

TEMPORARY AWARD ALLOWING COMPENSATION
(Affirming in Part and Reversing in Part
Temporary Award and Decision of Administrative Law Judge)

Injury No.: 08-035733

Employee: Richard Hatton
Employer: Johnson Controls, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission affirms in part and reverses in part the award and decision of the administrative law judge dated July 27, 2009.

The Commission affirms the determination of the administrative law judge in all respects except the assessment against employer for costs and attorney's fees under § 287.560. The award and decision of Administrative Law Judge Linda J. Wenman, is attached and incorporated by this reference to the extent it is not inconsistent with the findings, conclusions, award, and decision herein.

The Commission finds that employer had reasonable grounds to defend this matter because the claim involved a question of law as to whether employee sustained a compensable injury under the 2005 amendments to the Workers' Compensation Law, and because we are not convinced that the facts and circumstances compel a finding that employer acted egregiously in its handling of this claim. As such, the Commission reverses the portion of the award of the administrative law judge concluding that employer did not have such reasonable grounds. The remainder of the award of the administrative law judge awarding employee benefits is affirmed.

Given at Jefferson City, State of Missouri, this 11th day of May 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Richard Hatton

SEPARATE OPINION
CONCURRING IN PART, DISSENTING IN PART

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 affirmed in its entirety, and further, that employer should be assessed costs and attorney's fees for this appeal as it too is unreasonable.

In pertinent part, § 287.560 RSMo provides that if "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."

In *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. 2003), the employer was assessed costs and attorney's fees for two separate injuries under §§ 287.560. *Id.* at 250. For the first injury, the employee was sent to a doctor by the employer to determine if her injury was work related, and if it was, the employer told her it would pay benefits and medical expenses. *Id.* The doctor found the employee's injuries to be work related. *Id.* Despite this, the employer failed to pay benefits or medical expenses of the employee. *Id.* The employer defended the second injury on the grounds that the employee's work did not cause her injury. *Id.* It concluded that certain medical records showed that employee's injury was not work related. *Id.* The Court found that those records did not include any such conclusion, and therefore, did not give the employer a reasonable basis for denying the claim. *Id.*

In *Monroe v. Wal-Mart Associates, Inc.*, 163 S.W.3d 501 (Mo. App. 2005), the employer's own doctor opined that employee's injury was caused by her work. *Id.* at 504. "Despite [the doctor's] unequivocal conclusion that Claimant's hernia was the result of the alleged work place injury, [employer] continued to deny compensation." *Id.* The court found this conduct to be "egregious and outrageous." *Id.* at 508. The court further stated that "like the employer in *Landman*, at the hearing, Wal-Mart did not call witnesses or present any medical evidence ... and instead only pointed to alleged discrepancies in the medical records." *Id.*

The facts in this case are strikingly similar to those in both of the above cases. There is no question that employee suffered a herniated disc when he bent over to check the levels in employer's pump sprayer while on the job on May 5, 2008. Yet, employer continues to deny employee's claim without any evidence to support its position, and in the face of overwhelming medical evidence indicating that employee's injury is clearly work related. Employer's treating doctor found that employee's injury was work related, and recommended that employee return for physical therapy. When employee returned for physical therapy, he learned that employer would not approve his treatment. Employee subsequently received a phone call and a letter from a claims administrator informing him that his injuries were not covered by workers' compensation because his back condition did not arise out of and in the course of his employment. Even though there was no medical evidence providing a basis for employer's denial of employee's claim, employee was forced to seek treatment through his own primary care physician.

Employee: Richard Hatton

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Similarly, employer's evaluating doctor provided no basis whatsoever for employer's denial of the claim. Employer hired Dr. Mirkin to examine employee. Dr. Mirkin's report indicates that employee's work activity was the prevailing factor in causing employee's condition. Dr. Mirkin testified that the May 5, 2008, incident at work caused the disc herniation. When asked whether employee's condition is causally related to his activities at work, Dr. Mirkin replied:

Yeah. Had he not been bending over at that particular moment, doing that particular activity, that protrusion I don't think would have caused him problems or occurred at that particular instance in time.

Employer chose to ignore the opinions of its own treating and evaluating doctors and instead denied the claim based on a highly technical legal argument. Employer does not deny that employee suffered a herniated disc as a direct result of an activity he performed while in the course of his work duties for employer, yet employer argues that the claim is not compensable merely because employee *could have* been hurt in a similar fashion while not at work. Essentially, employer argues that because employee could have bent over when he was at home, this Commission should ignore the fact that employee suffered a herniated disc while bending over to check the levels in employer's pump sprayer on May 5, 2008. I find no reasonable support for employer's argument in the 2005 amendments to the Workers' Compensation Law, or the handful of cases interpreting the amendments.

Employer's unconscionable denial of this claim has placed an undue burden on employee, and has caused him to accrue additional costs and attorney's fees in the pursuit of his deserved benefits. For this reason, I would affirm the award of the administrative law judge in its entirety. Additionally, I would assess employer the costs and attorney's fees in connection with this appeal because I find the grounds for appeal to be unreasonable.

John J. Hickey, Member

TEMPORARY OR PARTIAL AWARD

Employee:	Richard Hatton	Injury No.:	08-035733
Dependents:	N/A		Before the
Employer:	Johnson Controls, Inc.		Division of Workers'
Additional Party:	Second Injury Fund (open)		Compensation
Insurer:	Self-insured		Department of Labor and Industrial
Hearing Date:	June 18, 2009		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	LJW

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: May 5, 2008
5. State location where accident occurred or occupational disease contracted: Hannibal, MO
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: While performing his job duties, Employee felt sudden stabbing low back pain.
12. Did accident or occupational disease cause death? No
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? \$242.80
16. Value necessary medical aid not furnished by employer/insurer? \$65,169.73

Employee: Richard Hatton

Injury No.: 08-035733

- 17. Employee's average weekly wages: Sufficient for maximum rates
- 18. Weekly compensation rate: \$742.72 / \$389.04
- 19. Method wages computation: Stipulated

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:	\$65,169.73
15 weeks of temporary total disability (or temporary partial disability)	\$11,140.80
§287.560 RSMo., costs	\$2,564.47
TOTAL:	\$78,875.00*

*OWED TO DATE

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 in favor of the following attorney for necessary legal services rendered to the claimant: Kenneth Koester

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Richard Hatton	Injury No.: 08-035733
Dependents:	N/A	Before the
Employer:	Johnson Controls, Inc.	Division of Workers'
Additional Party:	Second Injury Fund (open)	Compensation
Insurer:	Self-insured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: LJW

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on June 18, 2009. Richard Hatton seeks issuance of a temporary award ordering additional medical treatment under §287.510 RSMo., and 8 CSR 20-3.040. Neither party seeks a final award if additional medical treatment is denied. Briefs were received and the case was formally submitted on June 30, 2009. Attorney Kenneth Koester represented Richard Hatton (Claimant). Johnson Controls, Inc., (Employer) is self-insured, and represented by Attorney Mark Bates. The Second Injury Fund did not participate in the hearing, and by agreement will remain open.

Prior to the start of the hearing, the parties identified the issues for disposition in this case: liability of Employer for future medical expenses regarding additional medical treatment; liability of Employer for temporary total disability (TTD) benefits, accrued, but not previously paid; liability of Employer for past medical expenses; and expenses incurred by Employee in preparation for hardship hearing. Hearing venue was noted to be incorrect, but the parties consented to St. Louis venue. Jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Claimant offered Exhibits A-F, and Employer offered Exhibits 1-3. All exhibits were admitted. All markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Findings of Fact

All evidence presented has been reviewed. Only testimony necessary to support this award will be reviewed and summarized.

1. Employee is thirty-one years old, stands six foot and one inch tall, and has worked for Employer for approximately five years servicing and repairing large heating and air conditioning units at various business locations.

2. In order to service a business air conditioning unit, Claimant's job duties included cleaning the unit's coil with water from a garden hose, and using a two gallon pump sprayer filled with water and a cleaning mixture. Prior to cleaning a unit, Claimant would carry the hose, a two gallon empty spray container, and a box of cleaning mixture that weighed approximately thirty-five pounds from his truck. To fill the sprayer, Claimant had to slowly add water to the mixture due to foam produced when the cleaning solution and water mixed. When mixed, the solution was highly caustic, requiring careful monitoring while mixing to not allow spill-over, and the wearing of protective clothing and use of goggles. While being mixed the solution was not visible from the outside of the sprayer, and required Claimant to peer into the sprayer to determine if the produced foam had dissipated before adding more water. It took several minutes to fill a sprayer, and the sprayer reached a height of Claimant's knees, requiring Claimant to bend at a forty-five degree angle to monitor filling.

3. On May 5, 2008, Claimant report to a jobsite to perform spring cleaning of approximately 100-120 roof-top air conditioning units. Following the routine outlined above, Claimant began filling a two gallon sprayer. During the filling Claimant experienced sudden intense stabbing low back pain. Claimant's co-worker witnessed the incident and lowered Claimant to the ground. Claimant's supervisor was notified, and Claimant was directed by Employer to seek medical care at Concentra.

4. Claimant was seen at Concentra on the day of injury. Dr. Kerbyson examined Claimant, diagnosed a lumbar strain, questioned whether Claimant displayed Waddells signs due to "over reaction," provided a lumbar support, ordered medication and physical therapy, placed Claimant on restricted duty, and opined the injury to be work related. Claimant was instructed to return for further evaluation in three days.

5. On May 8, 2008, Claimant returned to Concentra. Dr. Kerbyson noted Claimant's physical therapy had not been authorized, Claimant reported improvement, and his Waddells signs were negative. Dr. Kerbyson continued Claimant's treatment, and requested Claimant return for further evaluation in five days. On May 8, 2008, Claimant received a letter from Mr. Ramon Lendof, a senior claims adjustor with Employer's insurer, notifying Claimant "it has been determined that you did not sustain a specific work accident. Your back spasms condition did not **arise out of and in the course of your employment** and therefore is not covered by workers' compensation." Claimant next sought treatment from his personal physician, Dr. Susan Reed.

6. Dr. Reed examined Claimant on May 16, 2008. Claimant complained of low back pain with pain radiating into his left lower extremity. Dr. Reed ordered physical therapy and placed Claimant on an oral steroid. After receiving this treatment, Claimant did not improve, and a lumbar MRI was obtained on July 14, 2008. The MRI demonstrated a moderate size disc extrusion at L4-5 with left L5 nerve root impingement, and a L5-S1 board-based left central disc protrusion. Claimant was referred to Dr. Vellinga for additional physical therapy and a series of lumbar steroid injections and nerve blocks. On September 5, 2008, following three injections, Dr. Vellinga noted Claimant would experience short-term relief after an injection only to have recurrence of pain. Dr. Vellinga opined Claimant's MRI demonstrated a "large board-based left paracentral disc herniation at [L] 4-5 compressing the left L5 nerve root and causing spinal stenosis." Dr. Vellinga recommended Claimant be evaluated by Dr. Scodary, a neurosurgeon.

7. Dr. Scodary initially examined Claimant on October 27, 2008. Dr. Scodary agreed with Dr. Vellinga's interpretation of Claimant's MRI, and noted Claimant had failed conservative treatment. Dr. Scodary recommended lumbar spine surgery. On November 5, 2008, Claimant underwent a L4-5 left microdiscectomy with hemilaminotomy. Initially following surgery Claimant's symptoms decreased, but then returned. On December 1, 2008, a repeat MRI demonstrated a recurrent herniated disc at L4-5, and on December 17, 2008, Claimant underwent a second lumbar spine surgery for removal of a free disc fragment. For two weeks following the second surgery, Claimant again experienced a decrease of symptoms, only to have his symptoms return. On January 15, 2009, a new MRI demonstrated no new disc fragments, but demonstrated "a fairly significant L4-L5 central left disc protrusion." Claimant was re-referred to Dr. Vellinga for additional lumbar steroid injections.

8. The repeat injections provided relief for a brief period of time, and Dr. Scodary now recommends Claimant undergo a discogram to confirm the disc level(s) producing Claimant's pain. If the discogram is positive, Dr. Scodary would recommend Claimant proceed with a L4-5 spinal fusion. Dr. Scodary kept Claimant off work from November 5, 2008 until February 3, 2009. Dr. Scodary opined Claimant's work injury of May 8, 2008, was the prevailing factor for all treatment given to date, and for the treatment being contemplated in the future. Dr. Scodary further opined all treatment provided to date was reasonable and necessary to treat Claimant's work injury, and his bill for treatment given to date was fair and reasonable. Dr. Scodary conceded Claimant's initial disc herniation could have occurred at home if "he had a sprayer at home, bending over it, in that position for the same amount of time." (Exhibit F, pg. 21)

9. Dr. Nester, a board certified family practice physician, examined Claimant at his request on May 12, 2008. Following his examination, Dr. Nester diagnosed a L4-5 herniated disc with left radiculopathy, L5-S1 disc bulge, and severe residual lumbar and left leg pain. Dr. Nester noted prior to the work injury, Claimant had no previous history of low back complaints. Dr. Nester did not find Claimant to be at maximum medical improvement (MMI). Dr. Nester opined Claimant's May 5, 2008, work injury was the prevailing factor in Claimant's need for medical treatment. When asked how Claimant's work duties had placed him at a greater risk for a disc herniation than any non-work activities, Dr. Nester testified Claimant had done some lifting immediately prior to the injury, and his job related lifting requirements had placed his back at a greater risk for herniation. (Exhibit E, pgs. 19-21)

10. Dr. Mirkin is a board certified orthopedic spine surgeon, who examined Claimant at the request of Employer on April 15, 2009. Upon examination, Dr. Mirkin noted Claimant had decreased lumbar range of motion, positive left leg atrophy, positive straight leg raising, and absent left Achilles deep tendon reflexes. Dr. Mirkin opined Claimant's exam findings were consistent with nerve injury or nerve compression. Dr. Mirkin diagnosed a post-discectomy nerve problem in Claimant's lower lumbar spine. Dr. Mirkin opined additional surgery is a reasonable option for Claimant if his symptoms remain significant. Dr. Mirkin further opined Claimant's May 8, 2008, work injury was the prevailing factor in his need for treatment, and was causally related to his work activities, but Claimant's work activities provided no greater risk of herniation than if the injury had occurred while he was bending over at home. Upon cross-examination, Dr. Mirkin once again agreed Claimant's injury was causally related to his work activities noting "had he not been bending over at that particular moment, doing that particular

activity, that protrusion I don't think would have caused him problems or occurred at that particular instance in time." (Exhibit 1, pg. 13)

11. Mr. Jason Grills was working with Claimant on the date of injury, witnessed the injury, and corroborated Claimant's testimony regarding how a sprayer is filled and the events on May 5, 2008.

12. Mr. Arron Bates provided foundation testimony regarding the video produced as Exhibit 3. Mr. Bates acknowledged: the video demonstrated the filling of a 3 ½ gallon sprayer instead of the 2 gallon sprayer used by Claimant; he was not bending over while filling the sprayer with water; he was not wearing goggles during the filling; he did not have to pause and peer into sprayer while filling as he did not use the cleaning solution; and he has no knowledge of how Claimant performed his job.

13. As of hearing, Claimant's pain is dependent upon his level of activity, his left leg pain is constant and more severe than his low back pain, and he is unable to assist with housework or assist his son with baseball. Claimant is currently working for Employer, but relies on co-workers to assist him with lifting or carrying items. Claimant is willing to undergo the spinal fusion recommended by Dr. Scodary.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to accident & arising out of and course and scope of employment

Claimant bears the burden of establishing the essential elements of his claim. Included in the essential elements, is establishing accident, arising out of employment, and being in the course and scope of his employment when the injury occurred. The Missouri Workers' Compensation law was amended during the 2005 legislative session. Section 287.020.2 RSMo., 2005,¹ now 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 287.020.3(1), provides: In this chapter the term "injury" is hereby defined to be 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.

Section 287.020.3(2), provides in part: an injury shall be deemed to arise out of and in the course of employment only if:

¹ Unless otherwise indicated all further references are to RSMo Supp.2005.

(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.

Included in the 2005 amendments to Chapter 287, was the express intent of the legislature rejecting and abrogating established caselaw that had defined "accident," "arising out of," and "in the course of employment."

Following the 2005 amendments, two reportable cases have emerged from the Missouri Appellate Courts discussing the provisions cited above. Both are distinguishable on the facts from the instant case. In *Bivens v. St. John's Regional Health Center*, 272 S.W.3d 446 (Mo.App. 2008), the employee was walking down a hallway to clock in when she "just fell." *Id.* In sustaining the Labor and Industrial Relations Commission (LIRC), the *Bivens* Court noted the LIRC had determined the employee had presented no rational connection between her work and the injury that was sustained, and the employee had failed to show that she was exposed to an unusual risk of injury not shared by the general public. *Id.* In *Miller v. Missouri Highway and Transportation Commission*, No. SC 89960, (Mo.banc 2009), while repairing a highway, a highway worker was walking briskly toward his truck when he felt a pop in his knee. The Missouri Supreme Court found:

The injury here did not occur because Mr. Miller fell due to *some condition of his employment*. He does not allege that his injuries were worsened due to *some condition of his employment* or due to being in an unsafe location *due to his employment*. He was walking on an even road surface when his knee happened to pop. *Nothing about work caused it to do so*. The injury arose during the course of employment, but did not arise out of employment. (emphasis supplied) *Id.*

In the instant case, Claimant presents a rational connection between his work and the injury sustained. Claimant's job duties *required* him to carry cleaning solution and other supplies from his truck to the job site. Claimant's job duties *required* him to bend at an angle to allow him to monitor the filling of the sprayer, and *required* him to stay in that position for a sufficient period of time to safely fill the sprayer. While fulfilling the *required* elements of his job duties, Claimant developed a sudden onset of severe pain in his low back, which all medical experts agree resulted in Claimant's disc herniation. Claimant also met his burden to establish he was exposed to a risk of injury not shared by the general public. The general public may frequently bend over throughout the day for brief periods, but the general public does not routinely bend over to fill a two gallon sprayer that produces a caustic solution when mixed.

Claimant credibly testified regarding his job duties and the events surrounding his May 5, 2008, work injury. Claimant's testimony was fully corroborated by his co-worker. Claimant's description of his job duties was not challenged by Employer. Employer did produce a video purporting to demonstrate how a sprayer is filled, however, the procedure used in the video did not resemble the actual size sprayer or the procedure used by Claimant when filling a sprayer, and can be awarded little to no weight. Accordingly, I find Claimant has met his burden to

establish an accident that arose out of and in the course and scope of his employment with Employer occurred on May 5, 2008, for which Employer is liable under the applicable Missouri Workers' Compensation Act.

Issues related to additional medical treatment

Claimant seeks additional medical treatment for his low back injury. All medical physicians who testified found Claimant to be in need of additional medical treatment. Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. I find Employer is obligated to provide further treatment regarding Claimant's low back injury, including, but not limited to, medical examinations and care by a board certified neurosurgeon or orthopedic surgeon specializing in spine disorders, pain management by a board certified pain management specialist, physical therapy, medications, medical equipment prescribed by the authorized physician, and surgical or diagnostic needs. Employer will retain the right to direct any future medical care if utilizing a physician who meets the qualifications as previously described.

Issues related to past medical expenses

Section 287.140.1 RSMo. (2000), provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. 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 treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989).

Employer paid for one visit to Concentra on the day of injury. Claimant was then informed his injury was not work related and he was forced to seek treatment on his own. Claimant seeks reimbursement of medical expenses to treat his low back in the amount of \$65,169.73. An itemized listing of charges in the amount of \$65,169.73 was issued by the medical providers, supported by the appropriate medical records, and Claimant's testimony. Employer did not challenge the reasonableness or necessity of the treatment provided. Claimant's low back injury is compensable, and he has met his burden of evidence. Accordingly, I find Employer liable for \$65,169.73 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of his work related injury.

Issues related to past and future TTD benefits

TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled on other grounds). Employer has paid no TTD benefits to date. Dr. Scodary testified he authorized Claimant to remain off work from the date of his first surgery on November 5, 2008, until he was allowed to return to work on February 3, 2009, a period of 15 weeks. Therefore, I find Employer liable for 15 weeks of past TTD benefits, or \$11,140.80.

Additionally, Claimant may receive TTD benefits during the course of future medical treatment. Pursuant to this award, Claimant will receive medical intervention for his low back injury. He will also be entitled to receive TTD benefits to cover the healing period associated with such treatment, if the physician determines Claimant would be unable to work during that period.

Issues related to costs under §287.560

Claimant seeks \$2,564.47 in costs related to discovery conducted in preparation for the hardship hearing. Section 287.560 RSMo., provides in part: "if the division or 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." Reviewing the facts surrounding this case, while the question of compensability does rest on a question of law, it is inescapable to note Employer's authorized medical provider opined the injury of May 5, 2008, was the prevailing factor and that the injury was work related. Employer did not obtain a contrary opinion until April 15, 2009, when Dr. Mirkin examined Claimant and issued his report. Despite no opinion to the contrary, Employer's insurance adjustor ignored his own expert and denied Claimant benefits. Based on this history, I find Employer's position to have been unreasonable, and Claimant's request for costs is granted. Employer is liable for \$2,564.47 in costs.

CONCLUSION

On May 5, 2008, Claimant sustained injury by accident to his low back that arose out of, and in the course and scope of his employment. Claimant is entitled to receive Workers' Compensation benefits associated with his injury as described in this award. This is a temporary award, subject to further order, the proceedings are hereby continued, and the case kept open until a final award can be made. The remaining issues in dispute will be determined in future proceedings. SIF will remain open. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation