

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

Injury No.: 09-067980

Employee: Jerry Dillon
Employer: Architectural Materials Company
Insurer: Accident Fund National Insurance Company

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 August 5, 2011, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret Ellis Holden, issued August 5, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 1st day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jerry Dillon

Injury No. 09-067980

Dependents: N/A

Employer: Architectural Materials Company

Additional Party: N/A

Insurer: Accident Fund National Insurance Company

Hearing Date: 5/5/11

Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? NO
2. Was the injury or occupational disease compensable under Chapter 287? NO
3. Was there an accident or incident of occupational disease under the Law? N/A
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted: LIFTING A DOOR.
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: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0

Employee: Jerry Dillon

Injury No. 09-067980

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,109.13
- 19. Weekly compensation rate: \$739.46/\$422.97
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:0

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

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

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

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: 0

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

TOTAL: SEE AWARD

- 23. Future requirements awarded:

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

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

ROBERT HILL

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jerry Dillon Injury No. 09-067980
Dependents: N/A
Employer: Architectural Materials Company
Additional Party: N/A
Insurer: Accident Fund National Insurance Company
Hearing Date: 5/5/11 Checked by: MEH

The parties appeared before the undersigned administrative law judge on May 5, 2011, for a final hearing. The claimant appeared in person represented by Robert Hill. The employer and insurer appeared represented by Patricia Musick. Memorandums of law were filed by June 3, 2011.

The parties stipulated to the following facts: On or about August 13, 2009, Architectural Materials Company was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Accident Fund National Insurance Company. On the alleged injury date of August 13, 2009, Jerry Dillon was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. The alleged accident occurred in Polk County, Missouri. The claimant notified the employer of his injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the alleged accident, the claimant's average weekly wage was \$1,109.13, which is sufficient to allow a compensation rate of \$739.46 for temporary total disability compensation, and a compensation rate of \$422.97 for permanent partial disability compensation. No temporary disability benefits have been paid. The employer and insurer have paid no medical benefits. The attorney fee being sought is 25%. The parties

further agree that if the claim is found to be compensable, the total amount of fair and reasonable charges for medical expenses related to the on the job injury is \$28,529.51.

ISSUES:

1. Whether the claimant sustained an accident which arose out of the course and scope of employment.
2. Whether the accident caused the injuries and disabilities for which benefits are being claimed.
3. Whether the employer is obligated to pay past medical expenses.
4. Any temporary total benefits owed to the claimant.
5. The nature and extent of permanent disabilities.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The employer is a business which manufactures and installs store fronts, glass, commercial doors, and curtain walls. They perform work all over the state of Missouri, primarily in schools and businesses. The installations vary. Tim and Todd Smith are co-owners of Architectural Materials. Todd Smith is president. Tim Smith is vice president.

Claimant started with the employer on December 1, 2008. His position was a glazer. His duties included installing commercial glass, store fronts, curtain walls, doors, etc. This job physically required heavy lifting and carrying of materials, sometimes for a long distance. He was required to climb ladders and to set glass. In order to get to the job sites, he would have to drive all over the state.

Claimant had treated with a chiropractor for pain before June 2009. He said he went to Walters Chiropractic. Dr. Walters' records show he treated the claimant on July 12, 2006, for pain in his neck, shoulder pain, and pain and stiffness between his shoulder blades. He was treated for his rib, shoulder, back, and general soreness. He last treated before the alleged injury on November 2008. He also treated with his family doctor, Dr. Kendel Klein. He saw him on

April 26, 2005 for low back pain. He complained of sharp pains in his back and weakness in his legs but no numbness or tingling. He diagnosed a back strain/muscle spasm and prescribed muscle relaxers. The claimant testified he healed and returned to work.

Prior to the date of the accident, on June 16, 2009, claimant moved a refrigerator his wife had purchased. His father and the man he purchased it from helped the claimant. He borrowed a dolly and tie downs from his employer. The door to their home was too narrow and he had to take the door facing off to get the refrigerator in the house. He said he had no medical problems or medical treatment after the move. He took the next day off to finish installing the refrigerator. Claimant admitted on cross-examination that he might have told Tim at the employer that he was taking off because his back hurt. The next day, he crawled under the house to work on the water lines and put the door back together. He testified that he went into work that morning. He said the next Monday he worked a full shift and had no physical problem. He saw no reason to see a chiropractor or a doctor.

Claimant testified that in August 2009 they were building curtain walls. These would be constructed at the shop and then hauled to the site for installation. A crew of four would lift and move the curtain wall. One would be on each corner. They would lean it on the fence until it was loaded onto a trailer to take it to the site. Claimant said that after moving the curtain wall he had soreness and was worn out. He said he was sure he was talking and said he had low back pain.

Howard Zeigenbein testified by deposition. He is a job foreman and supervisor at Architectural Materials. He worked with the claimant about three days a week. He testified that he worked with the claimant on August 12, 2009, at Miller school. They were measuring and caulking that day. Mr. Zeigenbein described an incident that occurred when they stopped for fuel and a snack at a convenience store on the way out of town that morning. He said the claimant

slipped on an oil spot on the driveway and fell. He said the only thing the claimant said was that he wasn't too graceful. He also said that the claimant was complaining of back pain on the job at Miller school and had been for about a month or month and a half before that day when he slipped at the convenience store. Claimant was also holding his back. He also said the claimant commented he would have to take off work to go to the doctor. Mr. Zeigenbein testified he next talked to the claimant the following Saturday and he asked him how he was doing. Claimant told him he and his wife had been sitting on a porch swing and the back of it had collapsed. Claimant did not give Mr. Zeigenbein any indication he was hurt from the swing.

Claimant saw another chiropractor, Hunter Greenwood, on August 7, 2009, with complaints of sharp constant pain, mild to moderate to moderate to severe. Claimant testified that this was lower back soreness due to lifting the curtain walls. He said he had no pain down his legs.

On August 13, 2009, claimant was working on a project in Humansville, Missouri. He was the first on his crew to arrive. He testified that he was setting a door side light. He said he tore out the temporary material and went to unload the door. He said there were supposed to be others coming but he did not know when they would show up.

Claimant said he set up the side light and frame. He got the door out of the truck and had it in his right arm when he turned and felt a pop and pain. He set the door down. He said he called the office and told Tim or Todd that he had pulled the door out and felt a pop in his back, to find out where the crew was because he needed help and couldn't do the job because he hurt his back. Tim Smith testified that he received a call from the claimant about whereabouts of the rest of the crew that day but the claimant did not talk about an injury. He said that he had talked to the claimant about his back but he could not say when. He described seeing the claimant walking and standing and seemed to be struggling from about June on. He also said they had

several discussions about claimant's back. They discussed claimant needed to get it taken care of but he did not have insurance. He said they also tried to accommodate him with caulking and working with cylinders. Todd Smith testified that he also observed the claimant from June on seeming to not move well. He also discussed his back with the claimant and the fact he needed to get it taken care of. He also confirmed that they were trying to provide lighter work to the claimant.

Jim Boatman, a co-worker of claimant at employer testified. He had worked with claimant at previous employers and said claimant was a hard worker and he never saw him have physical problems before July 2009. He recalled moving the curtain wall in late July when it took four workers, including him and claimant. He was also sore, as they all regularly were. He did not recall claimant doing any light duty at employer. He said he worked with the claimant on August 10, 2009, and did not see him having problems. He did observe claimant after August 13, 2009, and said the difference was "night and day" compared to late July as the claimant was having difficulty and appeared to be in severe pain.

Claimant said this was a different pain than he felt in late July. He had never felt pain like this before. It was a bad, sharp pain in his tail bone that traveled down his leg. The back of his leg and knee tingled and it burned all the way down his leg. Claimant's wife testified that his problems were more severe after August 13, 2009, and he needed assistance getting out of bed, dressing, driving, and had to walk with a cane or her help.

The crew showed up about 45 minutes later. He said that he stayed on the job the rest of the day and basically watched. He said the crew were basically helpers and did not know what they were doing. If he did not stay they could not secure the building.

Claimant did not work on August 14th. He said he probably called the office. He saw chiropractor Greenwood on August 14 and 15. He was complaining of upper and lower back pain and received manipulation on both days.

Claimant returned to work on Monday, August 17, 2009. He said his back was killing him and he had hard time getting in and out of his truck. He described having constant pain that shot down his leg and that his leg would go numb while he was driving. He went to another school, which he thought was Ash Grove. He went to the locker room to do some caulking. He was using a ladder. He said he had a lift but it was rough and jerked. He used the ladder and had to climb onto the lockers. He was coming down the ladder when he slipped on the last two or three rungs. He said he then could not work anymore. He called Donna and told her he was not working. Claimant and Tim Smith testified that Humansville and Ash Grove were the only times the claimant had ever worked alone.

Claimant next went to Cox Hospital Urgent Care on August 18, 2009. He gave a history of problems with “back past several weeks, increased pain with lifting a door last week, yesterday fell down 3 rungs of ladder” and “slipped disc/bulge.” He was diagnosed with low back pain and muscle spasms. He was prescribed medications and instructed to follow up with Occupational Medicine.

Cox Hospital called the employer for authorization and was denied. Claimant said he called and talked to Tim or Todd and after discussion was told they were denying it was work related and not providing medical treatment.

On August 19, 2009, claimant went on his own to Dr. Kristi Foster at Family Medical Care Center. Claimant gave a history of “3 wks ago noticed back pain started slowly after work and has worsened since then. Thursday last week, picked up heavy door which worsened pain. Monday fell off ladder onto feet from rung 3 with severe increase in pain. Pain is 8/10, low back

radiates into left leg, worse with bearing weight and bending, some relief from lying flat.” Dr. Foster prescribed conservative treatment and would order an MRI if conservative therapy failed or other reasons developed. Dr. Foster took claimant off work for three weeks. He followed up with her on August 26, 2009. At that time he was reporting increased back pain, left leg pain and numbness down both legs, as well as an inability to ambulate. She ordered an MRI. An MRI performed on August 27, 2009, showed a small broad based disc bulge at L4-5 centrally with an annular tear and a focal disc herniation at L5-S1 centrally and to the left with mild superior extrusion. On September 1, 2009, he again saw her with problems urinating after taking Percocet. She referred him to neurosurgery and changed his medication. An MRI of September 7, 2009, showed degenerative disc disease at L4-5 and L5-S1 with paracentral extruded disc fragment at L5-S1 with mass effect on the thecal sac and possibly the left S1 nerve root origin without significant spinal stenosis and roughly 2 mm of retrolisthesis at L5-S1.

Dr. Greenwood’s records include a handwritten note dated August 28, 2009. Claimant’s wife told him they had hired an attorney. The note states claimant hurt his back originally loading a curtain wall in the back of his truck at the shop. It also states “1 ½ week in Humansville unloaded a commercial glazed door by self made back worse... was on ladder doing caulking and fell down last 3 steps...has been off work for 2 weeks now...have lawyer boss denies work injury.”

Dr. Robert Strang at Springfield Neurological & Spine Institute saw claimant on September 14, 2009. Claimant gave the history of low back soreness beginning in August 2009 while working on a curtain wall at work and undergoing chiropractic treatment. On August 13, 2009, while unloading a door had immediate onset of low back and left leg pain which persisted until the following Monday when he slid down a ladder and landed on his feet resulting in increased pain. After reviewing the MRI, Dr. Strang states in his notes “His MRI findings do

indicate an acute process and this, along with his history, would point to his work-related injury as being a substantial factor in his current diagnosis of low back pain and lumbar radiculopathy with herniated disc at L5-S1. It is unclear whether the L4-5 level is acute or chronic.” Dr. Strang clarified this opinion in a note of September 22, 2009, when he said that the lifting of the door on August 13, 2009, indicated an acute process that not only pointed to his work-related injury as being the substantial factor in his current diagnosis, but he also believed it was the prevailing factor in causing his current diagnosis and need for treatment regarding the herniated disc and resulting radiculopathy at L5-S1, but it was still unclear as to whether the L4-5 level is acute or chronic.

Dr. Strang recommended surgery and took claimant off work until October 22, 2009, when his status would be reevaluated. Surgery consisting of hemilaminectomy at L5-S1 was performed on September 23, 2009. On October 22, 2009, Dr. Strang kept claimant off work until the completion of work hardening which was to begin on November 2, 2009. On December 8, 2009, Dr. Strang returned the claimant to work with no restrictions. Claimant applied for unemployment and received it for two days before it was denied because he voluntarily quit.

Claimant testified that after the surgery he had immediate relief of his leg pain. He now has to be careful about what he does. He went to work for T&C Stainless as a welder on June 1, 2010.

Dr. Donald de Grange reviewed claimant’s medical records and depositions of Howard Zeigenbein, Donna Szumlas, and Jerry Dillon. He did not examine the claimant. His complete medical reports were admitted into evidence. He found that the claimant had complained of back pain 4 years before the injury, he did not believe claimant gave Dr. Strang an accurate history, and felt it was of interest that there was no telephonic communication from the patient to the employer on August 13, 2009. Dr. de Grange states “The facts of this case which are clear,

unambiguous and contained in the medical record leave this examiner to believe that if indeed a work related accident did occur it can be considered no more than an aggravation of an ongoing and previously established medical condition. As such, these alleged work injuries occurring on August 13th and August 17th, 2009 cannot be considered the prevailing factors resulting in the patient's current medical condition and disability. When assessing all the factors of this case, it is clear that the 2 incidents cannot be considered the primary factors among all the others responsible for the patient's current medical condition and disability." In subsequent reports he said that the records from Dr. Strang did not cause him to change his opinion, nor did review of Dr. Bennoch's opinion.

Dr. Shane Bennoch examined the claimant on February 26, 2010. His complete medical report was admitted. Dr. Bennoch diagnosed a traumatic injury to the low back at work resulting in acute traumatic disc at L4-5 and L5-S1 with a free fragment at L5-S1 and left L5-S1 hemilaminectomy. He diagnosed pre-existing low back pain, musculo-ligamentous. In his opinion the claimant had reached maximum medical improvement. He stated that the accident that occurred on August 13, 2009, was the prevailing cause of the injury to claimant's low back and resulting impairment. He rated him with a 25% permanent partial impairment to the body as a whole due to traumatic disc disease at L4-5 and L5-S1 with an annular tear at L4-5. Dr. Bennoch disagreed with Dr. de Grange's opinion that the August 13 and 17, 2009, accidents had nothing to do with the claimant's back pain; rather it was a prior condition. He said "Obviously I would strongly disagree with that. The patient had complained of back pain prior to the lifting incident on August 13, but the description that Mr. Dillon gives as to how he lifted the door on August 13, 2009, and how the pain onset occurred is very compatible with the pathology on the MRI." He also noted the problems claimant was having with urination and the fact that the chiropractor's records showed no radicular pain prior to lifting the door.

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

I do find that an incident occurred on August 13, 2009, when he lifted the door which was an unusual identifiable strain which produced symptoms of an injury, namely back pain. The more important question in this case is whether this accident caused claimant's condition.

2. Whether the accident caused the injuries and disabilities for which benefits are being claimed.

The claimant has to prove all essential elements of his claim, including a causal connection between the injury and the job. *Bond v. Site Line Surveying*, 322 S.W.3d 165 (Mo. Ct. App. W.D. 2010) Specifically, the claimant has the burden of proving that the accident was the prevailing factor in causing both the medical condition and disability.

Prevailing factor is defined in Section 287.020.3 as "the primary factor, in relation to any other factor in causing both the resulting medical condition and disability. There were many factors presented here. These include moving a refrigerator on June 16, 2009; the back pain that claimant admits he was experiencing and for which he sought chiropractic care in late July; the slip and fall which occurred in the parking lot of the convenience store on August 12, 2009, the day before the alleged accident; the porch swing incident when the back of the swing broke while the claimant was sitting in it and he fell; and the incidents of August 13th and 17th, 2009.

Given the existence of all of these events occurring in such a close time frame, I must be convinced that the incident of August 13, 2009, was the primary factor, in relation to all the other events. After a careful and in-depth examination of the evidence in its entirety, I am not convinced that it was. Therefore, I am unable to conclude that the accident of August 13, 2009,

was the prevailing factor in causing the claimant's back condition requiring surgery. As a result, claimant's claim is denied.

3. Whether the employer is obligated to pay past medical expenses.

As a result of the above ruling, this issue is moot.

4. Any temporary total benefits owed to the claimant.

As a result of the above ruling, this issue is moot.

5. The nature and extent of permanent disabilities.

As a result of the above ruling, this issue is moot.

Date: _____

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