

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

Injury No.: 07-129936

Employee: Richard A. Fuller
Employer: Kone, Inc.
Insurer: Ace American Insurance Co.

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. 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 28, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert B. Miner, issued April 28, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 18th day of December 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Richard A. Fuller

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 reversed.

Section 287.420 RSMo states as follows:

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. . . .

It is important to remember that, in this case, employee proved and employer did not dispute that employee suffered a serious injury and disability as the result of a work-related accident. He continues to work, but suffers from on-going weakness, fatigue, and occasional cramping due to his torn left bicep tendon. Nonetheless, the administrative law judge denied all benefits to employee based solely on his failure to report his October 9, 2007, injury in accordance with the above-cited statute.

Employee was unsophisticated and uninformed (in large part due to employer's failure to properly notify him -- as it was required to under section 287.127.1 RSMo -- of the requirement to give notice within 30 days) about the necessities connected with filing a Workers' Compensation claim. Employee testified credibly that, although he knew he had injured his arm, he believed that it would heal in the course of time. He was still able to continue working and did so. Employee had an old-fashioned and commendable work ethic. He was used to minor injuries and bruising. The discoloration and swelling associated with his injury dissipated after about a week, and employee believed that the other symptoms would also get better over time.

Employee never sought medical attention for his injury. Instead, he mentioned it to his doctor in connection with a routine physical on February 14, 2008. Upon the advice of personnel at his doctor's office, he immediately contacted his supervisor, who directed him towards employer-approved medical treatment, the total cost of which was only \$2,863.43. Employee did not even pursue surgery, although it was an option, because of the uncertainty of the outcome and the desire not to miss work.

Under these circumstances, I am persuaded that the administrative law judge applied the provisions of section 287.420 in an unduly draconian fashion. The statute provides an exception from the 30-day notice requirement in the case of an employer that is not prejudiced by the failure to strictly adhere to the notice provisions.

The purpose of giving an employer notice of a potentially work-related accident is to allow the employer the opportunity to timely investigate the accident and to minimize any resulting disability from the accident by providing medical attention. *Soos v.*

Employee: Richard A. Fuller

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Mallinckrodt Chemical Co., 19 S.W.3d 683, 686 (Mo. App. E.D. 2000) (overturned on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)).

As indicated above, employer did not dispute the fact of employee's October 9, 2007, work injury. The co-worker who was present when employee injured his arm was still working for employer and available for questioning when employee reported his injury. Thus, its investigation was in no way impaired or prejudiced.

Furthermore, employee had not incurred any medical expenses connected to this injury prior to the date he reported the accident to employer. Once reported, employer had full control over the doctors used and the expenses incurred. Thus, employee's delay in no way prejudiced employer's choice of medical treatments.

Finally, employer argued and the administrative law judge held that employer was prejudiced because the delay prevented it from minimizing employee's resulting disability from the accident. The administrative law judge in large part relied on the following single statement set out in Dr. James A. Stuckmeyer's written statement: "Unfortunately, this injury was not attended to immediately"

This statement is ambiguous at best. The best medical evidence indicates that surgical treatment remained an option regardless of any delay in reporting. And nearly two more months expired from the time employee reported the accident to the time he was referred to an orthopedic surgeon (Dr. Parmar). Dr. Parmar ordered physical therapy for employee. Employee participated in ten physical therapy sessions and then returned to Dr. Parmar for a follow-up visit in August 2008. Again, Dr. Parmar offered employee the option of surgery, which he declined. Accordingly, none of the medical records show any indication that employee's initial delay affected his ultimate physical progress. At most, during the time employee delayed, he was simply not improving.

I have given the ambiguous comment from Dr. Stuckmeyer little if any weight. He did not evaluate employee and issue his statement until October 2008, another six months after Dr. Parmar first saw employee.

Consequently, employee has shown that his delay in formally reporting his accident to employer in no way caused it any prejudice. Therefore, the decision of the administrative law judge, affirmed by the Commission majority, wrongly denied employee's claim for compensation. Accordingly, I would reverse the decision of the administrative law judge and award compensation. Thus, I must respectfully dissent from the decision of the Commission majority to deny compensation.

John J. Hickey, Member

AWARD

Employee: Richard A. Fuller

Injury No.: 07-129936

Employer: Kone, Inc.

Insurer: Ace American Insurance Co.

Hearing Date: February 10, 2009

Checked by: RBM

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: October 9, 2007.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? No.
8. Did accident or occupational disease arise out of and in the course of the employment? 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: Employee was moving an elevator motor that crushed his left arm between the motor and an elevator shaft.
12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Left upper extremity.
14. Nature and extent of any permanent disability: Not determined.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$2,863.43.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$1,375.85.
19. Weekly compensation rate: \$742.72 for temporary total disability and \$389.04 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

No weeks of temporary total disability (or temporary partial disability).

No weeks of permanent partial disability from Employer.

No weeks of disfigurement from Employer.

TOTAL FROM EMPLOYER: None.

22. Second Injury Fund liability: Not applicable. The Second Injury Fund is not a party in this case.

TOTAL: None.

23. Future requirements awarded: None.

Employee's claim is denied.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard A. Fuller

Injury No.: 07-129936

Employer: Kone, Inc.

Insurer: Ace American Insurance Co.

Hearing Date: February 10, 2009

Checked by: RBM

PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer on February 10, 2009 in Gladstone, Missouri. Employee, Richard A. Fuller, ("Claimant") appeared in person and by his attorney, Wilson R. Stafford. Employer, Kone, Inc., ("Employer") and Insurer, Ace American Insurance Co. ("Insurer") appeared by their attorney, Michelle D. Haskins. The Second Injury Fund is not a party to this case. Wilson R. Stafford requested an attorney's fee of 25% from all amounts awarded.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about October 9, 2007, Richard A. Fuller ("Claimant") was an employee of Kone, Inc. ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about October 9, 2007, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was insured by Ace American Insurance Co. ("Insurer").
3. On or about October 9, 2007, Claimant sustained an injury by accident or occupational disease in Kansas City, Clay County, Missouri, arising out of and in the course of his employment.
4. Claimant's Claim for Compensation was filed within the time allowed by law.
5. The rate of compensation for temporary total disability is \$742.72 per week and the rate of compensation for permanent partial disability is \$389.04 per week.
6. No compensation has been paid by Employer for temporary disability.

7. Employer/Insurer has paid \$2,863.43 in medical aid.

ISSUES

The parties agreed that there are disputes on the following issues:

1. Did Claimant provide notice of his injury as required by law?
2. What is Employer's liability, if any, for permanent partial disability benefits?
3. What is Employer's liability, if any, for disfigurement?

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

- A—Medical report of Dr. James Stuckmeyer dated October 27, 2008.
- B—Curriculum Vitae of Dr. James Stuckmeyer.

Employer offered the following Exhibits which were admitted without objection:

- 1—Medical records of Sunflower Medical Group.
- 2—Medical records of Concentra Medical Centers.
- 3—Medical records of State Line Imaging MRI.
- 5—Claim notes of Gail Guthrie.
- 6—ESIS Injury Report for Workers' Compensation.
- 7—Curriculum Vitae of Dr. Prem Parmar.

Employer also offered Exhibit 4, medical reports of Dr. Prem Parmar, which was admitted over the objection of Claimant's counsel.

The parties' Briefs were received on March 9, 2009.

Findings of Fact

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant, the expert medical opinions, the medical records, the exhibits admitted in evidence, the stipulations of the parties, and my personal observations of Claimant at the hearing, I find:

Claimant testified he was born on July 6, 1971. He started working for Employer in April 2007. He was hired by his supervisor, Neal Rasmussen.

On October 9, 2007, Claimant was hoisting a motor for Employer in an elevator shaft in a school with a helper, David Holler. Claimant was on top of the elevator cab trying to move a motor that weighed about 800 pounds using a hoist system with a tagline. While he was trying to position the motor, the motor got away from them and crushed Claimant's left arm between the motor and the back of the elevator shaft. He needed his co-worker's help to move it. He felt some pain right after that happened. He stopped work for a few minutes after the incident.

Claimant did not think that he had a serious injury at the time. He thought he had just bruised his arm. His arm was injured in the bicep area. His arm was a little bruised but the skin was not broken. He was able to move his arm after the incident. He continued to work for Employer the rest of that day. He did not seek any immediate medical attention.

Claimant noticed bruising the evening of the accident and put ice on his arm. He also noticed some swelling and discoloration. Claimant testified as time went on after the incident, his left arm did not feel the same or look the same. He also found his left arm was noticeably weaker than his right, and he had a lot of fatigue in the left arm.

It was common for Claimant to do heavy lifting in his job. It was a little more difficult for him to do his work with the weakness and fatigue in his left arm. Claimant said he did not discuss the accident with Mr. Rasmussen after it happened.

Claimant saw a healthcare provider, a nurse practitioner with Sunflower Medical Group, for a general checkup on February 14, 2008. At the end of the checkup, Claimant asked the nurse practitioner what she thought about his left arm. She got the doctor. Claimant described his accident, and the doctor's office told Claimant to contact his Employer.

Claimant called Mr. Rasmussen that same day to let them know what had happened. The first time he reported his accident to Employer was on February 14, 2008 when he called Mr. Rasmussen.

Mr. Rasmussen sent Claimant to Concentra where he was given a drug test and an evaluation by a doctor. The doctor was not a specialist. Later, Claimant saw a specialist, Dr. Prem Parmar, an orthopedic surgeon. Dr. Parmar ordered an MRI. Dr. Parmar noticed a deformity and decreased strength and fatigue. Claimant said Dr. Parmar told him he had a partial tear of his bicep tendon. Claimant discussed possible surgery or physical therapy with Dr. Parmar. Dr. Parmar told him there was no guarantee that he could repair his arm with surgery, and it could be worse after surgery. Claimant chose to have physical therapy. The physical therapy was done at Concentra, and was provided

by Employer/Insurer. Dr. Parmar also discussed possible surgery at the conclusion of physical therapy. Claimant testified Dr. Parmar told him he would be off work a minimum of three months if he had surgery. Claimant has not had surgery.

Claimant gave a recorded statement to an adjuster, Gail. Gail also took a statement from Mr. Holler.

Claimant described his present symptoms. He said he has weakness and fatigue in his left arm. He is able to do his job proficiently. He gets a little help when he needs it on certain heavy tasks. He has occasional cramping and loss of strength. On some days, at the weakest point, his strength is half of what it was because of fatigue. He continues to do the same type of work as he did for Employer, although with a different employer.

Claimant testified his supervisor was generally in Employer's office and was rarely in the field. Claimant testified he was rarely in Employer's office. Claimant testified he never received a notice from Employer that he should provide written notice of an accident within thirty days.

Claimant worked for Employer from April 2007 to April 2008. He was off work for three weeks after that, and then went to work for his current employer. He left Employer because he was laid off due to lack of work.

Claimant did not miss any time from work after the accident. Claimant testified that he was not asking for any future medical aid or any past or future temporary total disability benefits.

The first time Claimant put anything in writing about what happened was when he completed forms sent to him by Gail, the adjuster, in Exhibit 6.

Claimant testified he was working full time, seven days per week, twelve to sixteen hours per day at the time of the hearing. The work he was doing at the time of the hearing was similar to the work he was doing at that time of the accident. He works constructing elevators. He does not have any restrictions. He is not taking prescription medication for his injury. He has full range of motion and full use of his left arm.

The Court finds that Claimant was a credible witness.

The parties stipulated that on or about October 9, 2007, Claimant sustained an injury by accident or occupational disease in Kansas City, Clay County, Missouri, arising out of and in the course of his employment.

The Court viewed Claimant's left upper extremity and right upper extremity. The Court notes that Claimant's left upper extremity in the biceps area is approximately two to three inches less in diameter than the right upper extremity. Claimant is right handed. No noticeable scar or discoloration or lump was observed on Claimant's left upper extremity. The Court notes that in the event Claimant's claim is found compensable, two weeks of disfigurement should be assessed.

Exhibit 1 is a medical report of Sunflower Medical Group dated February 14, 2008 pertaining to Claimant. Portions of page 1 of the Exhibit were redacted at the time they were offered in evidence. The Court did not redact any portion of Exhibit 1 and did not mark on any exhibit.

Exhibit 1 notes Claimant had left arm pain. It notes that four months ago, a large object fell on his left arm at work. A left biceps tendon tear was noted. The Plan was "MRI left arm then to ortho."

Exhibit 2 contains records of Concentra Medical Centers pertaining to Claimant. The records document Claimant's treatment on February 18, 2008 by Dr. Stuart Kagan. Claimant presented that day and complained that his left arm was injured on October 9, 2007 hoisting an elevator motor when his upper arm got pinned by the motor they were hoisting. The history of present illness notes that Claimant had immediate decrease of strength in the arm but thought it would get better with time. The history notes that Claimant has no real pain and has been working the whole time, but his strength has not returned. The assessment was contusion of upper arm and biceps tendon rupture. Claimant was referred for an MRI. He was noted to return to regular duty on February 18, 2008.

Exhibit 3 is an MRI of the left arm dated March 13, 2008. The Impression notes apparent myotendinous injury to the distal biceps tendon above the level of the humeral condyle. The Impression also notes no soft tissue mass and the biceps muscle bulk remained intact without atrophy.

Claimant returned to Dr. Kagan on March 18, 2008. The assessment was contusion of upper arm. Activity status was noted as regular activity. The record notes that Claimant had been laid off the past two weeks. Exhibit 2 also includes records of ten physical therapy treatments that Claimant received from April 22, 2008 through July 1, 2008. Some May 2008 entries in the physical therapy records note Claimant's condition was progressing slowly.

Exhibit 4 includes Dr. Prem Parmar's April 14, 2008 report pertaining to Claimant. Exhibit 7 is Dr. Parmar's Curriculum Vitae. It notes that his practice is with Sports Medicine and Arthroscopy, Kansas City Sports Medicine, Lenexa, Kansas. He is

a Diplomate of American Board of Orthopedic Surgery. Dr. Parmar's April 14, 2008 report notes he examined Claimant that day. He noted obvious asymmetry to muscle bulk on the left compared to the right. He noted on palpation of his biceps tendon on the left compared to the right, there was a definite abnormality. His report states in part, "My impression is that patient has a partial biceps tendon injury probably close to 50% if not more." Dr. Parmar recommended physical therapy. His report concludes, "If he is better, great. If he feels that he is still having a problem, he may want to have something surgically done but he is aware of the procedure risks and alternatives and complications but would like to have something done more at the slow time during work rather than at present."

Exhibit 2 also includes notes of Dr. Parmar. Dr. Parmar saw Claimant on May 19, 2008. Claimant was doing somewhat better. Claimant had noticed some weakness but thought he was getting stronger. He reported he still got some occasional discomfort and cramping in his left biceps. The report of that date notes that "biceps and triceps strength are essentially normal on the right, maybe a little bit decreased on flexion of the biceps on the left compared to the right." The plan was for Claimant to continue physical therapy. He was on no work restriction at that point.

Dr. Parmar's Progress Report dated July 7, 2008 notes that therapy had helped decrease Claimant's pain and cramping, but Claimant still had some issue with that. Claimant still felt weaker on the left. Dr. Parmar's Impression was that Claimant was probably as good as he was going to get without an operation. He noted that Claimant was not to the point where he wanted to have anything done at present as he had been working and was actually able to do everything he needed to. He noted he believed Claimant was going to continue on non-operative treatment and that was probably the way it was going to stay. Dr. Parmar's Physician Activity Status Report dated July 7, 2008 contained in Exhibit 2 notes Claimant was released from care and "return to regular duty on 07/07/2008." The report also notes, "Patient at MMI, ready for a rating."

Exhibit 4 is a report from Dr. Prem Parmar dated August 6, 2008 pertaining to Claimant. It notes that Claimant did not wish to pursue any operative treatment. The report further states:

According to the American Medical Association Guides to the Evaluation of Permanent Impairment, his rating for his biceps tendon injury resulting in weakness is calculated as follows.

Musculocutaneous nerve maximum 25% value times 30% motor weakness of the biceps which is equivalent to a 7.5% upper extremity impairment which is rounded to an 8% upper extremity impairment. This is equivalent to a 5% whole person rating. Therefore, if I am correct in performing this patient's rating, he would obtain a 5%

whole person impairment or an 8% upper extremity impairment for his work related distal biceps tendon injury.

Exhibit 5 includes claim notes of adjuster, Gail Guthrie pertaining to Claimant. On February 22, 2008 she took Claimant's statement. Claimant remembered the injury being on October 8 or October 9, 2007. The description of the accident in the statement was consistent with Claimant's trial testimony. The Adjuster Comments note in part that Claimant stated that he did not report right away because he had worked through bruises before and did not think he had a serious injury. The Comments note that after about a week, swelling and discoloration went away but his arm still felt funny. The Comments note that Claimant was seen by his practitioner on February 14, 2008 and Claimant asked the practitioner to look at his arm as it still was not right. The practitioner brought in the other doctor who stated that Claimant had possible tendon and muscle damage. The Comments also state that Claimant did not report right away because he was used to getting bumps and bruises and really did not feel this was anything serious – he thought it would return to normal in time, but it did not. The Adjuster Comments also include comments of Ms. Guthrie's conversation with David Holler about the incident. Mr. Holler worked with Claimant. The Comments were consistent with Claimant's testimony about how the accident occurred.

Exhibit 6 is an Injury Report for Worker's Compensation of Claimant that is dated February 28, 2008. It notes a Date of Injury: "10-8, or 9-07" and "Time: 8:00 a.m." It describes what happened as, "Motor crushed my L/Biciept." (sic). The form states in response to the question, "What are your symptoms and injuries (list all body parts involved)", the handwritten response: "L/Bi-cept weak arm small bi cept loss of strength, cramping." The Report form is on a document that has a caption "ESIS An Insurance Services Company." It bears Claimant's signature. An Authorization Form signed by Claimant and dated February 29, 2008 is also included in Exhibit 6. A letter from Gail Guthrie to Claimant dated February 22, 2008 is also a part of Exhibit 6. It states in part: "Thank you for taking the time today to discuss your claim."

Exhibit A is the medical report of Dr. James Stuckmeyer dated October 27, 2008 pertaining to Claimant. Dr. Stuckmeyer's Curriculum Vitae notes that he was Board Certified by the American Board of Orthopedic Surgeons in 1989. Dr. Stuckmeyer performed an evaluation of Claimant at the request of Claimant's attorney on October 23, 2008. He reviewed medical records of Kansas City Sports Medicine, Dr. Prem Parmar, Concentra, and Stateline MRI. Dr. Stuckmeyer's report sets forth the injury, Claimant's initial complaints, Claimant's current complaints and condition, and results of physical examination. He notes that at the time of the evaluation, Claimant stated he had persistent symptoms of left biceps pain. Dr. Stuckmeyer notes that Claimant had an obvious left upper extremity Popeye deformity, and described weakness with lifting, cramping and easy fatigueability. Dr. Stuckmeyer performed a physical examination of

Claimant's left upper extremity and notes in his report that Claimant has "tenderness at the myotendinous juncture" and "marked weakness with biceps function as compared to the contralateral side."

Dr. Stuckmeyer concluded within a reasonable degree of medical certainty that as a direct, proximate and prevailing factor of the accident which occurred on October 9, 2007 while Claimant was employed with Employer, he "sustained a significant crush injury to his left upper extremity resulting in a biceps tendon disruption at the myotendinous junction." Dr. Stuckmeyer further stated:

Unfortunately, this injury was not attended to immediately, and I do not feel that surgical reconstruction would benefit Mr. Fuller due to the obvious atrophy, retraction of the muscle, and the likelihood that surgery would leave the patient with a flexion deformity at the elbow. The patient has been left with an obvious Popeye deformity, weakness with biceps function, and a persistent tenderness and cramping. I believe he has achieved maximum medical improvement.

Dr. Stuckmeyer further stated: "I would assess a 30% permanent partial disability to the left shoulder as a direct and proximate result of the accident date in discussion." He noted his opinions had been expressed within a reasonable degree of medical certainty.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant, the expert medical opinions, the medical records, the exhibits admitted in evidence, the stipulations of the parties, and my personal observations of Claimant at the hearing, and based on the application of the Workers' Compensation Law, I make the following rulings of law.

1. Did Claimant provide notice of his injury as required by law?

Section 287.800, RSMo¹ provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

¹ All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). See also *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

The Court in *Allcorn v. Tap Enterprises, Inc.*, --- S.W.3d ----, 2009 WL 482355 (Mo.App. 2009) states at 2:

[A] strict construction of a statute presumes nothing that is not expressed.” 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008). The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. 82 C.J.S. *Statutes* § 376 (1999). Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008). The clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions. 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008).

The *Allcorn* Court continues at 4: “Where strict construction is required, the court should not enlarge or extend the law, and only the clear, plain, obvious, or natural import of the language should be used. 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008).”

Section 287.808, RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. 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.

Section 287.020.2, RSMo provides:

The word ‘accident’ as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.190.6(2), RSMo provides in part that permanent partial disability shall be demonstrated and certified by a physician.

Section 287.420, RSMo provides:

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. No proceedings for compensation for any occupational disease or repetitive trauma 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 diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

Before the enactment of the 2005 Amendments to the Workers' Compensation Law, Section 287.420, RSMo provided:

No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and name and address of the person injured, have been given as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds the employer was in fact misled and prejudiced thereby.

Section 287.420, RSMo in effect on the date of Claimant's injury does not have a "good cause" excuse for failing to provide notice as the earlier version of the statute does. An employee's failure to comply with the notice provision of the new law will not be excused even if he had good cause for failing to do so.

The Court in *Seyley v. Spirtas Indus.*, 974 S.W.2d 536 (Mo.App. 1998), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. 2003), states at 538:

If the claimant has not provided employer written notice within thirty days of the accident, the claimant bears the burden of demonstrating

that the employer was not prejudiced by the claimant's failure to provide notice. *Willis v. Jewish Hospital*, 854 S.W.2d 82, 85 (Mo.App.1993).

See also Soos v. Mallinckrodt Chemical Co., 19 S.W.3d 683, 686 (Mo.App. 2000), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498, 504 (Mo.App.1968).

The *Seyler* Court continues at 538:

The purpose underlying the notice requirement is twofold. First, the notice requirement is designed to ensure that the employer will be able to conduct an accurate and thorough investigation of the facts surrounding the injury. *Id.* The second purpose of the notice requirement is to ensure that the employer has the opportunity to minimize the employee's injury by providing prompt medical treatment. *Id.* Thus, in cases where the employer does not have actual notice of the accident, courts have examined whether the claimant has proffered evidence on both the employer's ability to investigate the accident and the minimization of the employee's injury in determining whether the employer was prejudiced by the claimant's failure to provide written notice. *See Id.; Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498, 504-05 (Mo.App.1968).

See also Willis v. Jewish Hosp., 854 S.W.2d 82, 84 (Mo.App. 1993), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229.

The *Seyler* Court continues at 539:

The only evidence produced below relating to the minimization of claimant's injuries suggests that claimant's injuries became progressively more severe after the accident. Based on this record, we find that claimant failed to demonstrate that his failure to provide written notice did not hinder employer's ability to minimize his injury by providing medical treatment. *See Klopstein*, 425 S.W.2d at 505.

The parties stipulated that on or about October 9, 2007, Claimant sustained an injury by accident or occupational disease in Kansas City, Clay County, Missouri, arising out of and in the course of his employment. I find that on October 9, 2007, Claimant sustained an injury to his left upper extremity in the bicep area, by accident, arising out of and in the course of his employment for Employer. I find that Claimant knew he sustained an injury to his left upper extremity in the bicep area at the time of the accident.

Claimant felt some pain in the left arm at the time of the accident, and he noticed bruising soon afterwards. As time went on after the accident, Claimant's left arm did not feel the same or look the same, his left arm was noticeably weaker than his right, and he had a lot of fatigue in the left arm.

I find that Claimant did not give any notice of his October 9, 2007 injury to Employer until February 14, 2008 when he called Mr. Rasmussen. I find that he did not provide any notice of his injury to Insurer until he provided a telephone statement to Gail Guthrie on February 22, 2008, and that he did not provide a written notice to Insurer until he sent his Injury Report dated February 28, 2008 to Insurer. I find that Claimant did not comply with Section 287.420, RSMo, and that he did not provide the required notice of his accidental injury to Employer or Insurer until more than thirty days after the accident.

Claimant asserts in his Brief that Employer did not advise Claimant before the accident that he "must report all injuries immediately to the employer" or risk jeopardizing his ability to receive workers' compensation benefits. He asserts given the off-premises nature of Claimant's work, Section 287.127, RSMo mandates personal written notification of the contents of the "posted notice."

287.127. 1, RSMo provides in part:

Beginning January 1, 1993, all employers shall post a notice at their place of employment, in a sufficient number of places on the premises to assure that such notice will reasonably be seen by all employees. An employer for whom services are performed by individuals who may not reasonably be expected to see a posted notice shall notify each such employee in writing of the contents of such notice. The notice shall include:

(2) That employees must report all injuries immediately to the employer by advising the employer personally, the employer's designated individual or the employee's immediate boss, supervisor or foreman and that the employee may lose the right to receive compensation if the injury or illness is not reported within thirty days or in the case of occupational illness or disease, within thirty days of the time he or she is reasonably aware of work relatedness of the injury or illness; employees who fail to notify their employer within thirty days may jeopardize their ability to receive compensation, and any other benefits under this chapter.

I find that Claimant did not prove that Employer did not post the required notice at its place of business, and did not prove that he may not reasonably be expected to see a posted notice. Claimant testified he was rarely in Employer's office. But he was there. Further, as noted before, Section 287.420, RSMo in effect on the date of Claimant's injury does not have a "good cause" excuse for failing to provide notice.

Claimant has the burden to prove that his delay in providing notice of his injury did not prejudice Employer. I find that Claimant failed to meet his burden. I find the record does not convincingly establish that the delay in notice to Employer did not hinder Employer's ability to minimize his injury by providing medical treatment.

The evidence does not specifically address whether Claimant's injury would have been minimized if he had been provided prompt medical treatment after the injury. Claimant had ten physical therapy sessions between April 22, 2008 and July 1, 2008. Some therapy records note his condition was progressing slowly, but the records do not specifically address whether his progress was or was not impaired because of a delay in treatment. The treating doctors do not address the issue directly. Dr. Stuckmeyer does not either. His October 27, 2008 report states in part: "*Unfortunately, this injury was not attended to immediately*, and I do not feel that surgical reconstruction would benefit Mr. Fuller due to the obvious atrophy, retraction of the muscle, and the likelihood that surgery would leave the patient with a flexion deformity at the elbow." (Emphasis added.)

Dr. Stuckmeyer does not specifically discuss what he means by that statement. He does not describe whether Claimant sustained any additional permanent disability due to a delay in treatment, or whether Claimant's treatment was prolonged or made more expensive by the delay. Dr. Stuckmeyer concludes that Claimant has a 30% permanent partial disability to the left shoulder as a direct and proximate result of the accident. The wording of his report, "*Unfortunately, this injury was not attended to immediately*" suggests that the extent of his disability may have increased because of the delay in treatment.

The Court notes that Claimant did not miss time from work after his accident as a result of his injury, did not receive or request temporary total disability benefits, and elected not to have surgery on his left arm. However, I find that those facts do not establish that Employer was not hindered by the delayed notice of the accident. I find that Claimant did not prove that he would have had less expensive medical treatment or less permanent partial disability than he would have had if he had reported his injury to Employer as required by Section 287.420, RSMo. I find that Claimant failed to prove that his delay in providing notice to Employer did not hinder Employer's ability to minimize his injury by providing medical treatment.

In conclusion, based upon substantial and competent evidence and the application of the Missouri Workers' Compensation Law, I find in favor of Employer and deny Claimant's request for benefits. I find that Claimant did not provide notice of his injury required by Section 287.420, RSMo, and that he did not meet his burden of demonstrating that Employer was not prejudiced by his failure to provide notice of his injury as required by Section 287.420, RSMo. Claimant's claim is denied. All other issues are moot.

Date: April 28, 2009 Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation