

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

Injury No.: 02-012890

Employee: James G. Hawley
Employer: 360 Fiber Incorporated
Insurer: Commerce and Industry Insurance Company
Date of Accident: February 1, 2002
Place and County of Accident: Alleged to have occurred in
Reynolds 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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the associate administrative law judge 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 the award and decision of the associate administrative law judge dated January 3, 2005, and awards no compensation in the above-captioned case.

The award and decision of Associate Administrative Law Judge Gary L. Robbins, issued January 3, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 27th day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: James G. Hawley

Injury No. 02-012890

Dependents: N/A

Employer: 360 Fiber Incorporated

Additional Party: N/A

Insurer: Commerce and Industry Insurance Company

Hearing Date: September 29, 2004

Checked by: GR:sm

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease? Alleged to have occurred on February 1, 2002
5. State location where accident occurred or occupational disease contracted: Alleged to have occurred in Reynolds County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
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 alleged he injured his back while lifting a generator.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Employee alleged he injured his back/BAW.
14. Nature and extent of any permanent disability: None
15. Compensation paid-to date for temporary total disability: None
16. Value necessary medical aid paid to date by employer-insurer? None
17. Value necessary medical aid not furnished by employer-insurer? None
18. Employee's average weekly wage: \$913.29
19. Weekly compensation rate: \$608.86
20. Method wages computation: By agreement
21. Amount of compensation payable: None

FINDINGS OF FACT AND RULINGS OF LAW

On September 29, 2004, James G. Hawley, the employee appeared in person and by his attorney Robert. M. Miller, for a temporary or partial award. The employer-insurer was represented at the hearing by their attorney Dale E. Gerecke. The Court prepared a final award as the Court ruled that that there was no accident and that the employee is not entitled to any benefits. The Court took judicial notice of all of the records contained within the files of the Division of Workers'

Compensation.

At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Commerce and Industry Insurance Company.
2. The employer had notice of the employee's accident.
3. The employee's claim was filed within the time allowed by law.
4. The employee's average weekly wage was \$913.29 per week. The employee's rate for temporary total disability and permanent partial disability is \$608.86 per week.
5. No medical aid was furnished by the employer-insurer.
6. No temporary total disability benefits were paid by the employer-insurer.

ISSUES:

1. Whether on or about the date of the alleged accident or occupational disease, the employee was an employee of 360 Fiber Incorporated and was working under the Workers' Compensation Act.
2. Whether on or about February 1, 2002, the employee sustained an accident or occupational disease arising out of and in the course of his employment.
3. Whether the employee's injury was medically causally related to his accident or occupational disease.
4. Whether the employee needs additional or future medical care.
5. Whether the employee is entitled to temporary total disability benefits for the period of February 1, 2002 to present, for a total of \$84,457.58.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee Exhibits

- A. Medical records of Henry F. Steele, M.D.
- B. Medical records of St. Louis Orthopedic Institute
- C. Deposition of David B. Robson, M.D.

Employer-insurer Exhibits

1. Deposition of August Ritter III, M.D.

SUMMARY OF THE EVIDENCE:

The evidence presented at trial by the employee consisted of the live testimony of James G. Hawley, the employee; medical records from Dr. Henry Steele; medical records from St. Louis Orthopedic Institute; and the deposition of Dr. David B. Robson. The employer-insurer presented the live testimony of Terry Webster who was the immediate supervisor Mr. Hawley, the live testimony of Mr. Webster's supervisor, Allen Hemrich, and the deposition of Dr. August Ritter III.

James G. Hawley began his employment with 360 Fiber, Incorporated (360) in 1999. 360 was involved in the business of installing fiber optic cables all over the country. The employee performed his initial duties as a fiber optics splicer with a splicing crew, however his job duties also turned to general construction when 360 began having financial difficulties. Terry Webster was the supervisor of the crew that Mr. Hawley was assigned to. It was agreed that the employee kept 360's truck, trailer and other equipment and tools at Mr. Hawley's residence in Reynolds County, Missouri. Part of the equipment that 360 had on their splice trucks was a generator. This arrangement was made, as it was more convenient for the splicing crews to have the equipment based locally then to have it based at a central pickup point.

Mr. Hawley had not actually performed any services for 360 since December 14, 2001. That was the last time the he performed any duties with his splicing crew. At that time he was paid a check that included payment for hours worked, safety hours and a bonus. Due to the bankruptcy proceeding that 360 was going through, all splicing crews were being laid off. It was well known within the company that it was in financial trouble and was laying off all splicing crews. No splicing crews performed any duties for 360 in 2002. Mr. Hawley did not perform any duties for 360 in 2002.

Mr. Hawley testified that he injured his back on February 1, 2002, as he was loading a generator into the back of a truck that belonged to 360. Through a series of telephone calls over several days, Allen Hemrich had made arrangements to pick up 360 property and had driven to the employee's property on that day to pick up the 360 property the employee kept at his

residence.

The employee had back problems that are documented and treated as early as 1984. Records show that he received treatment for his back in January 2001, and had an accident where he was thrown off a horse in December 2001. The medical records document that prior to the events of February 1, 2002, the employee had undergone at least one MRI evaluation that showed numerous back problems at multiple levels to include a herniated disc at L5-S1.

The employee provided testimony recounting his version of the alleged accident of February 1, 2002 and the events leading up to the accident. He testified that he was an employee of 360 on an on-call status that did not change prior to February 1, 2002.

Mr. Hawley testified that he had a lack of trust with 360. He testified this lack of trust existed as a result of financial promises that he said 360 made and did not keep. In January 2002, the employee testified that he got a call from Terry Webster advising him to report to Minnesota with the splicing truck and other equipment. The employee indicated that he did not want to go due to preexisting matters at his home. It was agreed that he did not have to report to Minnesota with the rest of his crew. Mr. Hawley indicated that he knew that 360 was in financial trouble and that the other splicing crews had been laid off.

Mr. Hawley testified that a few days prior to February 1, 2002, Terry Webster called and advised him that he was going to be laid off and that Mr. Webster wanted to pick up 360 property. Mr. Hawley testified that there was a dispute regarding the 360 property he had at his property over storage fees, and an additional dispute over money he felt 360 owed him regarding the trailer. In a telephone call with Mr. Webster, the employee advised Mr. Webster that he was not going to allow anyone to take possession of the 360 property that he had at his property, and that in addition he was not going to allow anyone on his property to recover the property.

A couple of days later the employee testified that Allen Hemrich called and said that he was on his way to pick up the 360 property. Mr. Hawley testified that he told Mr. Hemrich that he was not going to be allowed to pick up the 360 property or to come on his property due to disputes over what he claimed 360 owed him. On January 29, 2002, when Mr. Hemrich called, the employee told him he could not pick up anything, as he was busy. On January 31, 2002, Mr. Hawley testified that when Mr. Hemrich called and told him he was on his way to pick up equipment, he advised Mr. Hemrich that unless he got a list of equipment that 360 wanted, he would not turn over any property. After Mr. Hemrich faxed a list, the employee advised he would not return some property.

Mr. Hemrich called at about 9:30 A.M. on February 1, 2002, and said he would be there about noon. On that day about 10:45 A.M., Mr. Hawley informed Mr. Hemrich that he had a job interview at noon and he would not be available until after the meeting.

Mr. Hawley testified that before Mr. Hemrich arrived at his property to take possession of 360 equipment he told Mr. Hemrich that the splice truck was stuck in the mud and had bad brakes. Additionally, the employee testified that he had taken all of the 360 property that was in the truck and loaded it onto a trailer. He then drove it to the edge of his property line where he placed the property on the ground. Included in this property was a generator.

Mr. Hawley testified that Mr. Hemrich arrived, and they met at an access road adjacent to his property at about 2:15 P.M. on February 1, 2002. Mr. Hemrich asked for and was given permission to turn his truck around on the employee's property. The employee testified that he would not let Mr. Hemrich near the splice truck as he felt they were too aggressive. The splice truck nor the trailer could be seen from the area where the employee placed the 360 equipment. The employee testified that Mr. Hemrich never asked him to bring the 360 equipment to the edge of his property. Mr. Hawley testified that Mr. Hemrich asked him to load stuff onto the 360 truck as Mr. Hemrich did the inventory. The employee testified that he did not remember Mr. Hemrich having a trailer, but he did see another man in the truck that Mr. Hemrich drove up in. The passenger never got out of the truck.

Mr. Hawley testified that he hurt his back when he loaded the generator onto the 360 truck and that he informed Mr. Hemrich of this.

Mr. Hawley testified that his wife was present during these events and he had her bring a gun as he felt 360 was being aggressive and the gun was brought as intimidation towards them. He additionally indicated that he knew he was being laid off prior to Mr. Hemrich's arrival at his property, but felt he was still employed until he loaded the last piece of property. He felt that the picking up of equipment was his termination.

Mr. Hawley testified that he faxed a time sheet to Mr. Hemrich about his work on February 1, 2002. He related that Mr. Hemrich had told him he would be paid for his work in loading the equipment and requested that he send a fax requesting payment.

Terry Webster testified that Mr. Hawley worked on the splicing crew that he supervised. His crews worked mostly between Chicago and New Orleans. He indicated that 360 filed for Chapter 11 bankruptcy in 2001. Splicing crews were being laid off constantly due to either completion of a project or due to lack of funding. He testified that 360's work was decreasing

and that after a crew was laid off they were never brought back.

Mr. Webster testified that he talked to his supervisor, Allen Hemrich, about his crew on January 10, 2002. This was the only crew that 360 had not yet actually laid off. It was determined that Webster's crew would be brought to Minnesota for a week on January 21, 2002, and then finally laid off. The purpose for this was for 360 to do some final clean up and mainly to recover their splice trucks and equipment from the field.

Mr. Webster testified that he called Mr. Hawley and told him to report to Minnesota beginning January 21, 2002. He indicated that Mr. Hawley told him that he could not do that as he had a construction commitment already scheduled at his house. By agreement it was determined that the employee did not have to report to Minnesota and arrangements would be made later for 360 to pick up the truck and other equipment. Mr. Webster testified that he informed the rest of his crew while they were in Minnesota that they were laid off. He additionally testified that he called Mr. Hawley on January 24th and told him the same thing. It was during this conversation that the initial discussion took place regarding the recovery of equipment. Mr. Webster testified that Mr. Hawley said it was all right to pick up the truck and equipment at his property.

Mr. Webster testified that while he was still in Minnesota he began to make arrangements to pick up the equipment from the employee, and arranged for he and another employee to drive to Missouri to accomplish this task. The plan was to drive to get the property, inventory it, hook up the trailer to the truck and drive off. Mr. Webster indicated that there would have been no need for anything to be lifted by the employee or anyone else, as the property should have been locked in the truck or on the trailer. On the Saturday before February 1, 2002, Mr. Webster testified that he called Mr. Hawley and was told that he should not bother to pick up the equipment, as he was not going to release it pending a lawsuit he was going to file. At that time Mr. Webster reported this to Mr. Hemrich and took no further steps to recover the 360 property that Mr. Hawley had in his possession.

Mr. Webster additionally testified that the employee did not fax him a time sheet asking for payment for his time in recovering the property. He also indicated that he was not aware of any agreements between 360 and Mr. Hawley about remaining employed while the company was in bankruptcy; or any agreement about Mr. Hawley keeping the 360 trailer in exchange for wages. He also indicated that he did not make any arrangements with Mr. Hawley to pay him rent for storage for keeping the 360 truck and property at his residence. He did indicate that 360 had a benefit in having the truck in the field rather than being located at a marshalling yard.

Mr. Webster testified that Mr. Hawley never informed him that the truck was stuck in the mud or had bad brakes. He indicated that the truck had been on Mr. Hawley's property since it was last used in mid December and he would have been the one to be informed if the truck had problems. He finally indicated that he has no knowledge of how the truck was ultimately recovered or whether it actually had any brake problems.

Allen Hemrich is an employee of 360 who managed all splice crews that operated in the United States. He testified that in 2001 all splice crews, except for Terry Webster's, were laid off and not called back due to completion of work or Chapter 11. The only crew that remained was the one directly supervised by Terry Webster. Mr. Hemrich testified that the last day that Webster's crew worked was on December 14, 2001. They were sent home on a holiday break and knew that they were going to be laid off, as there was no more work for them. He indicated that this crew did not work in 2002.

In 2002, Mr. Hemrich was working to recover the equipment that 360 had in the field. This was necessary as each splice crew had a splice truck and there was valuable equipment on each truck. He testified that the plan for Webster's crew was to get all of the crew to Minnesota for a week of busy work to recover the equipment. The crew was informed this would be the last employment with 360.

Mr. Hemrich testified that he was in Texas when he was informed that Mr. Hawley would not be coming to Minnesota. He made arrangements for Terry Webster to drive to the employee's property, get the keys and recover the 360 equipment by driving it away. When Mr. Hemrich was informed of the problems Webster had in recovering the property, he told him to discontinue his efforts and began to make arrangements himself.

Mr. Hemrich initially contacted 360's corporate counsel and then called Mr. Hawley on January 28, 2002. In a series of telephone conversations he informed Mr. Hawley that the property had to be recovered. He testified that Mr. Hawley said that he would not release the property as he was in the process of contacting an attorney to file a claim for lost wages. Mr. Hemrich testified that he informed Mr. Hawley that he saw no relationship between the two matters. Mr. Hemrich further indicated that he told the employee that he would be arriving on January 29, 2002, to recover the property. Mr. Hemrich made preparations to recover all 360 property. He drove from Texas with his father as a second driver, and a car hauler to pull the trailer onto, as he was told it was in disrepair. He testified that when he arrived he was prepared to take both the trailer and truck with him, and that he informed Mr. Hawley of his intentions.

He continued to have several telephone conversations with Mr. Hawley between January 29, 2002 and February 1, 2002. He testified that the employee informed him that if he came on his property, he would be arrested for trespass. Mr. Hemrich called the local sheriff and advised Mr. Hawley of that conversation.

On February 1, 2002, Mr. Heimrich called the employee at about 10:00 A.M. and informed him that he was about fifteen

minutes away. During that conversation Mr. Hemrich indicated that Mr. Hawley informed him that he had a job interview at noon and would not be available. Mr. Hemrich again checked with his general counsel. As a result of that conversation, he advised Mr. Hawley that he would be on the public road next to Mr. Hawley's property until 3:00 P.M. to pick up the property, and if that could not be done they would pursue other legal channels. Mr. Hemrich made contact with Mr. Hawley again about 2:00 P.M. and arrangements were made for Mr. Hemrich to park near the property. Mr. Hemrich arrived and parked his vehicle near the property and approached by foot. He saw the employee and was given permission to turn his vehicle around on the employee's property.

Mr. Hemrich further testified that his father who was a passenger in his truck got excited as he saw Mrs. Hawley with a gun. Mr. Hemrich told his father to stay in the truck and pulled his truck next to the equipment that was located on the ground. Mr. Hemrich testified that neither the 360 truck nor the trailer were visible. He had faxed a list of equipment to Mr. Hawley the day before and was in the process of inventorying the property when Mr. Hawley started loading stuff into the truck. Mr. Hemrich was asked if he checked everyone like this. Mr. Hawley expressed concerns about his treatment by 360, and specifically complained about his past treatment and wages he claims he was not paid.

Mr. Hemrich said he was nervous about the whole situation as Mrs. Hawley had a gun, but other than the gun he was not surprised at Mr. Hawley's actions as the whole situation was strained. He said he was there about twenty minutes and in that time Mr. Hawley loaded a generator in the truck. Mr. Hemrich specifically testified that he never asked Mr. Hawley to load anything in the truck and certainly never asked him to move anything near his property line, as his intention was to load the trailer onto the trailer he had brought, and drive the two trucks away with the equipment on board. Additionally he testified that Mr. Hawley never said anything about hurting his back when he loaded the generator, nor did he make any signs or gestures that he had hurt his back.

During that period there were several conversations about picking up the equipment. Mr. Hemrich testified that the earlier conversation had mostly been about the disrepair of the trailer but while he was in transit he was informed that the truck was stuck and had a brake problem. Mr. Hemrich testified that he told Mr. Hawley that he would get a tow truck, but Mr. Hawley stated that he did not want a tow truck on his property. Mr. Hemrich asked to see the truck to access its condition but was not allowed to do so.

Mr. Hemrich testified that Mr. Hawley was not an employee of 360 on February 1, 2002. He also testified that never told Mr. Hawley that he would be paid for any efforts that day. He additionally related that he never asked for nor received a fax from Mr. Hawley on this subject. He testified that the truck was later recovered but offered no specific information on that matter. He also indicated at some point after February 1, 2002, the trailer was transferred to the employee.

The medical records of Dr. Henry F. Steele were received as evidence. Those records disclose a course of treatment in 2001. On January 30, 2001, the employee was treated for back and foot pain. Dr. Steele diagnosed three deteriorated discs, prescribed Naproxen and ordered an MRI. On February 23, 2001, the employee saw Dr. Steele and complained about hip pain and wanted more Percocet. The doctor ordered x-rays that were read as negative. On December 4, 2001, the records reveal that the employee was being treated after having been thrown from a horse. Mr. Hawley was complaining of pain. Dr. Steele ordered x-rays of the cervical spine and prescribed medication. The x-rays were read as showing degenerative changes at several levels of the spine and cervical spondylosis. An MRI of the lumbar spine was read on December 16, 2001. That MRI revealed degenerative disc spaces at L2-3, L3-4 and L5; a left disc protrusion at L2-3 and L3-4, and a L5 significant disc herniation.

On February 5, 2002, the employee saw Dr. Steele and reported that he hurt his back while lifting a generator. Dr. Steele prescribed Percocet and ordered x-rays of the lumbar spine. Dr. Steele put the employee on a fifty pound lifting restriction.

On June 16, 2003, approximately sixteen months after the alleged accident, another MRI was taken of the employee's lumbar spine. It showed a slight disc bulge at L1-2, mild edema of the end plates and mild stenosis at L2-3, edema of the end plates, compression and spinal stenosis at L3-4, and a slight disc herniation at L5-S1. It also revealed spurring at all levels except L4-5 and L5-S1.

The records of The St. Louis Orthopedic Institute show that the employee had a history of back problems and was treated for back problems as far back as the 1980's. In a medical record dated December 28, 1990, the employee was treated for back pain. It reported that his pain is intermittent in nature lasting one to two weeks. It reports that the pain is sometimes so severe in the morning that he can hardly get out of bed and has to go to work using a cane.

Dr. David B. Robson examined the employee on February 12, 2003. In his reports the doctor indicates that the employee had a history of back problems prior to February 1, 2002, and that he reported he never missed work due to these problems prior to February 1, 2002. However, Dr. Robson's report of February 12, 2003 reports that the employee said he took off a week due to his back problems in 1985. Dr. Robson reported that the MRI's taken prior to February 1, 2002 show herniations. Dr. Robson recommended that a new MRI be done for comparison. Dr. Robson compared the MRI done on February 16, 2001 with one done on June 16, 2003. His opinion was that the films were similar, but the pre-accident MRI was "slightly worse" (emphasis added) than the post-accident MRI. He further opined that the February 1, 2002 incident did not cause herniation. He described that event as being more likely to have caused a flare-up and become symptomatic. His opinion initially was that the incident could have aggravated the employee's condition to where treatment was necessary, and then later said the

incident did aggravate the employee's condition as the employee reported it made him more symptomatic.

In his deposition, Dr. Robson stated that he bases his opinions on what the patient tells him and that relied on what Mr. Hawley told him in formulating his opinions. He acknowledged that the employee did not report that he had been thrown from a horse and did not tell him he had been laid off.

Dr. August Ritter III examined the employee on July 16, 2002 and indicated that it is possible that the incident of February 1, 2002 could have aggravated the employee's pre-existing back condition.

FINDINGS OF FACT AND RULINGS OF LAW:

ACCIDENT AND MEDICAL CAUSATION

The employee testified that he hurt himself while lifting a generator on February 1, 2002. He reported the same circumstances to the medical providers on February 5, 2002, when he first sought medical care. Other than his personal testimony, there is no other evidence to substantiate that this event took place as described by the employee. The employee offered medical evidence that supported his position that he is in need of medical care due to the lifting event of February 1, 2002. However, the medical testimony is premised on the facts as presented in the history provided by the employee. The practice of medicine and therefore any medical opinion is based on full, accurate and truthful disclosure by a patient to his doctor. Dr. Robson testified that he depends on the representations of his patients, and specifically relied on what the employee told him. Any medical opinion that supports the employee's position must therefore be based on the truthfulness and accuracy of those facts presented by the employee. If the representations made by the employee to the medical providers were not complete, accurate and truthful, then the medical opinions that are based on that information are invalid.

The employee's whole case rises or falls on whether the employee has met his burden of proof by proving that his accident arose out of and in the course of his employment. In other words, whether the employee's testimony is found to be truthful and supported by the evidence taken as a whole. Unfortunately for the employee, the Court finds that the employee's testimony regarding the accident lacks credibility and is specifically contradicted directly by testimony from other more competent witnesses and circumstantially by the totality of the evidence surrounding the events of February 1, 2002 and the events leading up to that date.

In addition to the employee's burden of proof on accident, the employee also has the burden to prove that there is a medical causal relationship between the accident and the injuries and the medical treatment that the employee is seeking. The employee has also failed to meet his burden of proof on the issue of medical causation.

THE FACTS SURROUNDING THE EVENTS ON OR SHORTLY BEFORE FEBRUARY 1, 2002:

Only the employee, Mr. Webster and Mr. Hemrich provided testimony about the events concerning the recovery of 360 property. The Court found the testimony of Mr. Webster and Mr. Hemrich to be credible, and found the testimony of Mr. Hawley to be lacking in credibility.

In the Court's opinion, it is an understatement for the employee to testify that his relationship with 360 was strained. Mr. Webster testified that during the week of January 21, 2002, he told the employee in a telephone conversation that he was that he was being laid off. As the employee was not going to Minnesota to turn in the truck and equipment, the employee said it was all right to get the truck. During the short period that Mr. Webster was making arrangements to secure the truck, the employee apparently had a change of heart. The evidence is very clear that from that point onward the employee was going to be obstructive and was not going to cooperate with the representatives of 360. Mr. Hawley informed Mr. Webster that he was filing a lawsuit and would not let anyone from 360 pick up property or even come on his property. The employee took every step he could to be obstructive to any efforts by Mr. Webster and then Mr. Hemrich to secure 360 property; even to the point of having his wife show up with a firearm. Mr. Hawley when asked by the Court why he did this, testified that it was for intimidation. The employee kept putting roadblocks into any attempts to recover 360 property. He testified that he would not let anyone take the property, he would not let anyone on his property, and that he was filing a lawsuit. He demanded an inventory of property and then said he would not release certain property. Apparently at the last minute, he said the truck was stuck in the mud with bad brakes yet would not let Mr. Hemrich check the condition of the truck. He kept delaying the times that he would be available, and then had his wife bring a gun to the scene when Mr. Hemrich arrived. He apparently was antagonistic with Mr. Hemrich during the loading process.

The generator and other 360 property should have been kept either on their truck or their trailer. The plan was for Mr. Hemrich to show up with a driver and drive the equipment away. He even brought an extra trailer as he understood that the 360 trailer was in disrepair. There was absolutely no need or reason for the employee to take the generator and other property, load it from the 360 equipment onto another trailer and then transport it to the edge of his property. The Court believes the employee did this as part of his efforts to make the recovery of property difficult.

Mr. Hawley says that he was still a 360 employee until he loaded the last piece of equipment. Both Mr. Webster and Mr. Hemrich dispute this. Both testified there was no agreement between either of them and Mr. Hawley to pay him for any

services rendered on February 1, 2002. There was no agreement for the employee to have to move or load equipment. All that should have been needed to recover property should have been to conduct an inventory and drive the truck and trailer away with the equipment on board. Mr. Hawley says Mr. Hemrich asked him to load the equipment, Mr. Hemrich specifically denies this. Mr. Hawley testified that when he lifted the generator, he hurt his back and told Mr. Hemrich of this. Mr. Hemrich testified that the employee never said he hurt his back nor did he make any gestures or motions that he hurt his back. In analyzing the case in its entirety, the Court believes the testimony of Mr. Hemrich over that of the employee. The Court does not believe that the employee hurt his back as he indicated on February 1, 2002.

The employee testified that he was told to send a fax with his claim for services. Mr. Hemrich denies saying this. Both Mr. Webster and Mr. Hemrich testified that they never received such a fax. No record of this event was introduced into evidence by the employee.

Based on the evidence that the Court finds to be reliable and truthful, the Court finds that the employee has failed to meet his burden of proof that he sustained an accident on February 1, 2002, that arose out of and in the course of his employment.

MEDICAL EVIDENCE

Even if the Court believed that Mr. Hawley was an employee of 360 on February 1, 2002, and even if the Court believed that he injured himself while lifting the generator as he reported, the employee's claim still fails on the issue of medical causation.

The employee does offer medical evidence stating that he needs medical care and that he could have been or was injured from the lifting incident of February 1, 2002. However, these medical opinions are based on the premise that the employee provided complete, accurate and truthful information. As the Court has found that the employee did not injure himself as he reported, the Court believes that the medical opinions are flawed as they are based on incomplete, inaccurate and untruthful information. As an example, the employee never advised Dr. Robson that he fell off a horse in December 2002, about a month prior to the lifting incident. Dr. Robson testified that he relied on what the employee told him when he reported that he remained virtually asymptomatic from February 1, 2001, until the lifting incident on February 1, 2002; and also when the employee reported that he began to experience pain right after the lifting incident and that prior to that incident he had few or minor pains.

In addition to the incomplete or incorrect information that the employee provided to medical providers, he also had pre-existing back problems dating into the 1980's. He denied that he ever missed work due to his back, yet Dr. Robson testified that the employee told him that he was off work for a week in the 1980's due to his back problems. More importantly the objective MRI evidence documents the significant problems that the employee had prior to the events of February 1, 2002. An MRI taken on December 16, 2001, documented protrusions and or herniations at multiple levels. Dr. Robson compared the results of an MRI taken on February 16, 2001, and one taken on June 16, 2003. He reported that the films were similar but the MRI of February 16, 2001 was slightly worse as there was some resolution of the disc herniation. This objective evidence, at least in Dr. Robson's medical opinion reveals that the employee's back was worse before, rather than after February 1, 2002.

Based on the credible medical evidence and the fact the medical providers were provided incomplete and inaccurate information, the Court finds that the employee has failed to meet his burden of proof on the issue of medical causation.

In summation, the Court did not find the testimony of the employee to be reliable and or truthful. He is entitled to no benefits.

EMPLOYER/EMPLOYEE RELATIONSHIP, ADDITIONAL MEDICAL CARE AND TEMPORARY TOTAL DISABILITY

The Court has denied the employee's case on the issues of accident and medical causation by ruling that the employee has failed to meet his burden of proof on either of these issues. The Court therefore has not addressed any other issues, as they are moot.

ATTORNEY'S FEE:

No attorney's fees are allowed in this case.

INTEREST:

None.

Date: _____

Made by:

Gary L. Robbins
Associate Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Gary Estenson
Acting Director
Division of Workers' Compensation