, Dr. Boyd determined that due to the employee reporting symptoms occurring about a week previously, employee was to be off work for a week beginning December 1, 2003; Dr. Boyd had not been told that the employee worked the preceding day, December 1, 2003; Dr. Boyd was not told the employee was injured at work; and there was no description of a work accident given Dr. Boyd on December 2, 2003.

On December 3, 2003, at approximately 1:00 p.m., the employee reported a work injury to his employer via a fax message. The employer assigned a nurse case manager, Ms. Kay Hall, to monitor the injury. Ms. Hall telephoned the employee on December 5, 2003, and the employee described the alleged accident to Ms.

Hall as he had to Tom Moore; employee also indicated to Ms. Hall that he had no back problems before the accident occurring December 1, 2003. These events occurred subsequent to employee being informed by Dr. Boyd that he may have possibly sustained a lumbar compression fracture.

Ms. Hall and the employer arranged for the employee to be seen and treated by Dr. Raskas; when the employee initially saw Dr. Raskas on December 19, 2003, the employee described the alleged work injury; he also told Dr. Raskas that he had no past history of back problems; employee told Dr. Raskas on December 19, 2003, that he experienced immediate onset of severe back pain at the time of the injury; these histories were inconsistent with his direct testimony at trial and prior conversations with Dr. Boyd.

On December 2, 2003, Dr. Boyd ordered a lumbar spine x-ray; the radiologist reported osteopenia, as well as an L-2 compression fracture and L-3 minor compression fracture which were new compared to the employee's July 10, 2001, lumbar spine x-ray, but still age indeterminate; the radiologist, in fact, recommended further evaluation with an MRI.

The recommended MRI was performed December 5, 2003; along with numerous degenerative findings, the radiologist's impression was a compression deformity of the superior aspect of L-3 that appeared to be old; on December 8, 2003, Dr. Boyd revealed to the employee that the MRI showed only one compression fracture, an old fracture at L-2, and significant spinal stenosis.

The diagnosis of Dr. Raskas of December 19, 2003, was an osteoporotic compression fracture at L-3; Dr. Raskas opined that the osteoporotic compression fracture was caused by the fall at work and the underlying osteoporosis; however, his opinion regarding the alleged work injury was based solely on the history provided him by the employee; the history the employee provided Dr. Raskas was that employee had no prior back problems and employee experienced immediate onset of severe low back pain when the accident allegedly occurred December 1, 2003; the history on which Dr. Raskas relied was disavowed by the employee and inconsistent with the employee's treating medical records.

III. Conclusions of Law

Upon reviewing the entire record, carefully reviewing the testimony of all witnesses, as well as the various exhibits offered and admitted into evidence, the Commission determines and concludes that the more believable evidence supports a finding that employee did not sustain an injury due to an accident arising out of and in the course of his employment as required by section 287.120.1 RSMo.

Due to the numerous irreconcilable inconsistencies in the employee's testimony and conflicts between his account and the undisputed documentary evidence as well as lack of corroboration of the employee's version of the accident/injury, the Commission will not defer to the credibility findings of the administrative law judge. The Commission makes its own findings of credibility and in so doing, reverses the award issued by the administrative law judge. The employee failed to meet his burden of proof that there was an injury due to an accident arising out of and in the course of his employment.

The administrative law judge concluded that the employee was "totally consistent" in relating how his injury occurred. The Commission cannot rationally explain how this conclusion was reached given all the contradictions and inconsistencies in this record that are not reconcilable. The administrative law judge then concludes that there were "slight inconsistencies" in the testimony of the employee but the inconsistencies were minor and did not damage his credibility, and others were explainable. Once again the Commission does not agree with this conclusion nor does the Commission believe it can be rationally explained. The Commission finds employee's contradictions and inconsistencies were not minor, were not insubstantial and the credibility of employee was impeached on several occasions and the inconsistencies were not explainable, nor reconcilable.

There is little if any evidence corroborating employee's version of the alleged accident and injury; the initial contemporaneous medical records negate any finding of a work related accident causing his medical condition; and there are significant inconsistencies, contradictions and conflicts between his account/testimony and the undisputed documentary evidence which ultimately undermines his credibility.

The events occurring December 1, 2003, and December 2, 2003, as well as the facts/histories contained in the contemporaneous records of the same two dates, convinces the Commission that employee has not met his burden of proof that he sustained an injury due to an accident arising out of and in the course of his employment as alleged on December 1, 2003.

The Commission finds that more than two hours before the employee began work on Monday, December 1, 2003, he called his personal physician, Dr. Boyd, or, Dr. Boyd's office, complaining that his left lower back was "hurting bad", and requested Dr. Boyd to prescribe and call in a pain medication; more than two hours before the employee reported to work on December 1, 2003, Dr. Boyd prescribed a narcotic pain medication, which was called into the employee's local pharmacy, and simultaneously, an appointment was scheduled for the employee to follow-up with Dr. Boyd the following day, December 2, 2003. This appointment was definitely scheduled prior to any alleged accident occurring December 1, 2003, and employee was not "worked in" December 2, 2003.

The employee worked as usual from 6:00 p.m. on December 1, 2003, until 2:30 a.m. on December 2, 2003, without reporting any injury to a supervisor or a co-worker although he had ample opportunity to do so; there was no witness to the alleged accident the employee reported December 3, 2003. This conduct is inconsistent with employee's history given Dr. Raskas December 19, 2003, that he experienced immediate onset of severe back pain at the time of the injury.

When the employee kept his appointment with Dr. Boyd on December 2, 2003, he told Dr. Boyd the following history: he pulled his back out about a week earlier when he was working on and pulling a part out of a car and he has had significant and severe symptoms since; the employee's job indisputably did not involve working on cars, but he did maintain and repair his family vehicles on his personal time; Dr. Boyd's December 2, 2003, office record contains no reference to any incident the previous evening, or the onset of severe symptoms that morning, such as a stabbing pain in the employee's back, which the employee later described at trial.

The employee did not report a work injury to the employer until December 3, 2003, which was subsequent to Dr. Boyd excusing him from work for a week which Dr. Boyd did at the office visit of December 2, 2003; and the Commission further finds that after reporting the alleged accident on December 3, 2003, the employee attempted to conceal or not reveal his prior back problems, and when attempting to reconcile such history of prior back problems, the credibility of the employee was further undermined.

The employee's case consists of an injury initially reported by the employee almost two days after the alleged event, and then repeated subsequently. However, the facts occurring contemporaneous with the alleged injury belie the subsequent reporting of the injury.

The Commission finds that the presence of a compression fracture in the employee's lumbar spine is not determinative of the issue of whether or not employee sustained an injury due to an accident arising out of and in the course of his employment. The Commission finds that the employee's pre-work back pain of December 1, 2003, which by his own report was severe for about a week prior, and was so "bad" before reporting to work that pain medication was requested and a doctor's appointment had been scheduled the following day, makes it impossible to infer from the December 2, 2003 x-ray or the December 5, 2003 MRI scan, that the compression fracture occurred at work on December 1, 2003, rather than in the previous

week.

The competent and substantial evidence indicates that there was a compression deformity of the superior aspect of L-3 that appeared to be old and just as likely could have been the cause of employee's severe pain prior to work on December 1, 2003, than the likelihood the pathology being the result of any alleged accident occurring subsequent to reporting to work on December 1, 2003. Due to the lack of the employee's credibility, the Commission will not make an inferential leap concerning the cause of the pathology and or pain, other than to definitively conclude that it was not resultant of any injury due to an accident arising out of and in the course of his employment on December 1, 2003.

Along that same thought, and somewhat repeating ourselves, it is undisputed that approximately two hours before the employee reported to work on December 1, 2003, he initiated a telephone call to Dr. Boyd, stating that his back hurt badly and requested pain medication. Before the employee went to work on December 1, 2003, a narcotic pain medication was prescribed for him and an appointment was scheduled to see Dr. Boyd the following day. The employee appeared at the appointment as scheduled on December 2, 2003, and at that time the employee told Dr. Boyd that his back pain started when he was working on a car about a week previously. The only obvious conclusion is that the employee had a back problem before reporting to work on the day of the alleged work injury, December 1, 2003.

Further undermining the employee's credibility was the fact the employee testified at his deposition that his back felt great when he went to work on December 1, 2003; that no doctor had prescribed medication for him for back pain before his alleged accident occurring December 1, 2003; and before the accident occurred on December 1, 2003, his back was fine so far as he knew. This testimony cannot be reconciled with the contemporaneous medical records of Dr. Boyd.

IV. Conclusion

The Commission determines and concludes that based on the more credible evidence, the employee did not sustain an injury due to accident arising out of and in the course of his employment. As to this issue the evidence presented by the employee is not deemed to be credible, trustworthy nor persuasive. The evidence proffered by the employer, which the Commission finds to be believable, credible and trustworthy, supports a finding that the employee did not sustain an injury due to an accident arising out of and in the course of his employment.

Accordingly, the award of the administrative law judge issued October 26, 2005, is reversed; the employee is not entitled to any amount of compensation payable; and the employer is not responsible for any award of cost and attorney's fees due to this litigation. Employee's motion for additional costs/fees is rendered moot.

The award and decision of Administrative Law Judge Linda J. Wenman issued October 26, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 6th day of April 2006.

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 affirmed.

The decision of the majority of the Commission disregards the credibility findings of the administrative law judge, noting that the Commission is not bound by the administrative law judge's findings of fact. I certainly agree with the proposition that the Commission is not bound. However, "in reviewing the award of the ALJ, the Commission should properly consider that the ALJ 'had the witnesses before [her] and was thus in a position which gave [her] a great vantage ground over the members of the Commission who afterwards had [only] the opportunity of reading [a transcript of] the testimony.'" *Davis v. Research Medical Ctr.*, 903 S.W.2d 557, 569 (Mo. App. 1995) (citations omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003). Further, the ALJ's findings are an important part of the whole record, carry considerable weight, especially where there is a question as to the credibility of witnesses, and should be given due consideration along with all the other facts and circumstances of the case. *Id.*

Employee's shuttle driver manifest shows he worked his entire shift on December 1, 2003. According to employee, on that night he slipped getting out of the shuttle and fell awkwardly back into the shuttle. Employee worked the remainder of his shift although his back was tired and hurting. Employee testified that he awoke on December 2, 2003, with severe back pain. X-rays performed that date revealed compression fractures at L2 and L3. The objective findings of compression fractures support employee's description of a fall. Along with the above evidence, I consider and give considerable weight to the administrative law judge's finding that employee is credible.

Based upon my consideration of the above evidence, I find employee's testimony credible. Accordingly, I find that employee sustained an accident at work on December 1, 2003, when he slipped while getting out of his truck.

I would affirm the temporary or partial award of the administrative law judge. I respectfully dissent from the decision of the majority of the Commission to deny benefits in this case.

John J. Hickey, Member

TEMPORARY OR PARTIAL AWARD

Employee: Jack Bell Injury No.: 03-122966
Dependents: N/A Before the
Employer: Consolidated Personnel **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: N/A Relations of Missouri
Jefferson City, Missouri
Insurer: Ace American Insurance Company
Hearing Date: September 26, 2005 Checked by: LJW:tr

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: December 1, 2003
5. State location where accident occurred or occupational disease contracted: St. Louis County, MO
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 happened or occupational disease contracted: While exiting a vehicle, Employee's foot slid, causing him to fall landing between the auto's seat and dashboard.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Low back
14. Compensation paid to-date for temporary disability: \$22,540.24 representing payments covering 12/2/2003 until 11/24/2004.
15. Value necessary medical aid paid to date by employer/insurer? \$17,167.61
16. Value necessary medical aid not furnished by employer/insurer? Indeterminate

Employee: Jack Bell Injury No.: 03-122966

17. Employee's average weekly wages: \$663.00
18. Weekly compensation rate: \$442.00 / \$347.05

19. Method wages computation: Stipulated

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses: To be determined

43 5/7th weeks of temporary total disability (or temporary partial disability) \$19,321.70*

Reasonable cost of recovery To be determined**

TOTAL: TO BE DETERMINED

*Temporary total disability (or temporary partial disability) to be continued until such time as the authorized treating physician determines Claimant could return to work or is maximum medical improvement, considering only the December 1, 2003 injury, or if Employer is unable to meet medical restrictions prior to maximum medical improvement.

**Within 10 days of issuance of this award, Employee is to provide Employer/Insurer documentation of costs and attorney's fee (said attorney's fee not to exceed 25% of the amount currently awarded) incurred in litigation and litigation preparation. Employer is to promptly issue payment once the documentation is received.

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Richard W. Gibson

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jack Bell

Injury No.: 03-122966

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Consolidated Personnel

Department of Labor and Industrial
Relations of Missouri

Additional Party: N/A

Jefferson City, Missouri

Insurer: Ace American Insurance Company

Checked by: LJW:tr

PRELIMINARIES

A §287.203 RSMo., hardship hearing was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on September 26, 2005. Jack Bell (Claimant) seeks issuance of a Temporary Award for resumption of temporary total disability (TTD) and additional medical treatment. The case was formally submitted on October 10, 2005. Attorney Richard W. Gibson represented Claimant. Consolidated Personnel (Employer) is insured by Ace American Insurance Company, and was represented by Attorney Maria W. Campbell.

Prior to the start of the hearing the parties identified the following issues for disposition in this case: accident; arising out of and in the course and scope of employment; medical causation; future medical care as it relates to issuance of a temporary award; liability for past and future temporary total disability; and cost of recovery. Due to the extent of Claimant's unrelated illness, an offer by the Court to hear the case for a final award was extended, but declined by both parties.

Claimant offered Exhibits A – E and G. Employer offered Exhibits 1 - 9. The exhibits were admitted without objection. Any objections not expressly ruled on in this award are overruled.

SUMMARY OF EVIDENCE

Only testimony necessary to support this award will be reviewed and summarized.

Testimony

Claimant: Claimant is 73 years old, obtained a GED, spent twenty years in active duty as a Marine combat engineer, and is a decorated veteran. Since retiring from the military, Claimant has worked primarily in jobs that required physical labor.

Claimant's job with Employer involved driving vehicles from the St. Louis Ford Motor Company staging area to a shipping area in preparation for final transportation of the vehicles. Claimant normally worked the late afternoon or evening shift, and he would normally get off work at 2:30 am.

On December 1, 2003, Claimant testified he began work at 4:00 pm, picked up cars from the staging area, and drove the cars to the shipping area. At approximately 8:00 – 8:30 pm, Claimant drove a vehicle to the shipping area, and upon exiting the vehicle, his foot landed on mud or oil, causing Claimant to slide, and fall between the vehicle seat and the dashboard. The event was not witnessed, Claimant felt slight pain in his back, and worked the remainder of his shift. Claimant didn't report the injury because he didn't think it was significant.

Upon awakening the following morning, Claimant noted intense back pain, similar to having a knife in the middle of his back. He called his family doctor, Dr. Boyd, who saw him that day. Dr. Boyd ordered x-rays that demonstrated two compression fractures in Claimant's low back. Dr. Boyd took Claimant off work, and wanted Claimant to have an MRI. Claimant then notified Employer (via Tom Moore) of the injury and his medical condition. Claimant produced a tape recording of his call to Tom Moore, and testified the taping was inadvertent, as he taped all his calls during that time period due to telephone harassment he was experiencing. [\[1\]](#)

Prior to this injury, Claimant testified he experienced backaches from time to time, but had not suffered any lasting back injuries. However, during 2002, Dr. Boyd told him he was developing arthritis. The morning of the injury, Claimant called Dr. Boyd prior to going into to work, because his hip was aching, and he wanted his arthritis medication increased.

Once notified of the injury, Employer sent Claimant to see Dr. Raskas, and later Dr. Chabot, for treatment. Employer also arranged for a nurse case manager, Kathy Hall, to be assigned to follow Claimant's case. Claimant received TTD benefits from December 2, 2003 until October 2004, and then benefits were stopped. Employer later issued another five weeks of TTD payments, intended to cover a period from benefit stoppage until November 24, 2004. Employer has not paid any additional TTD benefits.

Claimant was diagnosed with bilateral lung cancer with metastasis to his bones, including his lumbar spine, approximately August 2005. Claimant participated at hearing utilizing oxygen.

Upon cross-examination, Claimant testified December 1, 2003 was a typical workday, and when he arrived at work he felt comfortable and ready to work. Claimant was confronted with evidence taken at deposition in which he referred to his condition that day as “great”, and confronted with evidence he started work at 6:00 pm versus 4:00 pm on the date of injury. Claimant was also challenged regarding his testimony that Dr. Boyd’s office “worked him in” to be seen on December 2, 2003, when evidence showed he had a previous appointment scheduled that day.

Claimant testified he told Dr. Boyd on December 2, 2003, he had fallen and pulled something in his back, and he is not sure if he told Dr. Boyd it happened at work. Claimant acknowledged he has worked on his own and other family member cars at home providing minor repairs, tune-ups, and oil changes.

Claimant acknowledged he told Dr. Raskas, Dr. Chabot, and Kay Hall he had no back problems prior to the December 1, 2003 injury, except for arthritis, and he believed he had arthritis in his back. Finally, Claimant acknowledged sending a fax to Tom Moore, telling him about the injury, and providing Mr. Moore with a copy of his off work slip provided by Dr. Boyd.

Tom Moore: Employer has employed Mr. Moore for approximately five years. Mr. Moore currently serves as Vice President of Operations for Employer, and on December 1, 2003, he was employed as a Facilities Operations Manager. Mr. Moore confirmed Claimant was employed as a shuttle driver.

Mr. Moore testified he did not talk to Claimant on December 1, 2003, or December 2, 2003. He did receive a fax from Claimant on December 3, 2003, and Claimant informed him of his need for an MRI.

Upon cross-examination, Mr. Moore initially testified he learned of Claimant’s injury through a Union representative, and then conceded Claimant informed him about the injury during the December 3, 2003, telephone call from Claimant.

Brenda Chitty: Ms. Chitty is Employer’s Workers’ Compensation Claims Supervisor. Ms. Chitty was involved in managing Claimant’s workers’ compensation benefits. Ms. Chitty confirmed Claimant’s TTD benefit was terminated, after receiving Dr. Boyd’s records that indicated Claimant had low back pain after working on cars.

Medical Records Review

Dr. Boyd: Dr. Boyd initially met Claimant as a new patient on April 12, 2001. Between July 2001 and December 2003, Dr. Boyd interacted with Claimant regarding his low back and noted the following:

7/10/01 – Seen for weeklong history of back pain. Claimant placed on bed rest for 24-36 hours, and prescribed Lortab and Skelaxin. X-ray showed degenerative changes at L1-L3, no evidence of compression deformity, and osteopenia and osteoarthritic changes were noted.

7/16/01 – Rested for two days then put a roof on his house. Back pain better.

7/20/01 – Back pain completely resolved.

12/1/03 – Telephone call complaining of a pulled muscle, pain lower left side back, requested pain medication, Lortab prescribed, and is noted Claimant had an appointment for Tuesday.

12/2/03 – Dr. Boyd noted Claimant pulled his back out about a week prior to visit.

Dr. Boyd noted, “he was pulling some kind of part out of a car, but I’m not really sure what exactly happened.”

Claimant complained of pain over his right lower hip area. Medication prescribed, and x-ray was ordered.

12/4/03 – Call placed by Dr. Boyd to Claimant to advise of x-ray findings of compression fracture in his low back, and need to obtain MRI of lumbar spine.

12/5/03 – MRI showed T12-L1 disc bulge with mild stenosis; L3-4 mild stenosis; and a small disc bulge at L5-S1.

12/8/03 – Claimant was seen still complaining of back pain. Dr. Boyd noted, “he presented to me on 12/2/03 complaining of severe back pain after a fall.” Dr. Boyd referred Claimant for a second opinion at Claimant’s request because Claimant thought the injury was work related.

2/17/04 – Repeat MRI demonstrated moderate stenosis L4-5; degenerative spondylolisthesis L4 on L5; and a compression deformity at L3-4.

Between December 2003 and early April 2004, Dr. Boyd provided treatment for Claimant’s medical ailments only, deferring to Dr. Raskas for Claimant’s orthopedic treatment. Between mid-April 2004 through June 2004, Dr. Boyd suspected but could not confirm Claimant “had cancer somewhere”, but despite an extensive medical work-up, Dr. Boyd was unable to find evidence of cancer. By June 1, 2004, Dr. Boyd noted Claimant’s weight was beginning to stabilize, but due to Claimant’s continued low back pain Dr. Boyd did not believe Claimant could work, and urged him to retire.

On July 21, 2004, Dr. Boyd noted Claimant was now under the care of Dr. Chabot, and Dr. Chabot was concerned about lesions present at L2 on Claimant's MRI. Dr. Chabot suggested Claimant undergo biopsies of the lesions. The biopsies were to occur on August 11, 2004, but were delayed due to a mild infection developed by Claimant. A biopsy of L2 was obtained, and on August 30, 2004, Dr. Boyd notified Claimant the biopsy was benign. Later that day, Dr. Chabot requested another biopsy be performed, this time at L4. Claimant agreed to undergo the new biopsy.

Between August 30, 2004 and October 25, 2004, progress notes of Dr. Boyd make no mention of the second biopsy result, and reflected care for the following medical conditions: chronic obstructive pulmonary disease; high blood pressure; degenerative joint disease; chronic back pain; and atrial fibrillation. The last note in Dr. Boyd's record occurred on October 25, 2004, and contains no diagnosis of cancer.

Dr. Raskas: Dr. Raskas initially examined Claimant on December 19, 2003. Claimant's description of how the injury occurred matches the description contained in Dr. Raskas' records. However, Dr. Raskas noted Claimant had an immediate onset of severe lower back pain. Upon examination, Dr. Raskas noted continued low back pain, and diagnosed an osteoporotic compression fracture. Dr. Raskas opined two substantial factors caused the development of Claimant's condition; the December 1, 2003 fall and osteoporosis. Claimant was placed in a back brace. Dr. Raskas estimated Claimant would be unable to work for 10-12 weeks.

From January 2004 until late February 2004, Dr. Raskas treated Claimant for a L3 compression fracture with L4-5 facet joint syndrome. Claimant received medications, physical therapy, and facet blocks. On February 25, 2004, Dr. Raskas attempted to return Claimant to light duty with lifting restrictions.

Dr. Raskas next saw Claimant on March 24, 2004, after Claimant had been hospitalized. Dr. Raskas noted Claimant "looks real sick to me", and did not feel comfortable going forward with any further treatment for Claimant's back until Claimant's condition improved. Dr. Raskas opined Claimant was unable to work partially due to his back. On April 9, 2004, Dr. Raskas and Dr. Boyd conversed, and agreed Claimant had some sort of malignancy. Dr. Raskas then opined except for his medical condition, Claimant could probably be working.

Dr. Raskas last examined Claimant on June 23, 2004. Dr. Raskas noted Claimant remained off work, and was disabled by pain. Claimant's medical condition was now deemed stable by Dr. Boyd. Dr. Raskas opined Claimant's fracture was evidence of significant trauma which also aggravated a preexisting asymptomatic condition to the point where his spinal stenosis and L4-5 instability became symptomatic, and Claimant now required a laminectomy and fusion at L4-5.

Dr. Chabot: After Dr. Raskas' recommendation, Dr. Chabot was asked to evaluate Claimant. On July 9, 2004, Dr. Chabot reviewed Claimant's medical treatment to date, including all diagnostic tests performed. Claimant's description of how the injury occurred matches the description contained in Dr. Chabot's records. Following his review and examination, Dr. Chabot diagnoses included; lumbar spinal stenosis; history of compression deformity; osteoporosis; and back pain. Dr. Chabot recommended an additional MRI, a full body scan, and kept Claimant off work. Dr. Chabot opined Claimant's persistent complaints may be associated with his prior work injury to a significant degree.

On July 21, 2004, Dr. Chabot noted the MRI was suspicious for metastatic lesions involving L2 and L4. Dr. Chabot was uncertain if the lesions were responsible for Claimant's continuing lumbar pain, or if his spinal stenosis was responsible for the pain. Dr. Chabot recommended Claimant undergo epidural steroid injections, kept Claimant off work, and began to talk to Dr. Boyd about obtaining biopsies of the lesions. Dr. Chabot last examined Claimant on August 2, 2004, noted no improvement in Claimant's status, he wanted to see the biopsy results, and he kept Claimant off work.

Deposition Testimony

Kathleen Hall, R.N., BSN: Ms. Hall has been a registered nurse for twenty-five years. Ms. Hall is a case manager, and monitors cases for appropriateness and timeliness. Ms. Hall became involved in Claimant's case on December 5, 2003. Claimant told her he was injured when his foot slipped off a running board, and he wrenched his back. Claimant denied he had prior back problems.

Upon cross-examination, Ms. Hall verified Claimant's history of how the injury occurred has been consistent throughout his treatment. She also verified Claimant was compliant with treatment, attending all appointments she

scheduled, and cooperative during treatment. Ms. Hall testified she has input into what medical providers are used during treatment, but was not involved in the decision to terminate Claimant's TTD.

FINDINGS OF FACT & RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to accident and course/scope of employment

Claimant alleges an injury by accident that arose when he exited a vehicle he had transported and injured his low back. Section 287.020 RSMo., defines accident as an unexpected or unforeseen event or series of events that occur suddenly, without fault, and produce objective symptoms of an injury. The injury must be clearly work related, and that term is defined as work being a substantial factor in the resulting medical condition. A causative factor may be substantial even if it is not the primary or most significant factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998) (overruled on other grounds). Further, there is no minimum percentage set out in the Workers' Compensation Law defining substantial factor. *Id.* Whether employment is a substantial factor in causing the injury is a question of fact. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D. 1999) (overruled on other grounds).

Section 287.020.3(1) defines injury as that which has arisen out of and in the course of employment. Section 287.020.3(2) instructs that to arise out of and in the course of employment an injury must meet four requirements; (a) the employment is a substantial factor causing the injury, (b) the injury is a natural incident of the work/employment, (c) the employment was a proximate cause of the injury, and (d) the injury is not from risk unrelated to the employment to which other workers would be equally exposed outside of employment in normal life.

If Claimant's version of how the injury occurred is believed, this injury meets the criteria of an accident that arose out of, and in the course and scope of his employment. The alleged accident was unwitnessed. Employer points to a sentence contained in Dr. Boyd's December 2, 2003, progress note indicating Claimant had low back pain for one week after working on a car. However, Dr. Boyd goes on to say in the same note, he is not "exactly sure what happened," and Claimant had pain in his right lower hip (Exhibits C & 3). Dr. Boyd's progress note of December 8, 2003 indicated Claimant has severe back pain due to a fall (Exhibit 3). Dr. Boyd was never deposed, and his inconsistent progress notes cannot be reconciled.

By contrast, Claimant has been totally consistent in relating how his injury happened. Although Employer points to slight inconsistencies in Claimant's testimony, most are minor and not so substantial as to damage his credibility, and others are explainable. For example, Claimant's contention that he didn't have a prior history of back problems, while appearing to be inconsistent appears less so when understanding Claimant equates "back problems" as being different from "arthritis." The fact Claimant testified he started work at 4:00 pm, when he actually started work at 6:00 pm the day of injury, is inconsequential to an inquiry of whether the injury occurred. I find Claimant to be credible, and find Claimant sustained an injury by accident, that arose out of, and in the course and scope of his employment.

Issues relating to medical causation

Medical causation issues normally require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds).

Employer questions whether Claimant's need for treatment is related to his injury of December 1, 2003, or related to a subsequent diagnosis of cancer. It is an interesting theory, but unproved. Claimant carries the burden of proving the essential elements of his claim, and the evidence presented demonstrates Claimant has met his burden. The medical evidence ends prior to Claimant's diagnosis of cancer. Prior to Claimant's cancer diagnosis, all the medical professionals involved in Claimant's care causally relate Claimant's symptoms, and need for treatment to his December 1, 2003 injury. Further, the two MRIs closest in time to Claimant's injury did not show any suspicious lumbar lesions. Based on the actual evidence presented, I find Claimant has met his burden to establish medical causation as it relates to his December 1, 2003 injury.

Issues related to future medical care

Section 287.140.1 RSMo.(2000), provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the workers' injury. Claimant's last authorized treatment abruptly stopped in August 2004. None of the authorized treating physicians in this case have found Claimant to be at maximum medical improvement. I find Employer responsible to provide Claimant with additional medical treatment. I further find Employer is obligated to provide the following treatment: Employer shall authorize treatment with either Dr. Raskas or Dr. Chabot, and subject to Claimant's physical condition, authorize any medical specialty treatment recommended by the physician including, but not limited to:

- 1) any tests, procedures, or physical therapy as directed by the authorized treating physician,
- 2) any medications directed by the authorized treating physician,
- 3) any splints, braces or similar devices ordered by the authorized treating physician,
- 4) any necessary surgical procedures ordered by the authorized treating physician, including all doctor, hospital, diagnostic and medical costs,
- 5) all post-operative and rehabilitative care as directed by the authorized treating physician.

Issues relating to past and future temporary total disability

TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part). Employer has paid TTD benefits covering a period from December 2, 2003 until November 24, 2004. As stated previously, no attending physician has placed Claimant at maximum medical improvement, and the last authorized physician, Dr. Cabot, took Claimant off work until further notice on August 2, 2004. No other medical opinion exists to challenge Dr. Chabot's off work determination.

I find Employer is liable for 43 5/7th weeks of past TTD or \$19,321.70, covering a period from November 25, 2004 through September 26, 2005, and continuing until such time as the future authorized physician determines Claimant to be at maximum medical improvement, or able to work considering only his work related injury. Further, pursuant to this award, Claimant will receive additional medical intervention. He will also be entitled to receive TTD benefits to cover the healing period associated with such treatment, if Claimant is unable to work during that period.

Issues related to costs

Claimant seeks reimbursement of costs related to pursuing this temporary award. Section 287.203 RSMo., provides that reasonable cost of recovery shall be awarded to the prevailing party when a §287.203 hardship hearing is held. Cost of recovery includes an award of attorney's fee. *Metromedia Steakhouses Co. Inc. v. P.M.*, 931 S.W.2d 846 (Mo.App.1996). Claimant is the prevailing party in this case. Accordingly, §287.203 mandates an award of reasonable costs, including attorney's fee to Claimant. Within 10 days of issuance of this award, Employee is to provide Employer/Insurer documentation of reasonable costs and attorney's fee (said attorney's fee not to exceed 25% of the amount currently awarded) incurred in litigation and litigation preparation. Employer is to promptly issue payment once the documentation is received.

CONCLUSION

Claimant sustained an accident on December 1, 2003, that arose out of, and in the course and scope of his employment. Claimant is entitled to receive Workers' Compensation benefits associated with his low back injury as described in this award. This is a temporary award, subject to further order, the proceedings are hereby continued, and the case kept open until a final award can be made.

Date: _____ Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[\[1\]](#) Exhibit G contains the recorded call. A review of the call establishes Mr. Moore received the fax sent by Claimant on December 3, 2003, and that Mr. Moore had constructive knowledge of the injury. Mr. Moore is overheard saying he is "still trying to figure out why you didn't tell anyone you fell, period." Mr. Moore goes on to counsel Claimant about reporting work injuries in the future.