

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

Injury No.: 03-108382

Employee: Joseph Harper
Employer: RV Evans Company Distributors
Insurer: Cincinnati Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: June 6, 2003
Place and County of Accident: St. Charles 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 May 16, 2006.

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 Kevin Dinwiddie, issued May 16, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 7th day of September 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Joseph Harper

Injury No. 03-108382

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: ----

Employer: RV Evans Company Distributors

Additional Party: State Treasurer, as custodian of the Second Injury Fund (Open)

Insurer: Cincinnati Insurance Company

Hearing Date: February 10, 2006; finally submitted 2/27/06

Checked by: KD/bb

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: 6/6/03
5. State location where accident occurred or occupational disease contracted: St. Charles 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:
Employee injured low back while stepping down from a truck while carrying a box of nails
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: low back
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? None

16. Value necessary medical aid not furnished by employer/insurer? \$3,055.00

Employee: Joseph Harper

Injury No. 03-108382

17. Employee's average weekly wages: N/A

18. Weekly compensation rate: N/A

19. Method wages computation: N/A

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses: \$3,055.00

Employer to provide future medical care as per award.

Each of said payments to begin as of the date of this Award 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:

John D. Schneider

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joseph Harper

Injury No: 03-108382

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: ----

Employer: RV Evans Company Distributors

Additional Party State Treasurer, as custodian of the Second Injury Fund

Insurer: Cincinnati Insurance Company

Checked by: KD/bb

The claimant, Mr. Joseph Harper, and the employer and its insurer, RV Evans Company Distributors and Cincinnati Insurance Company, appeared at hearing by and through their counsel and entered in to certain stipulations and agreements as to the issues and evidence to be presented in this claim for compensation. The claimant seeks a temporary or partial award in the matter. Claimant requests that the issue as to the liability of the Second Injury Fund remain open. The parties identified at hearing the following issues to be resolved:

Injury by accident arising out of and in the course of employment;
Notice;
Medical causation;
Liability for certain past medical expenses;
Future medical care;
Rate of compensation; and
Temporary total disability.

Mr. Harper appeared at hearing and testified on his own behalf. Mr. Harper further jointly submitted with the employer and insurer the deposition testimony of Dr. David Lange. The employer and insurer elicited the testimony of Ms. Sheila Ross. Both the employee and the employer and its insurer elicited the testimony of Mr. Eric Frahm. The employer and insurer further elicited the deposition testimony of Ms. Vickie Watkinson, as the records custodian from St. Joseph Urgent Care.

EXHIBITS

The following exhibits were offered into evidence by the employer and insurer, and were received into evidence without objection from the employee:

Employer and Insurer's Exhibits

1. Surveillance videotape of 11/18/05
2. Surveillance videotape of 11/18/05
3. Deposition of Vickie Watkinson taken on 2/08/06

The following joint exhibit was received in evidence:

I. Deposition of Dr. David Lange taken on 1/05/05
The claimant offered the following exhibits in evidence:

Claimant's Exhibits

- A1. Certified medical records of Tesson Heights Orthopaedics (Dr. T. Lee)
- B1. Medical records of John D. Graham, M.D.
- C1. Medical records of David R. Lange, M.D.
- D1. Curriculum Vitae, billing statements and medical reports of Barry I. Feinberg, M.D.
- E1. Curriculum Vitae and Medical report of David G. Kennedy, M.D., dated 11/15/05
- A. St. Charles Sports and Physical Therapy records with billing statement
- B. Examination reports of SSM Health Care and Concentra Medical Centers
- C. Letter of Robert J. Gresick, Jr. M.D., dated 12/30/05
- D. Report of Injury dated 1/12/04
- E. Billing statement of Ernst Radiology Clinic, Inc. dated 12/20/05
- F. Subrogation letter from Ingenix dated 12/18/03

Claimant's Exhibits E1, B, C, D, and F are in evidence without objection from the employer and insurer. The employer made a foundation objection as to the reasonableness of the fees and charges as documented in exhibits A1 though D1. To the extent the involved medical billings relate to corresponding medical records also put in evidence, and to the extent the employee testified that the involved treatment was for the alleged work injury at issue, the objection of the employer and insurer as to Exhibits A1 though D1 must be overruled, see Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo.banc 1989). Exhibits A1 through D1 are in evidence.

Employer and Insurer made objection to Claimant's Exhibits A and E based on foundation and lack of certification of the record. Those objections are sustained. Claimant's Exhibits A and E are not in evidence.

FINDINGS OF FACT AND RULINGS OF LAW

RV Evans Company Distributors (hereinafter referred to as "employer") hired the claimant, Mr. Joseph Harper, in the latter months of 2000. Mr. Harper was a delivery driver, and would bring boxed nails to construction sites. Claimant would carry boxes of nails weighing anywhere from 35 to 50 pounds each, and would deliver as many as 6 pallets of nails a day, 100 boxes of nails to a pallet. Mr. Harper testified that on either June 4th or 6th of 2003, while in the process of stepping down out of his truck carrying a fifty pound box of nails at his side, he suffered a "pop" in his back. Mr. Harper recalls that he continued to work that day, and that he did not seek medical attention that evening, but believes that he advised Eric Frahm, his supervisor, that same day as to his back complaints. Mr. Harper alleges that his employer made a phone call to another office in Decatur, Illinois, and that as a consequence of that phone call claimant was advised that the employer did not have a "company doctor" in the St. Louis area, and that claimant should go to his own physician until such time as the injury was determined to be work related.

Mr. Harper acknowledges that after the event described in June of 2003, he first sought medical attention from Dr. Thomas Lee on 6/30/03. Claimant acknowledged at hearing that he had seen Dr. Lee on a prior occasion, in September of 2002, for evaluation of back complaints after jumping out of his truck in early July of 2002. The testimony of Mr. Harper, to the extent that he was treated very briefly in September of 2002 for a back strain that resolved without further complaint, is consistent with the records of Dr. Lee. Those records fail to document any follow up evaluations by Dr. Lee after the injury was diagnosed on 9/04/02 as a lumbosacral sprain, until such time as Dr. Lee met with Mr. Harper again on 6/30/03 (See Claimant's Exhibit A1).

The records of Dr. Lee indicate that in June of 2003 Mr. Harper was complaining of "back pain symptoms corresponding to the right L5 radiculopathy". MRI was ordered to rule out possible right L4-5 herniation. MRI from

South County Open MRI was interpreted as showing degenerative discs at certain levels, with right facet hypertrophy and disc protrusion. The interpreter of the MRI noted “the protrusion does significantly affect the canal, S1, and possibly the L5 right roots”.

Dr. Lee prescribed physical therapy and epidural steroid injections for “persistent symptoms related to right leg radiculopathy”. The records of Dr. Graham document a history of having provided claimant with epidural steroid injection to the low back on 7/8/03 and again on 7/16/03 (See Claimant’s Exhibit B-1).

While it is true that the treatment records of Dr. Lee for June and July of 2003 fail to document any history as to contemporaneous work injury, the hand written notes of Dr. Graham dated 7/8/03 (Exhibit B1) provide, in part, as follows with respect to complaints as to the right lower extremity: “Started in (sp?) 7/03, without event. Was working delivering nails.”

Claimant continued to have complaints, and continued treating with Dr. Lee for back and right lower extremity symptoms. Claimant had ongoing physical therapy and was prescribed pain medication; on 11/17/03 Dr. Lee noted that claimant was having no improvement with physical therapy, and chose to order a lumbar myelogram. On 11/26/03, the date the myelogram was performed, Mr. Harper also had an examination performed by Dr. Barry I Feinberg. Dr. Feinberg performed his evaluation without the benefit of the CT myelogram, and concluded that the claimant would benefit from physical therapy for an apparent right L5 radiculopathy.

On 12/1/03 Dr. Lee met with the claimant after having the CT myelogram results, and interpreted the myelogram and post myelogram CT taken on 11/26/03 as showing an L5 herniation that would account for the claimant’s complaints. Dr. Lee then discussed a surgical option with Mr. Harper, and as to possible fusion.

Claimant testified that after his injury in June of 2003 he continued to perform his delivery job, but notes that the employer accommodated his complaints by arranging for contractors to come to the curb for delivery of the nails, as opposed to having Mr. Harper carry the nails to the construction trailers. Mr. Harper did not seek further medical treatment for his complaints prior to leaving his employment in late January of 2004. Mr. Harper testified that delivery of nails became impossible due to his ongoing back and leg complaints.

Mr. Harper notes that in short order he went through a warehouse job, a carpenter job, and a painting job, before finding employment with Innsbruck Resort on 5/8/04. Claimant notes that his primary function is to go through a “punch list” with owners of new home construction, and to make the necessary corrections or minor repairs as listed on the punch list. The surveillance videotapes in evidence show Mr. Harper at work on 11/28/05, performing his usual duties for Innsbruck. Mr. Harper was observed carrying items from his truck, including a 20 gallon bucket filled perhaps as much as six inches deep with drywall mud for drywall repair. Claimant was also observed carrying large boxes believed to contain screens or screen frames for doors; a six-foot ladder; and, with the assistance of another worker, a cabinet believed by Mr. Harper to be made of particleboard, weighing about 20 pounds. Claimant testified that his employer was aware of his back complaints, and did not require claimant to perform any significant lifting.

Mr. Harper acknowledges that he continued working, and did not seek further medical care until returning to see Dr. Feinberg for a second evaluation in April of 2005. It is not at all clear that Dr. Feinberg had the benefit of the CT myelogram taken in November of 2003, inasmuch as he references the MRI but makes no comment as to the CT myelogram findings. Dr. Feinberg performed a physical examination and recommended a pain management program for what he describes as “a lumbar radiculopathy, primarily at the right L5 level”, with other findings as to mechanical dysfunction of the lower back, and as to changes at the thoracic spine with occipital headaches developing (See Exhibit D1).

The employer and insurer then referred claimant to Dr. David R. Lange for an independent medical evaluation as to the spine. On 7/07/05 Dr. Lange had the opportunity to elicit a history from Mr. Harper; to review the medical records, including as to the lumbar myelogram and post myelogram CT; and to perform a physical examination. Dr. Lange believed the claimant to present with a lumbar radiculopathy, and noted that a simple discectomy alone would not be sufficient to treat ongoing leg and back pain See Exhibit C1).

On August 29, 2005 Dr. Lange performed a follow up examination, documented ongoing back and right lower extremity symptoms, and recommended a repeat MRI. By history provided by Dr. Lange (there is no 9/15/05 MRI report in evidence) the claimant had a repeat MRI, and that MRI showed, among others, a degenerative disc disease at L5-S1 with narrowing of the right L5 nerve canal due to an arthritic joint, and “a disc prominence, probably consistent with a contained herniation in the mid zone”.

Dr. Lange recommended the lumbar discography performed at DePaul Health Center on 10/11/05. Dr. Robert J. Gresick Jr. performed the discography and recorded his conclusions (Report contained within Exhibit C-1). After having reviewed the report with Dr. Gresick, Dr. Lange concluded that he would be unable to “enthusiastically” offer surgery to Mr. Harper. Dr. Lange also did not believe that chronic pain management was warranted.

By deposition, Dr. Lange explained that he had a couple of reasons for being opposed to offering surgery. For one, he noted that the discography at L2-3 level showed reproduction of claimant's usual back pain, and Dr. Lange was loathe to offer a decompression and surgery at noncontiguous levels at L2-3 and L5-S1. Secondly, Dr. Lange noted that while the discography at L5-S1 level reproduced back pain, it failed to reproduce pain in the right leg, making it difficult for him to recommend surgery at a level that didn't reproduce symptoms (Joint Exhibit I, at pp. 20-22).

Dr. David G. Kennedy met with Mr. Harper on 11/15/05, took a history, reviewed the various medical records, and performed a physical examination. Dr. Kennedy concluded that claimant exhibited pain radiating in to the right leg "in a clearly sciatic distribution". He also interpreted the 9/15/05 MRI as demonstrating a 6 mm disc prolapse at L5-S1 with foraminal encroachment on the right side (See Exhibit E-1). Dr. Kennedy agrees with Dr. Lange to the extent that both surgeons believe that a microdiscectomy alone would not offer sufficient long-term pain relief. Given a history of intractable sciatic pain dating back to the date of the alleged injury, Dr. Kennedy disagrees with the conclusion of Dr. Lange as to a surgical option. Dr. Kennedy believes that a history of intractable pain makes claimant a surgical candidate. Dr. Kennedy also recommended a follow up myelogram "to assess the bony detail and the facets at L5-S1."

NOTICE

Eric Frahm was the claimant's immediate supervisor. Ms. Sheila Ross was the supervisor of Mr. Frahm, in her capacity as Fastening Operations Manager for the employer. Both Mr. Frahm and Ms. Ross deny being advised by Mr. Harper as to having suffered a work injury on or about 6/6/03. Ms. Ross testified that from the date of the alleged injury by accident until the claimant left the employment in 2004, the claimant never advised her that he had suffered an injury while exiting a truck with a box of nails.

Mr. Harper testified to a number of conversations with Mr. Frahm, conversations had both before and after the claimant went to see Dr. Lee, concerning the issue of workers' compensation coverage for his back complaints. Claimant further testified that the "home office" in Decatur, Illinois was contacted as to the issue as to whether the employer would cover the cost of surgery.

Mr. Harper claims to have had a series of conversations with Mr. Frahm as to his injury complaints, and further claims that Mr. Frahm made a work accommodation so that claimant would only be obliged to deliver to the street curb. Mr. Frahm denies both of these versions of events as described by Mr. Harper. Clearly, at least one of the witnesses at hearing was purposefully engaging in an obfuscation of the facts of the matter as it relates to notice of the injury.

The medical records in the matter support the history of injury to the back at work as provided by Mr. Harper at hearing. The notation in the record of Dr. Lee dated 8/27/03 supports the conclusion that at least as of 8/27/03, Mr. Harper had been attempting to resolve the issue as applicable insurance coverage. The hand notation by Dr. Graham dated 7/8/03 indicates that the claimant believed his back complaints began at work while delivering nails. The Report of Injury, submitted as Claimant's Exhibit D, also supports the version of events as provided by Mr. Harper. Lastly, as to the task of weighing the respective credibility of Messrs. Harper and Frahm, Mr. Frahm testified that if Mr. Harper had complained of a work injury to his back in June of 2003, Mr. Frahm would have filed an accident report. However, Mr. Frahm also testified that he did recall the claimant complaining of hurting his back, and of complaining of a "pop" while lifting a box of sinkers. Mr. Frahm recalls the claimant making these back complaints some 2 to 6 months or so after the claimant started working for the employer (the testimony reveals that claimant started with employer in 2000; the only documentation in the record as to a prior back complaint relates to the event in July of 2002 that caused Mr. Harper to seek treatment from Dr. Lee in September of 2002). On cross-examination, Mr. Frahm acknowledged that he never filed an accident report concerning the history of back complaint that he was able to recall. Clearly, there is a prior history of the claimant having reported a work related back complaint; of Mr. Frahm failing to file an accident report; and of the claimant seeking medical attention from his own physician thereafter for a work related back complaint.

From all of the evidence, the claimant is believed to be a more credible witness, and his recall of events to be more worthy of belief than that of either Mr. Frahm or Ms. Ross. Further, while it is apparent that Mr. Harper failed to give the required written notice as provided by statute, Section 287.420 RSMo, there is nothing in the record to persuade that the employer suffered a prejudice as a consequence. The employer is found to have had actual notice of the involved injury. A prima facie case of no prejudice is made if claimant can show the employer had actual knowledge of the injury Pattengill v. General Motors Corp., 820 S.W.2d 112, 113 (Mo.App. 1991). The issue as to

notice is found in favor of the claimant.

INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT/MEDICAL CAUSATION

An event is compensable if the claimant can show that he suffered an injury by accident as those terms are defined in Subsections 2 and 3 of Section 287.020 RSMo. Those two sections provide as follows:

2. The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) 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 employment is a substantial factor in causing the injury; and

(b) It can be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

(d) 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;

(3) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

The claimant is further obliged to show that a medical causal relationship exists between the complaints of ill being and injury at work. It is noted that the proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo.App. 1986).

"Medical causation, not within the common knowledge or experience, 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, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Choate v. Lily Tulip, Inc., 809 S.W. 2d 102, 105 (Mo.App.1991).

The testimony of Mr. Harper, as substantiated by the medical records in evidence, supports a finding that the claimant began to suffer from back pain and radicular symptoms in to his right leg after stepping down from his

delivery truck on or about 6/06/03 while carrying a 50-pound box of nails. Dr. David Lange, after receiving a history of injury from Mr. Harper consistent with the history of injury provided at hearing in the matter, provided the following responses to questions bearing on causation:

Q: Doctor, I gather you don't dispute that he has the symptoms and pain that he complains of?

A: Yes, I think he does.

Q: Those degenerative changes in his back with various symptoms, those are pains that can be aggravated by an injury as he describes of jumping off the back of a truck, carrying fifty pounds of nails?

A: Yes, I think that would not be an unreasonable mechanism of injury.

Q: So he has some sort of disability?

A: I think so, sure.

Q: As a result of his work injury?

A: Yes.

Q: And that work injury would be a substantial factor in that disability?

A: I think if the history is correct, it would be, that's correct. (Joint Exhibit I, at page 28)

Drs. Feinberg and Kennedy likewise believe that there exists a medical causal relationship between the claimant's complaints of ill being and a work injury in early June of 2003. Doctors Feinberg, Kennedy, and Lange all agree that the claimant suffers from a right radiculopathy, and Dr. Lange acknowledged that he would not disagree with Dr. Kennedy's finding that the claimant also suffers in part from sciatic pain. Dr. Kennedy persuades that the sciatic pain is due to nerve root compression, and is "a significant component of his overall pain complaints..".

From all of the evidence, on or about 6/06/03 claimant is found to have suffered an injury to his back as a result of an injury by accident arising out of and in the course of employment as provided in Section 287.020 RSMo. Expert medical opinion supports the conclusion that there is a causal relationship between the involved work injury and the complaints of ill being as to the low back and right lower extremity.

LIABILITY FOR PAST MEDICAL EXPENSE

Section 287.140.1 RSMo, provides, in part, as follows: "In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." If, after receiving notice of work related injury, the employer refuses or neglects to provide necessary medical care, employee may make his own selection and have cost assessed against the employer. Hawkins v. Emerson Electric Company, 676 S.W.2d 872, 880 (Mo.App.S.D. 1984).

The testimony of Mr. Harper persuades that immediately after his work injury he was actively seeking to have the employer provide him with medical care to cure and relieve of the effects of his back injury. The medical expenses of Dr. Lee as documented in Exhibit A-1 from 6/30/03 through 12/01/03 are necessary to cure and relieve of the effects of the injury, and are expenses for which the employer is liable.

The employer and insurer are further found liable for the expenses of Dr. Graham for epidural injection, as documented in Exhibit B-1; and for the evaluation and treatment recommendations from Dr. Feinberg after his evaluations as documented in Exhibit D-1. Specifically, the employer and insurer are found liable for the following medical expense:

<u>Provider</u>	<u>Date(s) of service</u>	<u>Amount</u>
Tesson Heights Orthopaedics (Dr. Lee)	6/30/03 through 12/01/03	\$330.00
Pain Treatment Center, Inc. (Dr. John avid Graham)	7/8/03 through 7/16/03	\$1800.00
Injury Specialists (Barry I. Feinberg, M.D.)	11/26/03 and 4/05/05	\$925.00
<u>TOTAL</u>		<u>\$3055.00</u>

As agreed to by claimant and his counsel at hearing, the employer and insurer is to reimburse third party insurers who have made payment for any of the medical expense for which the employer and insurer is found liable, with the balance payable to the claimant as a benefit under the act.

TEMPORARY TOTAL DISABILITY/RATE OF COMPENSATION

At hearing the claimant put rate of compensation and ttd in issue. After the hearing, counsel for claimant submitted written notice to the legal file in this matter, advising that the issue as to ttd was withdrawn.

Further, there is insufficient proof in the record to support a finding as to the average weekly wage. As a consequence, there is insufficient proof to support a finding as to an applicable rate of compensation.

FUTURE MEDICAL CARE

The claimant is not obliged to present evidence of specific medical treatment or procedures that would be necessary in the future in order to receive an award for medical care. Bradshaw v. Brown Shoe Co., 660 S.W.2d 390 (Mo.App.1983). It is sufficient to show "by reasonable probability" the need for additional medical treatment as a result of the work injury. Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823,828 (Mo.App. S.D. 1995).

Drs. Kennedy and Lange disagree as to the merits of surgery as a treatment option in this matter. In reaching his conclusion as to the advisability of a surgery, Dr. Lange does not dispute that the claimant has a lumbar radiculopathy; does not doubt that the claimant has the pain and symptoms for which he makes complaints; and does not dispute the finding of Dr. Kennedy as to sciatica. Dr. Lange notes that findings by discography suggested that the L2-3 level was more diagnostic than the lower level of L5-S1, and noted that while the discography at L5-S1 reproduced back pain, it failed to reproduce leg complaints. In a nutshell, Dr. Lange believed that the discography produced pain at levels that varied from the pain levels complained of by the claimant previously, and was too equivocal to use as a basis for performing decompression and fusion at L5-S1.

Dr. Lange clearly had a change of heart due to the findings by discography, inasmuch as he had the following to report at page 4 in his letter to counsel for the employer dated 7/7/05:

Mr. Harper does seem to present with a lumbar radiculopathy. This conceivably could be related to the disc prominence at the last functional lumbar level. It is important to point out that this terminology is utilized as the medical record would suggest that this last functional level has been termed L5-S1 in some reports by Dr. Lee as L4-5 due to the fact that there is a transitional vertebral segment. If Mr. Harper is not improving, certainly surgery could be contemplated at this disc level. Unfortunately with a combination of both

leg and back pain, a simple discectomy may well not be sufficient treatment. Considering his ongoing symptoms, he probably has not reached maximum medical improvement. (Claimant's Exhibit C-1)

Although the opinion of Dr. Kennedy as expressed in his written report was not subjected to the same scrutiny as was that of Dr. Lange by his deposition, it is apparent that Dr. Kennedy was well aware that injection at L5-S1 led to less than a full reproduction of the claimant's pain complaints, yet he still believes that claimant is a surgical candidate, given his intractable pain complaints.

The expert medical opinion of Dr. Kennedy as to the merits of a surgery is found to be more persuasive than that of Dr. Lange. The claimant is found to be in need of such further medical care as may be necessary to cure and relieve him of his complaints of injury. In the section of his report entitled **TREATMENT OPTIONS**, Dr. Kennedy states as follows: "I note that Dr. Lange thought there might be a suggestion of a pars defect at L5 which is not directly verifiable on the MRI and for this reason I think further investigation would be reasonable, specifically I would recommend a follow up myelogram to assess the bony detail and the facets at L5-S1."

The employer and insurer are to provide evaluation and treatment to Mr. Harper, consistent with the recommendations made by Dr. Kennedy, including but not limited to his recommendation for surgery.

This award is temporary or partial in nature, and the matter to be reset, if necessary, on notice from the parties as to issues ripe for adjudication.

Date: May 23, 2006

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
PATRICIA "PAT" SECREST
Director
Division of Workers' Compensation