

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

Injury No.: 08-048199

Employee: Larry Burnam
Employer: Curators of the University of Missouri
Insurer: Self-Insured
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 § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 26, 2013. The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued July 26, 2013, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 4th day of February 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: **Larry Burnam**

Injury No. **08-048199**

Dependents:

Employer: **Curators of the University of Missouri**

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: **Second Injury Fund (deferred)**

Insurer: **Self-Insured**

Hearing Date: **May 23, 2013**

Checked by: **RJD/njp**

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: **June 11, 2008**
5. State location where accident occurred or occupational disease was contracted: **Columbia, Boone County, Missouri**
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? **Yes.**
7. Did employer receive proper notice? **Yes.**
8. Did accident or occupational disease arise out of and in the course of the employment? **Yes.**
9. Was claim for compensation filed within time required by Law? **Yes.**
10. Was employer insured by above insurer? **Employer is self-insured.**
11. Describe work employee was doing and how accident occurred or occupational disease contracted: **Employee was changing a compressor on an MRI chiller unit, which required him to sit or lie on a concrete ledge and lean backward through a small opening to perform his work, resulting in injury to his low back.**
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: **Low back, body as a whole.**
14. Nature and extent of any permanent disability: **17.5% permanent partial disability of the body as a whole**
15. Compensation paid to-date for temporary disability: **\$78.20**
16. Value necessary medical aid paid to date by employer/insurer? **\$268.92**

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- 17. Value necessary medical aid not furnished by employer/insurer? \$23,437.25
- 18. Employee's average weekly wages: \$821.09
- 19. Weekly compensation rate: \$547.40 for temporary total disability; \$389.04 for permanent partial disability
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. From Employer

70 weeks of permanent partial disability benefits	\$27,232.80
5 weeks of temporary total disability benefits	\$2,737.00
Reimbursement of medical expenses	\$23,437.25

22. Second Injury Fund liability:

The claim against the Second Injury Fund is deferred for adjudication to a later date.

Said payments to begin immediately 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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Thad Mulholland

Employee: Larry Burnam

Injury No. 08-048199

FINDINGS OF FACT AND RULINGS OF LAW

Employee: **Larry Burnam**

Injury No. **08-048199**

Dependents:

Employer: **Curators of the University of Missouri**

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: **Second Injury Fund (deferred)**

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

Insurer: **Self-Insured**

ISSUES DECIDED

The evidentiary hearing in this case was held on May 23, 2013 in Columbia. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on June 14, 2013. The hearing was held to determine the following issues:

1. Whether the work-related accident of June 11, 2008 was the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
2. The liability, if any, of Employer for permanent partial disability benefits;
3. Whether Employer shall be ordered to reimburse Employee for medical treatment previously rendered; and
4. Whether Employer shall be ordered to pay temporary total disability (“TTD”) benefits, and, if so, for what period(s) of time.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers’ Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers’ Compensation Law at all relevant times;
5. That Employee sustained an accident arising out of and in the course of his employment with the University of Missouri on June 11, 2008;

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6. That Employee's average weekly wage is \$821.09, with compensation rates of \$547.40 for temporary total disability benefits and \$389.04 for permanent partial disability benefits;
7. That the notice requirement of Section 287.420 is not a bar to Employee's Claim for Compensation;
8. That Employer has paid \$268.92 in medical benefits and \$78.20 in temporary benefits; and
9. That the University of Missouri was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, Larry Burnam; medical records; medical bills; the deposition testimony of nurse-practitioner Patricia Kean, taken February 18, 2011; the deposition testimony of nurse-practitioner Linda Kolostov, taken February 18, 2011; the deposition testimony of nurse Karen Hackmann, taken February 18, 2011; the deposition testimony of Dr. Robert J. Bernardi, taken October 20, 2010 and February 26, 2013; the deposition testimony of Dr. Michael Chabot, taken June 15, 2012; the deposition testimony of Dr. David T. Volarich, taken November 19, 2010 and February 2, 2012; photographs; correspondence; transcript of recorded statement of Employee apparently taken June 13, 2008, but dated June 13, 2009.

DISCUSSION

Larry Burnam ("Claimant") was born on September 7, 1951. He has been employed since October 2004 for the University of Missouri ("Employer") as a master refrigeration technician. Claimant performs most of his work for Employer at the old Ellis Fischel building in north Columbia. Claimant has performed commercial refrigeration work for all of his adult life.

In 1997, Claimant sustained a left-sided disc herniation at L5-S1 with migration of the disc material down to the S1 nerve root. Claimant was experiencing a left lower extremity radiculopathy. Claimant underwent discectomy surgery with resolution of the radicular symptoms.

As stipulated, Claimant sustained a work-related accident and injury on June 11, 2008. The injury occurred while Claimant was changing a compressor on an MRI chiller unit. This required him to sit on a concrete ledge and lean backwards through a small open space in order to install the compressor and cut, re-route, and weld its piping. As he changed positions and moved around throughout the day while working on this project, he noted the onset of back pain and some difficulty straightening up. He described pain across his back at or above his belt level that extended down into his right buttocks to an area slightly below his right back pocket. He

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mentioned the symptoms to his supervisor before leaving work but did not seek treatment that evening. His back remained stiff and painful, even after he took a hot bath. The following morning he filled out an injury report when he arrived at work. He was sent to Work Injury Services at the University. Claimant was seen by a nurse or a nurse-practitioner on five occasions between June 12, 2008 and July 17, 2008. Claimant was treated conservatively with exercises and prescription medication, and was placed on modified work duty.

On Claimant's first visit to Work Injury Services, he reported a resting pain level of 6/10 which increased to 8-9/10 sharp pain with activity. It was documented that he "denies numbness/tingling in LE". He was ordered off work until June 16 at which time he was to return to work on modified duty. He was treated for a lumbosacral strain. Claimant was instructed to take ibuprofen, an anti-inflammatory, was prescribed Skelaxin, a muscle relaxant, and Ultram, a narcotic pain reliever.

Claimant testified that he asked nurse-practitioner Patricia Kean if he should undergo an MRI as he was worried about having sustained a herniated disc. Claimant testified that she declined. Ms. Kean testified that she did not recall Burnam asking about an MRI and, besides, that the mechanism of injury "was not there to herniate a disc." At the first visit, an x-ray was ordered by the nurse-practitioner. Claimant testified that the pain was greater on the right than left and the pain traveled into his buttocks very early after the injury.

On the June 19, 2008 visit to Work Injury Services, Claimant complained of "dull" and "achy" pain in the lumbosacral area. He was noted to have gait "guarded with sit to stand". He was maintained on modified duty but his restrictions were lessened and he was continued on ibuprofen and Skelaxin.

On the June 26, 2008 visit to Work Injury Services, it was recorded that Claimant indicated that his low back pain was usually a 5/10 by noon. His complaints were focused on the right low back. His movements were noted to be "stiff". Claimant was diagnosed with a lumbosacral strain, maintained on limited duty, and instructed to do home exercises. Claimant was, at that time, still taking a maximum daily dose of ibuprofen.

Claimant was next seen in Work Injury Services on July 9, 2008. He was diagnosed with a lumbar strain right greater than left. It was noted that he reported a pain level of 2/10 at rest with pain increasing to 4/10 by the end of the day. The physical exam revealed increased pain with lateral bending to the right. Ms. Kean testified that on the July 9, 2008 visit, Claimant's reported pain was limited to the right instead all of the way across the lumbar area. Claimant was still taking ibuprofen at that time although less than had been noted in the previous visit. Claimant was released to return to "medium-heavy" work.

Claimant was last seen in Work Injury Services on July 17, 2008. He was released from care at that time. It is noted that his "[b]ack pain resolved with no discomfort". However, Claimant testified that though his back improved over the five week period he was followed by Work Injury Services his pain never completely resolved and he never reported that his pain had completely resolved. The pain diagram for that visit was completed by Ms. Kolostov and it was shaded indicating pain in the lumbosacral area which is roughly the same area shaded by Kolostov during the June 26, 2008 visit. However, Ms. Kolostov testified that she shaded the

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pain diagram on July 17 not because Claimant reported pain in that area on that day but because he had *previously* reported pain in that area.

After five visits to University of Missouri Work Injury Services, Employer discontinued medical treatment. Claimant testified that his condition was improved on July 17, 2008 when he was released from Work Injury Services but that he had not been pain free at any time since his work injury. Claimant testified that while he was still treating at the Work Injury Services Clinic he began an exercise program that involved going to the gym and doing flexibility and stretching maneuvers. This, along with continued use of ibuprofen and a lightened work load seemed to diminish his symptoms. Claimant testified that the pain that had initially radiated into his buttocks had even diminished quite a bit.

Claimant testified that his low back condition worsened in August 2008. The pain that he had previously felt deep in his right buttock was now beginning to move down his right leg. He scheduled an appointment with his primary care physician, Dr. Alcock. He was referred to an orthopedic surgeon. He followed up with Dr. Dennis Abernathie at the Columbia Orthopaedic Group in October. Dr. Abernathie diagnosed Claimant with a probable flare up of facet joint pain. He underwent a cortisone injection on October 13, 2008 which provided minimal relief.

On November 4, 2008, Claimant was seen by Dr. Holt at Columbia Orthopaedic Group, complaining of pain in his right knee and "pain that he has had radiating up and down his right lower extremity." Claimant related to Dr. Holt that he felt his "knee pain is secondary to his back" and that "in September of 2008 he had worsening symptoms in his back with pain in the right buttocks, down his right leg with some numbness in the calf and into the anterior dorsum of his right foot." He also described tingling traveling down his right leg to his right foot.

Claimant was then seen by Dr. Jeffrey Parker at Columbia Orthopaedic Group on November 24, 2008. He reported to Dr. Parker that he continued to have low back pain which traveled into his right leg and that the pain in his right leg did not really start until about September. Dr. Parker's examination revealed a tender back, mild limitation in motion and numbness in the right thigh. Dr. Parker reviewed an MRI scan from November 21, 2008 and diagnosed a herniated disc at L4-5 on the right and felt that the disc had "migrated proximally" and may have been "slightly encroaching on his exiting L4 nerve root as well as his L5 root." Dr. Parker concluded that it would be best to try an epidural to "calm" the symptoms and if that did not work, Claimant would probably benefit from a discectomy at L4-5 on the right. On November 24, 2008, Claimant underwent an epidural steroid injection at L4-5 which provided significant relief for about two years.

On January 14, 2009, Employer sent Claimant to Dr. Robert Bernardi for an independent medical evaluation. Dr. Bernardi noted that Claimant was "adamant that when he was discharged from occupational medicine his symptoms were considerably improved but were not completely gone." Claimant reported to Dr. Bernardi that by August 2008 his low back was worsening and he developed "more pain in his right leg". Claimant also advised Dr. Bernardi that he had no left sided symptoms and did have intermittent pain in the lateral aspect of his right calf and into his right foot accompanied by weakness in his right leg.

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Dr. Bernardi characterized Claimant as a forthright and honest individual who continued to work following onset of the right leg symptoms which, according to Dr. Bernardi, must have been very severe. Dr. Bernardi concluded that Claimant's symptoms immediately after the June 11, 2008 work injury were of a "discogenic etiology". Dr. Bernardi, felt, however, that the work injury did not cause the disc herniation identified in the October 2008 MRI and was, therefore, not the prevailing factor in the symptoms Claimant reported to Dr. Bernardi in January 2009.

Claimant's back was doing reasonably well until sometime in late 2010 when the right-sided low back pain recurred. The pain was accompanied again by radiating pain into the right calf. Claimant saw Dr. Parker on February 3, 2011 about the recurring symptoms. He underwent another MRI on February 4, 2011 which Dr. Parker interpreted in his February 11, 2011 office note as showing a right paracentral disc protrusion at L4-5 which was producing right lateral recess stenosis. Dr. Parker noted that the sequestered fragment that appeared in the 2008 MRI was no longer present. Dr. Parker felt that given the success with the November 2008 injection, that it would be reasonable to try that again. The injection did not have its desired effect and on March 15, 2011, Dr. Parker performed a right L4-5 hemilaminotomy and partial discectomy.

Dr. David Volarich testified that the June 11, 2008 work injury was the prevailing factor in causing Claimant to sustain a herniated nucleus pulposus L4-5 to the right causing right leg radiculopathy. Dr. Volarich testified that surgical procedure performed by Dr. Parker was necessary to cure and relieve the effects of the work injury. Dr. Volarich also testified that all of the medical charges associated with the surgery were reasonable and customary. Finally, Dr. Volarich rated Claimant's permanent partial disability attributable to the June 11, 2008 work injury at 35% of the body as a whole at the lumbosacral spine due to the right-sided L4-5 disc herniation.

Dr. Michael Chabot performed an independent medical examination on January 9, 2012 at Employer's request. Dr. Chabot's report of that date is in evidence and he testified by deposition. Dr. Chabot testified to his opinion that the June 11, 2008 work injury was a back strain or sprain, and that the right-sided L4-5 disc herniation was sustained at some point thereafter, probably in September or October of 2011. Dr. Chabot opined that the disc herniation was likely caused by Claimant's degenerative disc disease.

I find from the evidence that it is almost certain that Claimant did not have a right-sided L4-5 disc herniation prior to June 11, 2008. (Eleven years earlier he had a *left-sided* disc herniation at *L5-S1*; after surgery in 1997 Claimant's *left* lower extremity radiculopathy was resolved. Claimant continued to work for almost eleven years in commercial refrigeration work - a very physically demanding job -- without low back problems, prior to the June 11, 2008 accident and injury.) There is no question that the November 21, 2008 lumbar MRI clearly evidenced a right-sided L4-5 disc herniation with probable encroachment on both the L4 and L5 nerve roots. Therefore, the right-sided L4-5 disc herniation developed or occurred at some time between June 11, 2008 and November 21, 2008. The question, then, is whether the right-sided L4-5 disc herniation occurred in the June 11, 2008 accident (as Dr. Volarich testified) or whether it developed or occurred after the accident (as Dr. Chabot and Dr. Bernardi testified).

Considering all the evidence, I believe Dr. Volarich's opinion as to the cause of the right-sided L4-5 disc herniation to be more likely correct. Dr. Chabot and Dr. Bernardi both believe

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that Claimant did, indeed, injure his low back on June 11, 2008, but that the injury was a strain/sprain, and not a disc herniation (although Dr. Bernardi also characterized the pain from the June 11, 2008 injury as “discogenic”). Dr. Bernardi testified that if Claimant was in fact experiencing consistent right buttock pain shortly after June 11, 2008 (as Claimant has testified) that would be consistent with the L4-5 disc herniation having occurred on June 11, 2008. (Dr. Bernardi relied on the records of the Work Injury Services personnel to conclude that Claimant was *not* experiencing right buttock pain shortly after the June 11, 2008 accident, and thus that the disc herniation occurred subsequent to the accident.)

I found Claimant to be a very credible witness. I believe that Claimant did advise the Work Injury Services personnel that he was experiencing right buttock pain. I also believe that Claimant truthfully advised the Work Injury Services personnel that the prescription medication, exercises and light duty were giving him significant relief of his symptoms. Perhaps Claimant was not vociferous enough in his complaints, or perhaps (as Claimant’s counsel suggests), the Work Injury Services personnel, not being physicians, did not ask Claimant the correct questions regarding his symptoms. However, it is interesting to note that Claimant asked the Work Injury Services if they would prescribe an MRI; Claimant had experienced a similar situation in 1997 with a left-sided L5-S1 disc herniation with nerve root impingement and radiculopathy; Claimant’s prior experience made him believe that an MRI was needed. Had the MRI been performed as and when requested, it would have provided a definitive answer to the crucial question in this case. What is also interesting to note is that by the June 26, 2008 visit to Work Injury Services, Claimant’s complaints (as recorded by Work Injury Services personnel) were focused on the *right side*. On the July 9, 2008 visit to Work Injury Services, Claimant was diagnosed with a lumbar strain *right greater than left*; Claimant had increased pain with lateral bending *to the right*; and Claimant’s pain was limited to the *right side*.

I also note that, after the epidural steroid injection on November 24, 2008, Claimant had significant resolution of his symptoms for almost two years while working full duty; while difficult to believe, it is undeniably true. Therefore, is it far-fetched to believe that, if Claimant sustained the right-sided L4-5 disc herniation in the June 11, 2008 accident, he was nevertheless able to experience significant resolution of his symptoms for 2-3 *months* with medication, rest and exercise?

I find that the June 11, 2008 accident and injury was the prevailing factor in the cause of the right-sided L4-5 disc herniation; therefore, the diagnostics and treatment, including the March 15, 2011 surgery, were all reasonable and necessary to cure and relieve Claimant from the effects of the work-related injury, and the costs thereof should be borne by Employer.

Regarding Claimant’s claim for TTD benefits post-surgery, Claimant testified that he was off work approximately six weeks. On April 13, 2011, Dr. Parker noted that Claimant “is going back to work next week”; on the May 11, 2011 visit, Dr. Parker noted that Claimant had been back to work and was doing well. Thus, it appears that Claimant was off work for at least five weeks (but less than six weeks) post-surgery.

Employee: Larry Burnam

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FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. Larry Burnam (“Claimant”) was born on September 7, 1951 and began work for the University of Missouri (“Employer”) in October 2004 as a master refrigeration technician;
2. Claimant’s job as a master refrigeration technician is a physically demanding job;
3. Claimant has performed commercial refrigeration work for all of his adult life;
4. In 1997, Claimant sustained a left-sided disc herniation at L5-S1 with migration of the disc material down to the S1 nerve root and was experiencing a left lower extremity radiculopathy; Claimant underwent discectomy surgery with resolution of the radicular symptoms;
5. Claimant continued to work in commercial refrigeration after the 1997 surgery without any significant back problems;
6. On June 11, 2008, while working for Employer, Claimant sustained a work-related accident and injury while changing a compressor on an MRI chiller unit;
7. Immediately after the June 11, 2008 accident and injury, Claimant experienced low back pain, and particularly right-sided low back pain with pain in his right buttock;
8. In November 2008, Claimant was diagnosed with a right-sided L4-5 disc herniation;
9. The work-related accident of June 11, 2008 was the prevailing factor in the cause of the right-sided L4-5 disc herniation;
10. Claimant received significant relief from the symptoms of the right-sided L4-5 disc herniation for almost two years following a November 24, 2008 epidural steroid injection; in late 2010, the symptoms returned and surgery was needed;
11. On March 15, 2011, Claimant underwent surgery, consisting of a right L4-5 hemilaminotomy and partial discectomy;
12. Claimant was unable to work for five weeks post-surgery;
13. The March 15, 2011 surgery was reasonable and necessary to cure and relieve Claimant from the effects of the June 11, 2008 injury;
14. Employer is responsible for the costs associated with the surgery;
15. Claimant is entitled to five weeks of TTD benefits at the stipulated rate of \$547.40, totaling \$2,737.00;
16. As a result of the June 11, 2008 low back injury and right-sided L4-5 disc herniation, Claimant has sustained a permanent partial disability of 17.5% of the body as a whole;
17. Claimant is entitled to 70 weeks of permanent partial disability benefits at the stipulated weekly rate of \$389.04, totaling \$27,232.80;
18. Employer is responsible for the following medical charges, totaling \$23,437.25, and shall be ordered to reimburse Claimant for same:

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Columbia Orthopaedic Group	\$5,153.00
Boone Hospital Center (2/4/11 MRI)	\$1,798.00
Boone Hospital Center (3/7/11 MRI)	\$1,798.00
Boone Hospital Center (3/11/11 pre-op workup)	\$1,146.00
Boone Hospital Center (3/15/11 surgery and recovery)	\$13,542.25

ORDER

Employer is ordered to pay Claimant the sum of \$2,737.00 for temporary total disability benefits, \$27,232.80 for permanent partial disability benefits, and \$23,437.25 for medical benefits.

Claimant's attorney, Thad Mulholland, is allowed 25% of all benefits awarded herein as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

The claim for compensation against the Second Injury Fund is deferred to a later date.

Any past due compensation shall bear interest as provided by law.

Made by /s/Robert J. Dierkes 7/24/2013

Robert J. Dierkes
Chief Administrative Law Judge
Division of Workers' Compensation