

FINAL AWARD DENYING COMPENSATION
(After Mandate from the Missouri Court of Appeals
for the Eastern District)

Injury No.: 10-026257

Employee: Leotha Faulkner
Employer: Aramark Educational Services, Inc.
Insurer: Indemnity Insurance Company of North America
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

On September 3, 2013, the Missouri Court of Appeals, Eastern District, issued an opinion reversing the December 6, 2012, award and decision of the Labor and Industrial Relations Commission (Commission). *Aramark Educational Services, Inc., et al. v. Leotha Faulkner*, ED99439 (September 3, 2013). By mandate dated September 25, 2013, the Court confirmed its decision to reverse the Commission's award and remanded this matter to the Commission with directions to set aside the Commission's award of December 6, 2012, and enter, in lieu thereof, an order denying compensation benefits in accordance with the Court's opinion delivered September 3, 2013.

Pursuant to the Court's mandate, we issue this award.

Our prior award and decision of December 6, 2012, is hereby set aside. Employee's claim for compensation is denied because employee failed to proffer substantial and competent evidence to meet her burden of proving employer was not prejudiced by her failure to provide timely notice pursuant to § 287.420 RSMo.

Given at Jefferson City, State of Missouri, this 30th day of October 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

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

Injury No.: 10-026257

Employee: Leotha Faulkner
Employer: Aramark Educational Services, Inc.
Insurer: Indemnity Insurance Company of North America
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge (ALJ) dated April 17, 2012.

Preliminaries

On January 29, 2010, employee injured her right knee in a work fall. The ALJ denied employee's claim for temporary total disability benefits and permanent partial disability benefits because he found that employee failed to provide employer with proper, timely notice and failed to prove that employer was not prejudiced as a result of her failure to provide said notice.

Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

Discussion

The only issue before the Commission is whether employee provided employer with proper notice of her January 29, 2010, work injury.

Section 287.420 RSMo provides, in relevant part:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

Written notice is not required if the claimant can prove that the employer had actual knowledge of the accident or the employer was not prejudiced by the claimant's failure to report the accident within the statutory time period. *Soos v. Mallinckrodt Chem. Co.*,

¹ Statutory references are to the Revised Statutes of Missouri 2009 unless otherwise indicated.

Employee: Leatha Faulkner

- 2 -

19 S.W.3d 683, 686 (Mo. Ct. App. 2000), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

In this case, employee concedes that she failed to provide proper, timely notice under § 287.420 RSMo. Employee's only argument on appeal is that employer was not prejudiced by her failure to do so. In support of said argument, employee points to the fact that employer stipulated to every factual issue in this case that could speak to compensability. Therefore, employee argues, the evidence she is statutorily required to provide with respect to proving a lack of prejudice was provided by stipulation in this matter.

In response to employee's contention that no prejudice resulted from her failure to provide proper notice, employer raises numerous arguments alleging that it was, in fact, prejudiced.

Employer argues that it was prejudiced in that it was unable to timely investigate the accident to determine causation and address safety issues. Specifically, employer argues that because it was unable to timely investigate the accident, 1) it does not know if employee breached her duty (as provided in employer's policies) to wear non-slip footwear; 2) it was unable to secure the scene of the accident and address the injury at its safety meetings; and 3) it was prevented from providing employee with proper medical treatment.

Employer stipulated that the injury occurred when and how employee alleges, and that as a result of the accidental work injury employee sustained 20% permanent partial disability of the right knee. By stipulation, employer concedes that employee's injury on January 29, 2010, arose out of and in the course of her employment. If employer believed that causation was an issue in question, it should not have stipulated to that issue at the hearing. Further, if employer believed that employee failed to wear her non-slip footwear in violation of its safety rules, it needed to plead the same as an affirmative defense under § 287.120.5 RSMo. See *Carver v. Delta Innovative Services*, 2012 Mo. App. LEXIS 1123 (Mo. App. Sept. 11, 2012).

Employer argues that it only stipulated to the aforementioned because it had no evidence to contradict employee's version of the facts, but argues that it is *because* of employee's failure to provide timely notice that it was unable to timely investigate the accident to obtain said contradictory evidence. We do not find this argument persuasive. It is employee's burden to prove her entitlement to compensation. If employer questioned the circumstances surrounding how the accident occurred, it should not have stipulated to every fact concerning the same.

With respect to employer's contention that it was prejudiced by its inability to secure the scene of the accident and address the injury at its safety meetings, we find that employer has pointed out the potential for prejudice, but did not point to *actual* prejudice as a result of employee's untimely notice. If another individual was injured in the same location that employee was injured and employer could have prevented said injury had employee provided proper notice, this would represent prejudice. However, employer is merely pointing to the possibility that it *could have* suffered prejudice due to employee's untimely notice and we do not find this argument persuasive.

Employee: Leatha Faulkner

- 3 -

As mentioned above, employer also argues that its inability to timely investigate the accident prevented it from providing proper medical treatment. Employer stipulated that as a result of the work injury employee sustained 20% permanent partial disability of the right knee. Employee does not seek reimbursement for her past medical expenses, nor does she request future medical care. In light of the foregoing, we fail to see how employer was prejudiced by its failure to direct and provide employee's medical treatment.

Based upon the foregoing, and in light of employer's stipulations, we do not find that employer was prejudiced by its inability to timely investigate the accident and provide medical treatment.

In addition to the aforementioned, employer argues that it was prejudiced by employee's untimely notice because it caused employer to breach its contract with Washington University. While employer does not point to any adverse action actually taken by Washington University with regard to this accident, employer contends that Washington University could have terminated the contract with employer due to employer's failure to provide it with timely notice of the accident. Similar to employer's argument that it was prejudiced by its inability to address the accident in its safety meetings, employer has only pointed out the possibility of it suffering prejudice due to employee's untimely notice, but has not pointed to any *actual* prejudice suffered as a result of the same. Further, the contract between Washington University and employer was not entered into evidence, which makes it very difficult to determine what, if any, provisions were breached as a result of employee's untimely notice.

We find, based upon the totality of the evidence, that employee met its burden of proving that employer was not prejudiced by her failure to report the accident within the statutory time period.

Award

We reverse the ALJ's award and find that while employee failed to provide employer with timely notice of her accident, employee met her burden of proving that employer did not suffer any prejudice as a result of the same.

In accordance with the parties' stipulations and the findings herein, employee is awarded, and employer is ordered to pay: 1) 7 6/7 weeks of temporary total disability benefits from April 8, 2010, through June 2, 2010, or \$1,895.06; and 2) 20% permanent partial disability benefits rated at the right knee, or \$7,718.08.

Sam W. Eveland, attorney for employee, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

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

Employee: Leotha Faulkner

- 4 -

The award and decision of Administrative Law Judge John K. Ottenad, issued April 17, 2012, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 6th day of December 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Leotha Faulkner

Injury No.: 10-026257

Dependents: N/A

Employer: Aramark Educational Services, Inc.

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

Additional Party: Second Injury Fund (Open)

Insurer: Indemnity Insurance Company of North
America C/O Sedgwick Claims Management Services

Hearing Date: January 11, 2012

Checked by: JKO

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? Yes
4. Date of accident or onset of occupational disease: January 29, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
8. Did accident or occupational disease arise out of and in the course of the employment? 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 occurred or occupational disease contracted: Claimant was employed as a custodian for Employer, when she slipped and fell on black ice, injuring her right knee.
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: Right Knee
14. Nature and extent of any permanent disability: 20% of the Right Knee
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Leotha Faulkner

Injury No.: 10-026257

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$361.79
- 19. Weekly compensation rate: \$241.19 for TTD/ \$241.19 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Claim denied under Section 287.420 for failure to give timely notice \$0.00

22. Second Injury Fund liability: Open

TOTAL: \$0.00

23. Future requirements awarded: None

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: Sam W. Eveland.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Leotha Faulkner	Injury No.: 10-026257
Dependents:	N/A	Before the
Employer:	Aramark Educational Services, Inc.	Division of Workers’ Compensation
Additional Party:	Second Injury Fund (Open)	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Indemnity Insurance Company of North America C/O Sedgwick Claims Management Services	Checked by: JKO

On January 11, 2012, the employee, Leotha Faulkner (Claimant), appeared in person and by her attorney, Mr. Sam W. Eveland, for a hearing for a final award on her claim against the employer, Aramark Educational Services, Inc., and its insurer, Indemnity Insurance Company of North America C/O Sedgwick Claims Management Services. The employer, Aramark Educational Services, Inc., and its insurer, Indemnity Insurance Company of North America C/O Sedgwick Claims Management Services, were represented at the hearing by their attorney, Mr. Robert J. Amsler, Jr. The Second Injury Fund is a party to this case, but is being left open by agreement of the parties for the purposes of this hearing.

At the outset of the hearing, it was discovered that the Division of Workers’ Compensation file had two alleged employers listed, Aramark Educational Services, Inc. and Aramark/Washington University, as well as their respective insurers. By agreement of the parties on the record at the time of this hearing, the parties asserted that both alleged employers were technically the same and, so, therefore, the alleged employer, Aramark/Washington University, along with its respective insurer, could be voluntarily dismissed. Pursuant to that agreement by the parties, Orders of Dismissal are being separately issued from this award voluntarily removing Aramark/Washington University and Indemnity Insurance Company of North America C/O Specialty Risk Services, LLC, from this Claim.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about January 29, 2010, Leotha Faulkner (Claimant) sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant.
- 2) Claimant was an employee of Aramark Educational Services, Inc. (Employer).
- 3) Venue is proper in the City of St. Louis.

- 4) The Claim was filed within the time prescribed by the law.
- 5) At the relevant time, Claimant earned an average weekly wage of \$361.79, resulting in applicable rates of compensation of \$241.19 for total disability benefits and \$241.19 for permanent partial disability benefits.
- 6) Employer has not paid any benefits to date.
- 7) There is no issue regarding past or future medical benefits.
- 8) If Employer's notice defense fails, Claimant is entitled to receive \$1,895.06 in temporary total disability (TTD) benefits for the period of time of April 8, 2010 through June 2, 2010, or 7 6/7 weeks.
- 9) If Employer's notice defense fails, Claimant is entitled to receive \$7,718.08 for 20% permanent partial disability of the right knee.

ISSUE:

- 1) Did Claimant provide Employer with proper notice of the injury under the statute?

EXHIBITS:

The following exhibits were admitted into evidence:

Joint Employee & Employer/Insurer Exhibits:

- A-1. Right knee X-ray report from Forest Park Hospital dated February 19, 2010
- B-2. Right knee MRI report from Forest Park Hospital dated March 8, 2010
- C-3. Certified medical treatment records of SSM St. Clare Surgical Center
- D-4. Medical treatment records of Dr. Julian Mosley, Jr.
- E-5. Medical treatment records of Dr. Clayton Perry
- F-6. Incident Reporting & Transitional Work Procedure acknowledgement form
- G-7. Acknowledgement of Receipt of Employer's policy manual
- H-8. Incident Report form
- I-9. Notification of Unsatisfactory Performance

Note: Some of the records submitted at hearing contain handwritten remarks or other marks on the Exhibits. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on January 11, 2012.

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the medical records, the other records and documents, and the testimony of the other witness, as well as based on my personal observations of Claimant and the other witness at hearing, I find:

- 1) **Claimant** is a 50-year-old woman, who testified that she has worked for Aramark Educational Services, Inc. (Employer) as a custodian for seven years on the campus of Washington University. She was employed in this position for Employer on or about the date of her injury, January 29, 2010.
- 2) Claimant testified that on or about January 29, 2010, she slipped on black ice and fell while walking between North and South Brookings Halls at Washington University. Claimant said that after she fell, she got up and went right back to work. She testified that she spoke to the Vice Chancellor of Admissions about the fall, but she did not report the injury immediately to her supervisor or Employer. Claimant testified that she did not report it immediately because she thought she was all right. She said that she realized she was hurt about ten days later when her right leg started to swell, but even then she did not report it to Employer because she was afraid she would get in trouble for a late accident report.
- 3) Claimant sought treatment on her own for her right knee with her primary care physician, **Dr. Julian Mosley, Jr.** (Exhibit D-4). On February 18, 2010, Dr. Mosley's record indicates that Claimant fell on ice and hurt her right knee, which was now swelling. X-rays of the right knee taken at **Forest Park Hospital** (Exhibit A-1) on February 19, 2010 were negative for fracture and within normal limits. She continued to follow up with Dr. Mosley for pain and swelling. She was given a right knee brace and released to return to her normal work duties, as long as she was wearing the brace, as of March 8, 2010. Dr. Mosley had taken her off work from February 5, 2010 to March 5, 2010.
- 4) When the pain and swelling persisted, Dr. Mosley sent her for an MRI of the right knee. The MRI of the right knee was taken on March 8, 2010 at **Forest Park Hospital** (Exhibit B-2). The MRI showed joint effusion, a lateral meniscus tear and increased signal in the lateral tibial plateau, most consistent with an area of a degenerative cyst and/or osteochondral injury. Dr. Mosley (Exhibit D-4) again took Claimant off work from March 15 to March 21, 2010 for her right knee and referred her to Dr. Clayton Perry for further evaluation and treatment.
- 5) Medical treatment records from **Dr. Clayton Perry** (Exhibit E-5) confirm that he first examined Claimant on March 25, 2010. His record contains a history of her fall at work on January 29, 2010. He notes that despite aspiration and injections performed by Dr. Mosley, her knee pain and swelling returned. He diagnosed her with a torn lateral meniscus, but also noted that her fall at work aggravated her arthritis and her knee was starting to break down. He recommended arthroscopic debridement of her knee.

- 6) Claimant confirmed that she first reported the work injury to Employer near the end of March 2010. She noted that by the time she reported it, she was already scheduled for surgery. She testified that she reported it at that time because she was asking about FMLA for the period of time she was going to be off work for the upcoming knee surgery and the fact that she injured the knee at work earlier in a fall on ice came up in the discussions. Claimant agreed that there was a meeting at that time with her and Mr. Barlow, the account director for Employer. Mr. Barlow asked her to cancel the knee surgery that had already been scheduled, but she refused and said she would simply go to her own doctor for treatment.
- 7) The **Incident Report** (Exhibit H-8), which Claimant signed and dated on March 31, 2010, indicated that she was injured on January 29, 2010, when she slipped and fell on black ice between North and South Brookings Halls. She hurt her right knee. The report confirms that Claimant first reported this accident to her supervisor on March 31, 2010.
- 8) Medical treatment records from **SSM St. Clare Surgical Center** (Exhibit C-3) document the right knee surgery Claimant had performed by Dr. Clayton Perry on April 8, 2010. Dr. Perry performed a partial medial and lateral meniscectomy and chondroplasty of the lateral compartment and patellofemoral joint, to treat Claimant's degenerative tears of the medial and lateral menisci and chondromalacia of the lateral compartment and patellofemoral compartment.
- 9) Claimant continued to follow up with Dr. Perry (Exhibit E-5) after surgery. She was sent for physical therapy and was supposed to return to work in early May 2010, but given her continued complaints of stiffness and pain in the right knee with extended weight bearing, her return to work was delayed. By May 26, 2010, Dr. Perry noted that she was walking without a limp, but was still in quite a bit of pain. He provided medication, gave her a cortisone injection and commented that she may be headed toward a knee replacement, if this doesn't help her complaints. He did release her to return to work without restrictions at that time.
- 10) Claimant testified that she returned to work for Employer in June 2010. She said she was working in a knee brace, but she was still in a lot of pain. She said that working was difficult but she did it. She also continued to see Dr. Mosley and Dr. Perry for additional symptomatic treatment for her knee, including medications and injections.
- 11) Eventually, on August 31, 2011, Claimant testified that she had the right total knee replacement. She said that her last day of work prior to the knee replacement was August 24, 2011. However, she did return following her recovery from the knee replacement surgery and she is still working for Employer at the current time.
- 12) During cross-examination at hearing, Claimant admitted that she had been injured before on the job. She said that she fell in 2005 and she reported it and received medical treatment. She admitted that she knew the policy was to report an injury immediately to a supervisor. This policy was confirmed by the **Incident Reporting & Transitional Work Procedure acknowledgement form** (Exhibit F-6) which

- Claimant had signed on April 28, 2006. She admitted that it was further confirmed in the employee handbook from Employer. Claimant admitted that she signed the **Acknowledgement of Receipt** (Exhibit G-7) of the updated employee handbook on January 28, 2010.
- 13) Finally, Claimant admitted that she was disciplined for not immediately reporting the accident that is the subject of this case. In the **Notification of Unsatisfactory Performance** (Exhibit I-9) that Claimant and her supervisor signed on April 1, 2010, Employer and Claimant confirmed that the injury that occurred on January 29, 2010 was first reported on March 31, 2010. They further confirmed that the failure to report the accident immediately was a violation of Employer's conduct guidelines, which resulted in the written warning that she received.
- 14) **Desire' Dent** (nee Callahan) testified on behalf of Employer at the time of the hearing. Ms. Dent has worked for Employer for over eight years as the Human Resources Office Manager. In this position, she is in charge of payroll, keeping employment records, and handling workers' compensation injuries and unemployment claims. She is located at Washington University in St. Louis. Ms. Dent confirmed that she knows Claimant, based on Claimant's work as a custodian for Employer at Washington University.
- 15) Ms. Dent testified that Employer's contract for providing services at Washington University requires them to report any injuries or accidents to Ms. Jan Schade, the contract administrator for the university, when they occur. She explained that Employer is not responsible for maintaining the grounds, another company does that, and the university wants to know when an accident occurs, so that the other company can be contacted to rectify the situation that caused the accident and then hopefully prevent others from getting injured too. She explained that they must report accidents immediately for the safety of all on the campus. She also asserted that the immediate report of an accident allows an investigation to occur.
- 16) Ms. Dent asserted that their failure to timely report an accident like this, is a breach of their contract with the university. She explained that the penalty for a breach of contract could be loss of the contract that Employer currently has with the university. However, in this case, Ms. Dent acknowledged that although the university was upset because of the lack of notice of the injury, there was no action taken by the university that she knew of, regarding the contract and no penalties were levied by the university on account of the supposed breach for failure to timely report the accident.
- 17) Finally, Ms. Dent testified that every week they have a safety meeting to cover injuries that have occurred and to make sure that anything that can be done to correct the situation and prevent another such injury from occurring is done. She said that in this case, because of Claimant's late report of the injury, they were not able to effectively cover it in a safety meeting and to try to prevent others from sustaining similar such accidents.

18) Ms. Dent believed that if Claimant had timely reported the injury, Employer may have had reduced medical costs in this matter. However, medical costs are not at issue, since Claimant has not requested any past or future medical bills as a part of this case.

RULINGS OF LAW:

Based on a comprehensive review of the evidence, including Claimant's testimony, the medical records, the other records and documents, and the testimony of the other witness, as well as based on my personal observations of Claimant and the other witness at hearing, and based on the applicable laws of the State of Missouri, I find the following:

I find that there is no dispute in this case, and the evidence clearly shows, that Claimant sustained an accident, arising out of and in the course of her employment for Employer on January 29, 2010, which resulted in an injury to her right knee. I find that she was working as a custodian for Employer, when she slipped and fell on black ice, injuring the right knee. I find that Claimant sustained tears of the medial and lateral menisci and chondromalacia of the lateral compartment and patellofemoral compartment in the right knee, which were surgically treated. I find that her right knee injury and medical treatment was medically causally connected to her accident at work on January 29, 2010. I further find, based on the stipulation of the parties, that Claimant sustained 20% permanent partial disability of the right knee related to this accident at work on January 29, 2010, and that she was off work for a period of time of 7 6/7 weeks from April 8, 2010 through June 2, 2010 while she recovered from her medical treatment for this accident.

The sole issue for determination in this matter is whether Claimant's failure to timely give notice of the injury to Employer results in her inability to claim entitlement to the temporary total disability and permanent partial disability benefits that the parties stipulate she would have otherwise received, if timely notice had been given. In other words, if Employer's notice defense is successful, then Claimant receives nothing on account of this accidental injury at work, but if Employer's notice defense is not successful, then Claimant receives the temporary total disability and permanent partial disability benefits enumerated above.

Issue 1: Did Claimant provide Employer with proper notice of the injury under the statute?

Considering the date of the injury, it is important to note that the new statutory provisions are in effect, including **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court "shall construe the provisions of this chapter strictly" and that "the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts." Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, "In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true."

Under **Mo. Rev. Stat. § 287.420 (2005)**, “No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.”

Case law has held that the purpose of this section is to give an employer the timely opportunity to investigate the facts surrounding an accident, and if the accident occurred, the chance to provide the employee with medical treatment in order to minimize the disability. *Willis v. Jewish Hospital*, 854 S.W.2d 82 (Mo. App. E.D. 1993) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). However, if the employee failed to give timely written notice of the injury, that failure may be circumvented if the failure to give timely written notice did not prejudice the employer.¹

Courts have held that the most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. If employer does not admit actual knowledge, then it is up to the employee to produce substantial evidence that the employer had actual knowledge. If employee produces such evidence, the employee has made his prima facie showing of the absence of prejudice and the burden shifts to employer to now show that employer, was, in fact, prejudiced. However, if the employee does not show written notice or actual knowledge, then the burden rests on the employee to supply evidence that no prejudice to the employer resulted. If no such evidence is provided, then it is presumed that employer was prejudiced by the lack of notice, because it was not able to make a timely investigation. *Soos v. Mallinckrodt Chemical Co.*, 19 S.W.3d 683 (Mo. App. E.D. 2000) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

I find that there is absolutely no dispute in the evidence that Claimant did not timely provide written notice of her accident and injury to Employer under the provisions of Section 287.420. Claimant signed statements that are in evidence and also readily admitted at trial that she was injured on January 29, 2010 and first reported the injury in writing to Employer on March 31, 2010. I find that Claimant was well past the 30-day notice requirement under the statute at the time that she notified Employer in writing about her accident.

Since Claimant did not provide timely written notice of her accident to Employer, the inquiry then shifts to whether that failure can be circumvented or excused by showing that the failure to give timely written notice did not prejudice Employer. In that respect, I find that Employer has not admitted having any actual knowledge of the accident at the time it occurred. I further find that Claimant has not produced any competent, credible or substantial evidence that Employer had actual knowledge of the January 29, 2010 accident either. I find that Claimant

¹ Prior to the 2005 amendments to the Workers' Compensation Statute, in addition to employer not being prejudiced by the lack of such notice, Section 287.420 also allowed for the failure to give timely written notice to be excused if the employee made a showing of good cause for the failure to give such notice. The cases dealing with the issue of notice all dealt with both whether there was good cause for the lack of timely notice and whether employer was not prejudiced by that lack of notice. However, the good cause provision was removed from Section 287.420. Therefore, the failure to give timely written notice can now only be excused if that failure did not prejudice employer.

never verbally notified Employer of any such accident on January 29, 2010, despite missing time from work and seeking medical treatment on her own for her knee condition, until such time as she knew she would miss a significant period of work for her knee surgery.

Even though Claimant testified that she did not immediately report the accident because she did not think she was actually injured at first, Claimant admitted that she knew within ten days after the fall that something was wrong with her knee since it was painful and swelling. Had she simply reported the accident at that point to Employer, she would have still been well within the 30-day statutory period and there would effectively be no notice defense in this matter. However, Claimant admittedly still did not provide notice to Employer at that point out of fear that she would get in trouble for not following Employer's policy that all injuries must be immediately reported. Therefore, she continued treating the knee on her own, with no notice to Employer that an accident had previously occurred.

Claimant also suggests that she may have told a Vice Chancellor of Admissions at Washington University about her fall, but it is clear to me that Claimant does not work directly for Washington University and no Vice Chancellor of Admissions would be considered one of Claimant's supervisors or any kind of agent for Employer.

Based on the evidence in the record, including the Incident Reporting & Transitional Work Procedure form, as well as the Acknowledgement of Receipt of the employee handbook, both of which were signed by Claimant, I find that Claimant was well aware of the proper procedure she should have followed with regard to reporting this accident to Employer. I further find that Claimant failed to follow this procedure and then failed to timely report the injury within the 30-day statutory period, out of a concern that she would be in trouble for not having followed Employer's policy in the first place. By the time she finally had to report it, because she was about to miss a significant period of time from work for her knee surgery, she was already well beyond the 30-day statutory notice period.

Since Claimant did not provide timely written notice and did not produce substantial evidence to prove Employer had actual knowledge of the accident at the time it occurred, the burden rests on Claimant to supply evidence that no prejudice to the employer resulted by the failure to provide notice. Claimant could prove the lack of prejudice if she could show that Employer knew she was injured and knew that the injury was work related. However, Claimant did not provide any such proof in this case. While I believe, based on Claimant missing time from work and seeking treatment with a doctor for her knee, that Employer may have known she was injured, I find no credible evidence in the record to support the contention that Employer knew, or should have known, that her injury was work related.

As such, I find that Employer had absolutely no opportunity to timely investigate or to provide timely medical treatment to minimize the disability that Claimant might otherwise have on account of this accident. I find Ms. Dent credible when she testified that Employer investigates accidents and makes them the subject of work safety meetings that they regularly hold. Employer was denied any such opportunity to do that in this case by the failure to timely receive notice of the injury. I further find it reasonable that Washington University would want timely notice of injuries to protect the safety of everyone on the campus and I can understand how that provision of Employer's contract with the university would technically be breached by

Employer's employees not timely providing notice, thereby leaving Employer to also provide late notice to the university.

Therefore, with no timely written notice and no actual knowledge of the accident on January 29, 2010, and based on Employer's inability to timely investigate, inability to control medical treatment to lessen Claimant's disability in this matter, and inability to meet the terms of its contract with the university, by virtue of having no timely notice from Claimant that an accident occurred, I find that Claimant has not produced any competent or substantial evidence to show that Employer was not prejudiced by the failure to receive timely notice of the accident.

Accordingly, I find that Claimant's Claim for Compensation for this accident cannot be maintained since Employer was never provided with proper notice of the accident as called for in Section 287.420. Claimant's claim for temporary total disability and permanent partial disability benefits is denied.

CONCLUSION:

Claimant sustained an accident, arising out of and in the course of her employment for Employer on January 29, 2010, which resulted in an injury to her right knee. She was working as a custodian for Employer, when she slipped and fell on black ice, injuring the right knee. Claimant sustained tears of the medial and lateral menisci and chondromalacia of the lateral compartment and patellofemoral compartment in the right knee, which were surgically treated. Her right knee injury and medical treatment was medically causally connected to her accident at work on January 29, 2010. Based on the stipulation of the parties, Claimant sustained 20% permanent partial disability of the right knee related to this accident at work on January 29, 2010, and she was off work for a period of time of 7 6/7 weeks from April 8, 2010 through June 2, 2010 while she recovered from her medical treatment for this accident.

However, Employer is not responsible for the payment of any temporary total disability or permanent partial disability benefits in this matter, nor any other benefits for that matter, because Claimant failed to give Employer proper, timely notice of the accident as required by Section 287.420. Accordingly, Claimant's claim for temporary total disability and permanent partial disability benefits is denied.

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation