

TEMPORARY OR PARTIAL AWARD  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-064607

Employee: Jason Gamet  
Employer: Dollar General Corporation  
Insurer: Self-Insured, Dolgen Corp., Inc.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
Date of Accident: July 8, 2006  
Place and County of Accident: Fulton, Callaway County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated April 17, 2007.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Ronald F. Harris, issued April 17, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13<sup>th</sup> day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## TEMPORARY OR PARTIAL AWARD

Employee: Jason Gamet

Injury No. 06-064607

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: N/A

Employer: Dollar General Corporation

Additional Party: Second Injury Fund (left open)

Insurer: Self Insured, Dolgen Corp., Inc.

Hearing Date: February 26, 2007

Checked by: RFH/tmh

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: July 8, 2006.
5. State location where accident occurred or occupational disease contracted: Fulton, Callaway County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted:  
Bending to pick up an empty pallet and experienced immediate pain.
12. Did accident or occupational disease cause death? No Date of death? N/A.
13. Parts of body injured by accident or occupational disease: BAW/back.
14. Compensation paid to-date for temporary disability: -0-
15. Value necessary medical aid paid to date by employer/insurer? One bill paid to Urgent Care, amount unknown.
16. Value necessary medical aid not furnished by employer/insurer? \$3,188.00.

Employee: Jason Gamet

Injury No. 06-064607

17. Employee's average weekly wages: \$443.81.
18. Weekly compensation rate: \$295.54.
19. Method wages computation: By agreement.

#### **COMPENSATION PAYABLE**

20. Amount of compensation payable:

Unpaid medical expenses: \$3,188.00 Unpaid mileage (90 roundtrip miles x 6 trips x 41.5 cents per mile) \$224.10

Weeks of temporary total disability: Continued and ongoing from July 8, 2006, until MMI at \$295.54 per week.

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

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

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

# FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jason Gamet

Injury No: 06-064607

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: N/A

Employer: Dollar General Corporation

Additional Party: Second Injury Fund (left open)

Insurer: Self Insured, Dolgen Corp., Inc.

Checked by: RFH/tmh

## PRELIMINARIES

The parties appeared before the undersigned Administrative Law Judge for a temporary hearing on February 26, 2007. The Division had jurisdiction to hear this case pursuant to §287.110 RSMo. Attorney Thad Mulholland represented Jason Gamet ("Employee"). Attorney Amy Young represented Dollar General Corporation ("Employer"). The Employer is self-insured through DolgenCorp, Inc. The Second Injury Fund did not appear and is left open as the issues presented were limited to those raised in a temporary award and did not directly involve the Second Injury Fund. Both parties submitted post hearing memoranda.

## STIPULATIONS

1. The Employee and the Employer were operating under the provisions of the Workers' Compensation Law on or about July 8, 2006;
2. The Employer's liability was self-insured;
3. The Employee's average weekly wage was \$443.31;
4. The rate of compensation for temporary total disability is \$295.54; and
5. The Employer has paid no TTD or medical benefits to date with the exception of one medical bill to Urgent Care at University Hospital.

## ISSUES

The parties requested the Division to determine:

1. Whether Employee sustained a compensable injury by way of an accident arising out of and in the course of his employment on July 8, 2006.
2. Whether Employer must reimburse Employee for medical expenses related to the alleged accident of July 8, 2006.
3. Whether Employer must provide Employee with additional treatment.

4. Whether Employee is entitled to temporary total disability and if so, for what time period.
5. Whether Employee is entitled to reimbursement for mileage expense and if so, in what amount.
6. Whether the Employee is entitled to attorney fees and costs pursuant to Section 287.560.

The following exhibits were admitted into evidence without objection.

#### **EXHIBITS OF EMPLOYEE**

Exhibit A: Columbia Orthopaedic Group Account Ledger  
Exhibit B: Deposition of Dr. Randal Trecha  
Exhibit C: Deposition of Ms. Carmen Tiffany  
Exhibit D: Deposition of Mr. David Steffes  
Exhibit E: Deposition of Ms. Tracy Strange

The Employer offered no exhibits.

Any exhibits containing markings, highlighting, etc., were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled.

#### **FINDINGS OF FACT**

Employee testified to being 33 years of age on the date of the hearing. Employee graduated from high school in 1991 and has also obtained an Associates' Degree from Linn State Technical College.

The employee began working for the Employer in March or April 2006 as a "Man up operator" in the repack department. His job duties required operating a fork lift 50% of the time and lifting, stooping and bending the other 50% of the time. His schedule was Friday through Sunday reporting to work at 6:00 a.m. and working a 12 hour shift each day.

On Saturday, July 8, 2006, he was "farmed out" (a term used by the employer when an employee is sent to another department to help out) to the case pack department. The case pack department was running behind and not getting the production they needed so they needed more people to speed up the process. Employee testified that the work in the case pack department was very fast paced. His duties in case pack required lifting boxes or cases off a pallet, sometimes stacked as high as head height and sometimes as low as shin height, weighing anywhere from 1 to 60 pounds and then turning and placing the box on a conveyor belt. According to Ms. Carmen Tiffany, supervisor for the case pack department, 90% of the job involves bending, lifting, and stooping (Employee's Exhibit C, p.16). When all the boxes had been taken off a pallet, the empty pallet was then to be picked up and taken to a designated area so that a new freshly stocked pallet could be brought in.

Employee testified that he was bending over to pick up an empty pallet off the floor when he felt immediate sharp pain in his lower middle back just above the belt line and slightly to the left. He set down on his heels for a few seconds because of the pain and then reported the incident to Ms. Tiffany, the department supervisor, and indicated that he believed he needed treatment. Ms. Tiffany began to complete an accident report as she and the employee were walking toward the front when she came upon Ms. Tracy Strange, the repack supervisor. Ms. Tiffany basically turned the matter over to Ms. Strange at that point.

Upon completing the necessary paperwork, Employee was taken to Urgent Care at University Hospital where he was examined, given medications and work restrictions. Because of the pain and work restrictions, Employee missed his next scheduled shift on Sunday.

On Monday, July 10, 2006, Employee called the Employer and left a message. A couple of days later, the Employee had a telephone conversation with David Steffes, claims representative for the Employer who is responsible for handling workers' compensation matters for the Employer. The Employee asked if the Employer had light duty work to accommodate the doctor's work restrictions and was informed that his case was being denied, no accommodations would be made for the restrictions and he would have to come back to work.

Over the next couple of weeks, the Employee spent most of his time in bed as a result of the pain. On July 26, 2006, Employee presented to the Columbia Orthopaedic Group for treatment and saw Dr. Randal Trecha. Employee reported low back and left leg pain. Dr. Trecha compiled a history, which included a description of the incident and also noted no prior back complaints. The doctor also performed a physical examination and found restriction with flexion; complaints of pain with attempts at flexion and extension; weakness in muscles to the left foot; and a tension sign indicating nerve root irritability on the left side. Dr. Trecha suspected a possible herniated nucleus pulposus, lumbar spine and ordered an MRI. The doctor placed the Employee on work restrictions of eight hours a day, no bending, no repetitive lifting, and a ten-pound lifting restriction. Employee testified his employment was terminated on August 4, 2006, because he was unable to work.

The MRI was performed on September 11, 2006. Dr. Trecha noted the MRI revealed desiccation of intervertebral disc and disc space collapse at L5-S1 with herniated nucleus pulposus and a large fragment on the left side, which was pushing on the nerves. The doctor recommended conservative care and ultimately administered a series of three epidural steroid injections on September 11, October 16, and November 10, 2006. Employee experienced some temporary relief after each injection. At the time of his deposition on December 15, 2006, the doctor had not seen the Employee since November 10, but noted he was scheduled to see the Employee the following month in January 2007. The doctor stated that if the Employee was doing fine when he saw him, there would be no need for further treatment, but if the symptoms were the same as when he first saw the Employee, he would likely recommend a microdiscectomy. At the time of his deposition, Dr. Trecha stated the Employee was not at maximum medical improvement and that the work restrictions would remain the same as he had initially stated the first time he saw the Employee.

Although no report was submitted at the hearing with respect to a January 2007 visit with Dr. Trecha, the Employee testified he did see the doctor in January and his understanding was that the doctor was recommending surgery. Employee has not worked since his termination by the Employer, nor has he drawn any unemployment compensation benefits during that time.

I find the Employee to be a very credible witness.

### **RULINGS OF LAW**

#### **Did Employee sustain a compensable injury by way of an accident arising out of and in the course of his employment on July 8, 2006?**

A number of changes were enacted to the Workers' Compensation Act (the "Act") effective August 28, 2005. The definition of "accident" was one such change.

As of August 28, 2005, Section 287.020.2 defines accident as "...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." Although raised by the Employer as an issue at the hearing, there does not appear to be much of an issue that an "accident" occurred but rather the issue is really whether the injury sustained as a result of the accident is compensable under the law. The incident described by the Employee, bending over to pick up an empty pallet and feeling an immediate sharp pain in his lower middle back driving him down to his heels, clearly meets the statutory definition of accident.

The next step in the analysis is to determine whether that accident caused a compensable injury. Section 287.020.3(1) (all statutory references are as of 2005) defines injury as "...an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The prevailing factor is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."

Subsection 2 of 287.020.3 provides further guidance by stating that "An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life."

During the 2005 legislative session, the legislature expressed its displeasure with what it perceived to be the expansion of the Act to such an extent that the focus on determining whether a case was compensable seemed to be whether the act was “incidental” to the employment, a doctrine that some including the Employer in the instant case refer to as “positional risk”, rather than whether the employee was actually engaged in performing the duties of employment.

Section 287.020.10 clearly states that displeasure as follows:

“In applying the provisions of the chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of “accident”, “occupational disease”, “arising out of”, and “in the course of employment” to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo. App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying or following those cases.”

In *Kasl* the Court found that the conditions of Ms. Kasl’s work which included waiting for time to dispense medication, caused her foot to fall asleep thus causing the accident when she attempted to walk. In *Drewes* the Court held that the claimant, who fell while carrying lunch through a break room, had a compensable injury because she would not have been equally exposed outside of her employment to the risk of falling during her lunch break. The *Bennett* Court held that an injury caused or aggravated by walking could be considered arising out of employment because walking was incidental to her duties.

The Employer argues that by abrogating *Bennett*, *Kasl* and *Drewes* the legislature made it clear that the equal exposure doctrine should not be ignored and that strict construction of the statutory provisions of the chapter as required by Section 287.800 leads to the conclusion the Employee has not suffered a compensable injury by way of an accident arising out of and in the course of employment. While I am cognizant of the requirement to construe the statutory provisions strictly and agree that the equal exposure language in 287.020.3(2) is not to be ignored, I disagree with the assertion that leads to a conclusion the Employee has not suffered a compensable injury in accordance with the relevant statutory provisions of the Act.

Employer argues that the act of bending over to pick up the empty pallet is not compensable because bending is also an activity of non-employment daily life. While I agree that bending is an activity in which we all engage in our normal non-employment life, the statutes do not provide a list of activities that are **automatically** prohibited from compensability. Indeed, since so many of the physical activities associated with our employment are also associated with our normal non-employment lives; such as bending, lifting, carrying, pulling, pushing, turning, twisting, packing, climbing, etc., a very extensive list of automatically prohibited activities would essentially render the Act meaningless.

Workers Compensation is not health insurance. Nor was it ever designed to “operate as accident insurance with blanket coverage as to any and all accidental injuries wherever and whenever received by an employee ...” *Leslie v. School Services and Leasing, Inc.* 947 S.W.2d 97 (Mo. App. 1997) quoting *McQuerrey v. Smith St. John Mfg. Co.*, 216 S.W.2d 534, 537 (Mo. App. 1948). On the other hand, while definitions, eligibility requirements, etc., have changed over the years the fundamental purpose of the Act remains: That an employee who is injured as the result of an accident arising out of and in the course of employment is entitled to limited benefits as provided by the act and in return the employer is protected from being sued by the employee in court. The employee bears the burden of proving all the essential elements of his claim. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271 (Mo. App. 1996).

It is interesting that all three of the Employer’s witnesses stated in their respective depositions that what was significant in denying this case is that the Employee was simply bending to pick up the empty pallet and “was not actually doing anything” since he had not yet picked up the pallet. Without specifically saying so, Mr. Steffes certainly implied that had the Employee actually picked up the empty pallet before experiencing pain in his back it would have been accepted as compensable (Employee’s Exhibit D, p.16). Employee questions whether that would in fact have been the Employer’s position if the Employee had actually picked up the empty pallet since lifting is also an activity in which one engages in the normal course of daily life.

Employer’s attempt to distinguish between “bending” and “lifting” clearly demonstrates the folly in arbitrarily deciding which “activities” are compensable and which are not. Rather than making such an arbitrary determination one must carefully and thoughtfully examine the facts of each individual case. Since prior case law has been abrogated, a logical common sense approach would be to examine if the incident occurred while the individual was engaged in performing the

necessary and required duties of the job in furtherance of the employer's business.

In the instant case, part of the Employee's job was to remove empty pallets so they could be replaced with stocked pallets. There was no testimony or evidence indicating there was any way to remove an empty pallet other than to bend down and pick it up.

Dr. Trecha stated that it is highly unusual for a healthy, well hydrated disc to herniate even in very traumatic situations (Employee's Exhibit B, p.22) and went on to note the Employee had a desiccation or drying of the disc prior to the accident (Employee's Exhibit B, p. 19). The doctor went on to state that "everyone has discs that desiccate or dry out. You can't escape it. It happens to everyone." (Employee's Exhibit B, p.22). Even so the doctor clearly stated at various points during his deposition that based upon a reasonable degree of medical certainty, the accident was the cause for the herniated disc: the incident "wherein he bent to lift a pallet was the significant reason and cause for his symptoms and his injury to his intervertebral disc" (Employee's Exhibit B, p.14); the accident was the prevailing factor in causing the injury and disability (Employee's Exhibit B, p.16); and the herniated disc was sustained as a result of a traumatic event (Employee's Exhibit B, p.21).

Employer argues that Dr. Trecha did not explain his understanding of the meaning of "the prevailing factor" and that he used that term interchangeably without explaining the difference, with "a substantial factor" (actually the doctor did not use the term "a substantial factor" but rather at one point stated that the incident was "the significant reason") (Employee's Exhibit B, p. 14). I do not fault the doctor for not sticking to a "script" and using only the "magic words" in the statute. When read in its entirety, Dr. Trecha has very clearly testified that he was aware the disc was not a perfectly healthy disc at the time of the accident; the Employee had experienced some desiccation of the disc prior to the accident; there was no evidence of any prior back problems; and considering all those factors it was his medical opinion based upon a reasonable degree of medical certainty that the traumatic event was the prevailing factor in causing both the injury and the disability. Employee has met the burden of proving the first prong of the test in 287.020.3 regarding whether the injury arose out of and in the course of employment.

The second prong of the test is that the injury not come from a hazard or risk to which the employee would have been "equally exposed" outside of employment in one's normal non-employment life.

As discussed earlier, bending over is indeed an activity the Employee would also engage in the normal course of his non-employment life. But the question is not whether he would have been "exposed" to the activity of bending over in his non-employment life but rather would he have been "equally exposed"? The testimony of the Employer's case pack department supervisor, Ms. Tiffany, provides the answer. The job description for the case pack department "refers to bending, stooping, and lifting. It's physical" (Employee's Exhibit C, p.15). In fact it involves a lot of bending, stooping and lifting on a daily basis; with 90% of the work involving bending, stooping, and lifting. (Employee's Exhibit C, pgs.15-16). In addition, there was added pressure on July 8, 2006, to "speed things up" because the case pack department was running behind schedule.

Although Ms. Tiffany did not attempt to break down the percent of time spent performing each of the activities of bending, stooping, and lifting, it is clear that as a requirement of the job the Employee would necessarily be doing more bending than he would in the normal course of his non-employment life. The testimony of both Ms. Tiffany and the Employee clearly establish that rather than being "equally exposed" to risk or injury from bending over, the Employee faced an "increased exposure" of injury by virtue of performing the required duties of his employment. Consequently, the Employee has met his burden of proof regarding the second prong of the arising out of and in the course of employment test.

While the issue of medical causation was addressed to some extent earlier, further explanation is necessary. As noted earlier, "the prevailing factor" is defined as the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

In the situation of a complicated medical condition, medical causation is not within common knowledge or experience and must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200 (Mo. App. 1991). The subject of a herniated disc and its diagnosis, causation, and cure has been held to be "the realm of highly scientific techniques where expert opinion is essential." *Silman v. William Montgomery & Associates*, 891 S.W.2d 173, 176 (Mo. App. 1995)(overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)).

As noted earlier, although Dr. Trecha noted the desiccation of the disc, he left no doubt that the herniation was the result of the traumatic incident in which the Employee was bending over to pick up the empty pallet. The evidence reveals there are only two possibilities for the herniated disc, and the doctor clearly identified the traumatic event as the cause of the Employee's medical condition and the disability. Although he did not use the statutory language, it was clearly Dr. Trecha's medical opinion that the traumatic event was the primary factor when compared to the disc desiccation. No medical opinion to the contrary was submitted.

For the reasons set forth above, after careful and thorough consideration of the evidence and the applicable statutes, I conclude the Employee has met his burden of proving that he has suffered a compensable work-related injury by way of an accident arising out of and in the course of his employment.

### **Liability for Past Medical Expenses**

Section 287.140.1 provides in relevant part that "the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Under Missouri Workers' Compensation Law, the employer has the right to direct medical care. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against his employer." *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995).

There is no question the Employer sent the Employee to Urgent Care at University Hospital the day of the injury and that the Employer, in fact, paid for that treatment. There is also no question the Employer then determined the claim would be denied and offered no further treatment. Dr. Trecha identified Deposition Exhibit 2 (same document as Employee's Exhibit A) as representing his charges for treatment rendered the Employee for the herniated disc through November of 2006. Employee also identified the charges in Employee's Exhibit A as being for treatment for the herniated disc. The Employer waived its right to control medical treatment when the decision was made to deny the claim.

A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with the treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 112 (Mo. banc 1989).

Review of Employee's Exhibit A reveals a deposition fee of \$750.00 is included along with the actual treatment expenses. Employee's claim for costs and attorney fees will be addressed later in this award. I find the Employee has met his burden of proof in establishing that the Columbia Orthopaedic Group medical bills in the amount of \$3,188.00 (\$3,938.00 - \$750.00 deposition fee) are causally related to the treatment he received for the herniated disc. Employer is liable for and is hereby directed to pay those medical bills in the amount of \$3,188.00 for treatment rendered through November 2006, as represented by Employee's Exhibit A.

### **Is Employee Entitled to Ongoing Medical Care Related to this Injury**

It is clear from Dr. Trecha's testimony in December 2006, that the Employee had not yet been released at maximum medical improvement at that time. Since no report was submitted at the hearing regarding the January visit it is unclear specifically what transpired and what recommendations were made regarding treatment. Dr. Trecha testified that if the Employee represented that he was doing fine then the doctor would anticipate releasing him at that time. On the other hand, if the symptoms were still the same as when the doctor first saw him the doctor would likely recommend a microdiscectomy. The Employee testified that he did see the doctor in January and it was his understanding the doctor was recommending surgery.

If Dr. Trecha is now recommending surgery or other treatment for the herniated disc, the Employer is directed to pay for it. When the doctor determines the Employee has reached maximum medical improvement and is no longer in need of treatment, the Employer's obligation to provide treatment obviously will cease.

### **Liability for Temporary Total Disability**

Employee seeks TTD benefits from the date of the injury to the present. The employee has the burden of proving entitlement to temporary total disability to a reasonable probability. *Cooper v. Medical Centers of Independence*, 955 S.W.2d 570 (Mo. App. 1997)(overruled on other grounds by *Hampton*, 121 S.W.3d 220).

Employer is responsible for the payment of temporary total disability benefits during the continuance of such disability. Section 287.170. Total disability is defined by 287.020.6 as the “inability to return to any employment and not merely...(the) inability to return to the employment in which the employee was engaged at the time of the accident.” The test for determining whether one is entitled to temporary total disability is not whether the person is able to do some work, but whether the person is able to compete for work in the open labor market considering the person’s current physical condition. *Thorsen v. Sachs Electric Co.*, 52 S.W.3d 611 (Mo. App. 2001).

Dr. Trecha testified that he imposed work restrictions of eight hours a day, no bending, no repetitive lifting, and a ten-pound lifting limit on the Employee and that those restrictions had remained constant from the first time the doctor saw the Employee. The Employee was never paid temporary total disability benefits nor in the alternative was he offered modified duty within the physician-imposed restrictions because Employer denied the claim. The Employee’s employment was terminated on August 4, 2006, while he was still on the physician-imposed work restrictions. Employee testified his employment was terminated because he was unable to work. Employer offered no other reason for the termination.

On cross-examination the Employee stated, although there is nothing in Dr. Trecha’s testimony to substantiate it, that the doctor told him he could perform something along the line of clerical work. There was no explanation as to what specific work the doctor was referring, what skills would be required or whether the Employee actually possessed those skills. For example would he have to operate a computer or be proficient with word processing or other computer programs and if so does he possess those skills? With no disrespect intended, Dr. Trecha is not a vocational or employment specialist capable of assessing the Employee’s employability in the open labor market.

Employee also testified the reason he had not looked for work was that based on the doctor’s advice he did not believe he could work. An employee’s credible testimony regarding his ability to work can constitute competent and substantial evidence. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223-224 (Mo. banc 2003)(citing *Jost v. Big Boys Steel Erection, Inc.*, 946 S.W.2d 777, 779 (Mo. App. 1997)).

Additionally, had the Employer not fired the Employee the Employer would have been responsible for either paying TTD or providing modified duty within the doctor’s restrictions. An employer’s liability to provide benefits under the Act does not cease simply by terminating the employment relationship.

The 2005 statutory changes do provide for disqualification from receiving TTD benefits for any periods of time in which he applied for and received unemployment compensation (287.170.3) or if he was terminated from post-injury employment based on post-injury misconduct (287.170.4), but there is no evidence in the record to suggest that either of those provisions are applicable to this case.

Having considered all the evidence, I find the Employee is entitled to continued and ongoing TTD benefits at the weekly rate of \$295.54 from July, 8, 2006, until Dr. Trecha releases him at maximum medical improvement for his herniated disc.

## **Mileage Reimbursement**

Employee seeks reimbursement for mileage for six visits at 110 miles roundtrip from his residence for treatment with Dr. Trecha through November of 2006. Employer argues that mileage reimbursement should be determined from the place of employment rather than the employee’s residence.

Prior to the legislative changes enacted in 2005 the relevant portion of 287.140.1 addressed mileage reimbursement as follows: “When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the place of **injury or the place of his residence**, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses...” (emphasis added). In 2005 the relevant portion of the statute was changed to read as follows: “When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the **employee’s principal** place of **employment**, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses...” (emphasis added). The 2005 changes eliminated the employee’s residence as a point of measurement and left the employee’s principal place of employment as the sole point of measurement.

Although five of the six trips to Dr. Trecha occurred after the Employee had been terminated, there is nothing in the statute that would allow a different measuring standard after the individual is no longer an employee. The statutory language

is clear and unambiguous.

Employee testified on cross examination that it was 90 miles round trip, measured from the former employer's place of business and Dr. Trecha's office. Therefore, Employee is entitled to reimbursement in the amount of \$224.10 (90 miles x 6 trips x 41.5 cents per mile) for visits through November 2006. Employer is directed to reimburse Employee for mileage through November 2006 in the amount of \$224.10.

### **Claim for Attorney Fees and Costs**

Employee contends he is entitled to an award of attorney fees in the amount of \$3,750.00 (25 hours at \$150 an hour) and costs in the amount of \$943.05 (Dr. Treca's deposition cost of \$750.00 and court reporter fees) pursuant to Section 287.203 or Section 287.560. This is not a Section 287.203 hearing, so that statute is not applicable.

Section 287.560 provides in pertinent part as follows: "...if the division or the commission determines that any proceedings have been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them." The whole cost of the proceedings consists of "all amounts the innocent party expended throughout the proceeding brought, prosecuted, or defended without reasonable grounds, including attorney's fees." *Monroe v. Wal-Mart Associates, Inc.*, 163 S.W.3d 501 (Mo. App. 2005) quoting *DeLong v. Hampton Envelope Co.*, 149 S.W.3d at 555 (Mo. App. 2004).

While the division or the commission has the discretion to order costs pursuant to 287.560, it should only be ordered where the issue is clear and the offense is egregious. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. banc 2003)(overruled on other grounds by *Hampton* 121 S.W.3d 220).

Employee asserts that the Employer's arbitrary denial of this case on the basis that employee was merely bending to pick up the empty pallet, whereas, had he actually been lifting the pallet, it would have been compensable demonstrates the frivolousness of the defense.

Employer counters that it raises legitimate questions of law regarding interpretation of various provisions of the Act following the 2005 legislative changes. Employer notes this is a case of first impression, in that there as yet are no court decisions interpreting the meaning of those statutory changes. Both arguments have merit.

It does appear the Employer's decision to deny benefits in this case was based upon a purely arbitrary decision that some activities would automatically be denied as compensable whereas other activities would be compensable.

However, Employer's point that absent any court decisions as yet to provide guidance regarding the interpretation and application of the 2005 statutory changes the Employer cannot be found to have defended the case without reasonable ground is well taken.

After careful consideration of both arguments, I cannot in good conscience conclude that the Employer's denial in this case rises to the "egregious" level contemplated by the Court in *Landman*. Consequently, Employee's claim for attorney fees and costs is denied.

However, the Employee's attorney is entitled to a fair and reasonable fee in accordance with 287.260 RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173 (Mo. App. 1988). As the Court noted in *Page*, "[R]estrictions upon attorneys fees, which prevent an attorney from receiving a reasonable fee often work a hardship upon potential clients because they cannot secure the assistance they need."

The instant case provides a very good example, in that without the attorney preparing and presenting the case for hearing on the disputed issues, the employee would still not be receiving any benefits. Consequently, I find the Employee's attorney is entitled to and is awarded an attorney's fee of 25% of all amounts awarded.

Finally, I would caution that it would be a mistake to interpret this decision as standing for the proposition that all incidents involving the activity of bending while at work will be compensable. This decision was, and all cases to follow will be, decided applying the applicable law to the specific facts of each individual case. Each case will stand or fall on its own merits.

**CONCLUSION**

Employee has met his burden of proving that he suffered a compensable injury as the result of a work related accident arising out of and in the course of his employment. I hereby order the Employer to pay Employee \$3,188.00 for necessary medical expenses for treatment of the herniated disc as well as \$224.10 in mileage reimbursement. Employer is also responsible for providing continued and on-going medical treatment as recommended by Dr. Trecha to cure and relieve the Employee of the effects of his injury. Additionally, Employer is responsible for the payment of continued and on-going TTD benefits from July 8, 2006, until the doctor releases the Employee at maximum medical improvement for the herniated disc. Employee's claim for assessment of attorney's fees and costs against the Employer is denied.

Employee's attorney is awarded a fee of 25% of all benefits awarded for necessary legal services.

This award is temporary or partial in nature, is subject to further order, and the proceedings are hereby continued and left open until a final award can be made.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

RONALD F. HARRIS  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*