

FINAL AWARD DENYING COMPENSATION
(Reversing Temporary or Partial Award of Administrative Law Judge)

Injury No.: 08-107387

Employee: David Johnson

Employer: Land Air Express, Inc. and Franklin Trucking Company

Insurer: Great West Casualty Company

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have heard oral argument, reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the temporary or partial award of the administrative law judge (ALJ) dated December 20, 2010.

Preliminaries

The ALJ heard this matter to consider: 1) whether employee sustained an injury by accident arising out of and in the course of his employment; 2) whether the alleged accident was the prevailing factor in causing the conditions employee is complaining of; 3) whether Land Air Express, Inc. (employer) is liable for additional medical treatment; and 4) whether employee is liable to employer for its expenses.

The administrative law judge found that employee sustained an injury by accident arising out of and in the course of his employment on December 1, 2008. The administrative law judge further found that the December 1, 2008, accident is the prevailing factor in causing employee's need for additional medical treatment. The ALJ ordered employer to provide such additional medical treatment as may be necessary to cure and relieve the conditions caused by employee's accident on December 1, 2008. The ALJ also found that employee has been temporarily totally disabled and unable to compete in the open labor market since September 17, 2009, and ordered employer to pay employee's weekly temporary total disability benefits from September 17, 2009, until such time as employee has recovered and is able to compete for employment in the open labor market. Lastly, the ALJ denied employee's claim against Franklin Company (the other employer listed in employee's Claim for Compensation) and denied employer's claim for expenses against employee.

Employer appealed to the Commission alleging that the ALJ erred in finding: 1) that employee sustained an accident on December 1, 2008; 2) that the accident of unloading a truck by hand resulted in the injury for which medical treatment and temporary disability were sought; and 3) that employee gave notice to employer that he was injured on December 1, 2008, when he "repetitively lifted, twisted and bent picking up heavy boxes."

¹ Statutory references are to the Revised Statutes of Missouri 2008 unless otherwise indicated.

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Employee contends that the ALJ's temporary or partial award is fully supported by the competent and substantial evidence.

We find that the primary issue currently before the Commission is medical causation.

Findings of Fact

On December 1, 2008, employee was moving a pallet by hand when he twisted improperly and felt a sudden pain in his lower back. Employee reported this incident to his supervisor, George Schneller. Mr. Schneller asked employee if he wanted to go to a doctor, but employee did not think he needed to go and returned to work. Employer filed a report of injury regarding this incident.

Employee had a history of low back problems prior to the December 2008 incident. Employee had injured his back while pole-vaulting in high school and had seven prior workers' compensation claims relating to his back. In 1999 or 2000 employee underwent an L4-L5 spinal fusion. Employee testified that this relieved his low back pain until the December 2008 work injury. However, after the fusion in 1999 or 2000, employee did have some right leg problems, including twitching and a little weakness.

Following employee's December 2008 work injury, employee did not seek medical care for his lower back until June 11, 2009, when he consulted his nurse practitioner of 20 years, Carol Thomas, and Dr. Cater. Dr. Cater's records indicate that employee injured his back approximately 2-3 weeks prior to June 11, 2009, when he was "lifting some heavy objects with bending and twisting a lot and began having increased pain." Employee was prescribed anti-inflammatories and muscle relaxers. Neither Ms. Thomas's nor Dr. Cater's records make any mention of a December 2008 incident and/or ongoing low back problems therefrom.

Employee returned to work following the May/June 2009 lifting incident, but experienced problems. Employee told Mr. Schneller his back was "killing him." Employer did not offer treatment. September 17, 2009, was the last day employee worked for employer.

Employee followed up with Ms. Thomas and Dr. Cater on September 3, 2009, and complained of severe pains down his left leg. Ms. Thomas scheduled an MRI for employee and referred him to Dr. Montone.

Employee saw Dr. Montone on September 23, 2009, and complained of a gradual increase in pain over the previous 6-8 months. Dr. Montone performed surgery on employee's back on September 30, 2009, and discovered a large disc herniation on the left side of L5-S1. Dr. Montone also observed some calcification scarring in that disc that extended towards the midline and traveled up towards the L4-L5 disc space. There was also scarring of the L5 nerve root. Dr. Montone testified that he believes that the aforementioned observations can indicate that the disc herniation was there for some time.

On February 15, 2010, Dr. Montone prepared a report regarding employee's condition. Dr. Montone stated in said report that it is his opinion that employee's condition "was

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caused by his work injury originating on December 8, 2008, through his frequent need to perform repetitive bending, heavy lifting and twisting as well as bending, lifting and twisting with a weight in the hand.” Dr. Montone went on to state that he believes “this was the prevailing factor for his condition and was ultimately responsible for his need for medical treatment and eventually his surgery, as well as his current level of pain and disability.”

Dr. Montone testified during his deposition that employee’s injury to his lower back “was caused by the incident on December 8, 2008, in which he went to lift an object and felt back pain.” On cross-examination, Dr. Montone revealed that during his initial visit with employee on September 23, 2009, employee did not mention a December 2008 work injury. In fact, employee did not discuss his work activities with Dr. Montone, nor was Dr. Montone aware of a December 2008 incident, until after his surgery. None of Dr. Montone’s treatment records show that employee told him about any incidents at work in 2008 or 2009 that caused or increased his symptoms. During the initial visit on September 23, 2009, however, employee did discuss with Dr. Montone his prior back injury/surgeries in 1999 or 2000.

Dr. Montone testified that he never questioned employee about Dr. Cater’s records showing that employee’s symptoms started following a lifting injury 2-3 weeks prior to June 11, 2009. Dr. Montone conceded that he could not rule out the May 2009 event as the cause of employee’s herniated L5-S1 disc.

Dr. Amundson saw employee on August 4, 2010, for the purpose of performing an independent medical evaluation. Dr. Amundson testified that employee related to him during the medical evaluation that on December 1, 2008, he was moving a pallet with freight that weighed approximately 100 lbs. when he felt a pull and strain in his back. Employee told Dr. Amundson that he waited several months before seeing his personal physician because he did not wish to provide an additional expense to his employer.

Dr. Amundson noted that employee had no treatment for his back from 2000 until June 2009. With regard to Dr. Cater’s June 11, 2009, note, Dr. Amundson found it significant that Dr. Cater stated that employee was moving in somewhat of a guarded fashion and that he was having “pain in his left low back with straight leg raise and slightly worse on the left than the right.”

Dr. Amundson noted that employee’s first indication of radiculopathy in the left leg was in Dr. Cater’s September 3, 2009, note. However, Dr. Amundson testified that employee told him during his evaluation of employee that the left leg radiculopathy all started on December 1, 2008. Dr. Amundson testified that employee did not tell him about the May/June 2009 lifting incident.

Dr. Amundson stated in his report that “the medical records do not support a December 2008 injury whatsoever.” Dr. Amundson stated that he had a lot of trouble making a disposition of medical causation because of the discrepancies in the record. Dr. Amundson noted that employee was very clear in his history about a specific injury, date of injury, and progression of symptoms from that date of injury, and that he had no preexisting problems

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prior to that date of injury. However, after going through employee's medical records, Dr. Amundson observed that employee had at least 20 years of preexisting back problems. In addition, none of employee's medical records supported his December 2008 injury until the fall of 2009, including his most proximate visit with his primary care physician on June 11, 2009. Dr. Amundson ultimately concluded that while he could not definitively state what the medical causation was, he could state that the December 2008 injury was not the prevailing factor in causing employee's low back condition.

Conclusions of Law

First, it is important to note that employee is alleging that his accidental injury occurred in December 2008. Therefore, this case falls under the purview of the 2005 amendments to Missouri Workers' Compensation Law.

Section 287.120 RSMo "requires employers to furnish compensation according to the provisions of the Workers' Compensation Law for personal injuries of employees caused by accidents arising out of and in the course of the employee's employment." *Gordon v. City of Ellisville*, 268 S.W.3d 454, 458-59 (Mo. App. 2008).

Section 287.020.2 RSMo defines "accident" as: "An unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift."

Pursuant to § 287.020.3 RSMo, an "injury" is defined to be "an injury which has arisen out of and in the course of employment." Section 287.020.3 RSMo further states that:

"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."

The primary issue concerning this case is medical causation. In determining medical causation, the Court in *Bond v. Site Line Surveying*, 322 S.W.3d 165 (Mo. App. 2010) held, as follows:

'The claimant in a worker's compensation case has the burden to prove all essential elements of her claim including a causal connection between the injury and the job.' *Royal v. Advantica Rest. Group, Inc.*, 194 S.W.3d 371, 376 (Mo. App. W.D. 2006)(internal quotation marks and citations omitted). 'Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause.' *Lingo v. Midwest Block & Brick, Inc.*, 307 S.W.3d 233, 236 (Mo. App. W.D. 2010)(quoting *Gordon*, 268 S.W.3d at 461). The weight afforded a medical expert's opinion is exclusively within the discretion of the Commission. *Sartor v. Medicap Pharmacy*, 181 S.W.3d 627, 630 (Mo. App. W.D. 2006). Furthermore, where the right to compensation depends on which of two medical theories should be accepted, 'the issue is peculiarly for the

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Commission's determination.' *Goerlich v. TPF, Inc.*, 85 S.W.3d 724, 731 (Mo. App. E.D. 2002)(internal quotation marks and citation omitted), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Bond, 322 S.W.3d at 170.

The ALJ relied on Dr. Montone's opinions in finding that the December 1, 2008, accident was the prevailing factor in causing employee's L5-S1 disc herniation and resultant extrusion that developed into a large extruded fragment. We disagree with the ALJ's conclusion as we do not find Dr. Montone's opinions credible.

To begin with, Dr. Montone opined in his February 15, 2010, report that employee's condition "was caused by his work injury originating on December 8, 2008, through his frequent need to perform repetitive bending, heavy lifting and twisting as well as bending, lifting and twisting with a weight in the hand. [Dr. Montone] believe[s] this was the prevailing factor for his condition and was ultimately responsible for [employee's] need for medical treatment and eventually his surgery, as well as his current level of pain and disability."

While it is worth pointing out that Dr. Montone stated employee's date of accident as December 8, 2008, throughout his report and testimony when employee is actually alleging a date of accident of December 1, 2008, we do not find that this slight discrepancy in employee's evidence is dispositive. See *Pate v. St. Louis Independent Packing Co.*, 428 S.W.2d 744, 752 (Mo. App. 1968). However, we do find it significant that Dr. Montone relates employee's herniated disc to his "repetitive" job duties when employee reported a December 1, 2008, acute injury to Mr. Schneller and reported, in great detail, a December 1, 2008, acute injury to Dr. Amundson. Dr. Montone's opinions are undercut by the fact that his February 15, 2010, report makes no mention of a specific event, or an acute injury, that occurred on December 1, 2008, when nearly all of employee's facts relied on relate to an acute injury on that date. Dr. Montone's opinions are further undercut by the fact that the only information he received regarding employee's work activities was received **after** the surgery in a typewritten statement from employee, which he later discussed with employee. It was never discussed or indicated in Dr. Montone's, Dr. Cater's, or Ms. Thomas' treatment records prior to the surgery that employee's low back condition was the result of a December 2008 lifting incident. We find this peculiar in light of the fact that employee did discuss his prior back injuries/surgeries from 1999 or 2000 with Dr. Montone during his pre-surgery consultations. These facts cast further doubt on Dr. Montone's opinion that the December 2008 lifting incident was the prevailing factor in causing employee's herniated disc and current low back condition because the only source of employee's back complaints related to Dr. Montone prior to the surgery concerned employee's prior back injuries/surgeries from 1999 or 2000. Dr. Montone was not even aware of the December 2008 incident until after the surgery.

In addition to the aforementioned, we find that Dr. Montone's opinions are undercut by the fact that he disregards the significance of employee not seeking medical treatment

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until June 11, 2009, for an alleged injury that occurred in December 2008. Six months is a significant amount of time to live with a substantial L5-S1 disc herniation without seeking treatment. Additionally, once Dr. Montone became aware of the May/June 2009 incident (after the surgery) he did not even question employee about it. This is especially bothersome considering the gap in time from the alleged primary injury and this alleged aggravation and the fact that there is no history of employee ever reporting left leg radiculopathy until after this May/June 2009 incident. Employee's left leg radiculopathy was a new symptom never reported prior to the May/June 2009 incident. All of the facts suggest that the May/June 2009 incident may have been more significant than a mere aggravation of a December 2008 incident, yet Dr. Montone nearly ignored it altogether in arriving at his causation opinions.

It was not until Dr. Montone was cross-examined about the May/June 2009 incident that he testified that he could not rule it out as the cause of employee's L5-S1 disc herniation. Dr. Montone attempted to explain away what little weight he initially gave the May/June 2009 incident by stating that he only considered the description of the events given to him by employee. We find that Dr. Montone's basis in arriving at his medical causation opinion is illogical. If Dr. Montone only bases his opinions on the history given to him by his patients, that means he would completely disregard all prior medical records supporting a prior or intervening injury if a patient did not describe said prior or intervening injury to Dr. Montone as part of their history. This narrow-sighted approach discredits Dr. Montone's opinions in that it suggests he would ignore objective medical evidence.

For the foregoing reasons, we find that Dr. Montone's medical causation opinion is not credible.

Dr. Amundson, on the other hand, could not state within a reasonable degree of medical certainty what the medical causation for employee's herniated disc and current condition is, but he did take note of the absence of medical records linking employee's low back condition to a December 2008 incident. Dr. Amundson took a logical look at employee's condition and the medical records as a whole and concluded that the December 2008 incident was not the prevailing factor in causing employee's herniated disc and current low back condition.

We find that while Dr. Amundson's opinion is somewhat inconclusive, we agree with his statement that the record as a whole fails to support a finding that the December 2008 incident is the prevailing factor in causing employee's herniated disc and current low back condition. As stated above, it is employee's burden to prove medical causation. In this case we find that employee failed to establish a causal link between the December 2008 incident and his eventual herniated disc and current need for treatment.

Decision

We hereby reverse the temporary or partial award of the ALJ and issue this final award denying employee's claims for additional medical treatment and temporary total disability benefits.

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The temporary or partial award of Chief Administrative Law Judge Nelson G. Allen, issued December 20, 2010, is attached and incorporated hereto for reference.

Given at Jefferson City, State of Missouri, this 28th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: David Johnson

DISSENTING OPINION

I did not participate in the September 14, 2011, oral arguments in this matter. However, I have reviewed the evidence, read the briefs of the parties, and considered 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 temporary or partial award of the administrative law judge should be affirmed. Therefore, I adopt the temporary or partial award of the administrative law judge as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

TEMPORARY OR PARTIAL AWARD

Employee: **DAVID JOHNSON**

Injury No. **08-107387**

Employer: **LAND AIR EXPRESS, INC. and FRANKLIN TRUCKING COMPANY**

Insurer: **GREAT WEST CASUALTY COMPANY**

Hearing Date: **SEPTEMBER 27, 2010**

Checked by: **NGA**

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 as to Land Air Express, Inc.; No as to Franklin Trucking Company**
3. Was there an accident or incident of occupational disease under the Law? **Yes**
4. Date of accident or onset of occupational disease: **December 1, 2008**
5. State location where accident occurred or occupational disease was contracted: **Platte County, Missouri**
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? **Yes as to land Air Express, Inc.; No as to Franklin Trucking Company.**
7. Did employer receive proper notice? **Yes as to Land Air Express, Inc.**
8. Did accident or occupational disease arise out of and in the course of the employment? **Yes**
9. Was claim for compensation filed within time required by Law? **Yes**
10. Was employer insured by above insurer? **Yes**
11. Describe work employee was doing and how accident occurred or occupational disease contracted: **Employee was lifting freight and twisted his back.**
12. Did accident or occupational disease cause death? **No** Date of death? **N/A**
13. Part(s) of body injured by accident or occupational disease: **Back and body as a whole.**
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? **None.**
- 17. Employee's average weekly wages: **N/A**
- 18. Weekly compensation rate: **\$356.79/\$356.79**
- 19. Method wages computation: **By Stipulation**

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:

Weeks of temporary total disability (or temporary partial disability)

Land Air Express, Inc. is ordered to pay to the claimant the sum of \$356.79 per week commencing September 17, 2009 and continuing until such time as the claimant is able to compete for employment in the open labor market. The claim against Franklin Trucking Company is hereby denied.

TOTAL:

Each of said payments to begin **September 17, 2007** and to be payable 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: **Keith Yarwood.**

Land Air Express is directed and ordered to provide such additional medical treatment as may be necessary to cure and relieve the claimant of the conditions caused by his accident on December 1, 2008.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: **DAVID JOHNSON**

Injury No. **08-107387**

Employer: **LAND AIR EXPRESS, INC. and FRANKLIN TRUCKING COMPANY**

Insurer: **GREAT WEST CASUALTY COMPANY**

Hearing Date: **SEPTEMBER 27, 2010**

Checked by: **NGA**

ISSUES

Injury Number 08-107387 and 08-01232911 were heard concurrently. Prior to presenting evidence, the parties stipulated the issues to be determined by this hearing are:

1. Did the claimant sustain an accident arising out of and in the course of his employment;
2. Was the claimant's alleged accident the prevailing factor in causing the conditions the claimant is complaining of;
3. Did the employer have proper notice of claimant's alleged injury;
4. What is the liability of the employer for additional medical treatment;
5. Is the claimant liable to the employer for its expenses.

STIPULATIONS

The parties agreed that on December 1, 2008, David L. Johnson was employed by Land Air Express, Inc.

On January 12, 2009, the assets of Land Air Express, Inc. were transferred to Franklin Trucking Company. Mr. Johnson remained an employee of Franklin Trucking Company for all of 2009. That is relevant to these claims.

Both employers were operating under and subject to the provisions of the Missouri Workers' Compensation Law. Both employers were fully insured by Great West Casualty Company. Both employers were represented by the same attorney, Jeffrey D. Slattery.

Land Air Express admits notice of claimant's December 1, 2008 accident. Franklin Trucking denies notice of any accident or resulting injury.

Neither employer has provided any compensation or medical aid.

The correct rate of compensation is \$356.79 per week for both temporary total disability and permanent partial disability.

Exhibits

Claimant offered the following exhibits which were admitted into evidence:

- A. Dr. Montone Deposition
- B. Withdrawn - Mr. Schneller Deposition
- C. Claimant's Attendance Record
- D. Secretary of State Application
- E. Kentucky Secretary of State Application
- F. '99 Missouri Annual Report – Land Air Express
- G. 2007 Annual Registration Report

Employer/Insurer offered the following exhibits which were admitted into evidence:

- 1 Withdrawn – Wage Statement
- 2 Withdrawn – Wage Statement
- 3 Dr. Amison Deposition
- 4 Report of Injury
- 5 Letter to EE re: Change of Employer
- 6 Lease Agreement
- 7 Safety Training for Employee
- 8 Withdrawn – Attendance Record
- 9 Claim for Compensation
- 10 Claim for Compensation
- 11 Claim for Compensation
- 12 Claim for Compensation
- 13 Claim for Compensation
- 14 Claim for Compensation
- 15 Claim for Compensation
- 16 Deposition – Mr. Johnson
- 17 Unemployment Claim

All objections contained in the admitted depositions are overruled unless otherwise noted.

Findings of Fact – Summary of the Evidence

Claimant testified in person. He is 49 years old. He has a high school degree. He has always done physical labor. He started his employment with Land Air Express in 2003. I found claimant to be a believable witness.

Mr. Johnson said that he loaded and unloaded freight by operating a forklift and by hand. He used a forklift 60% of the time and lifted by hand 40% of the time. He would lift up to 100 pounds.

On December 1, 2008, he was unloading a truck by hand. He lifted a heavy object. He twisted improperly and felt a sudden pain in his lower back. He reported this to his supervisor, George Schneller.

Mr. Schneller asked the claimant if he wished to go to the doctor. The claimant said he told his supervisor that he did not wish to go to a doctor.

He said he had a sore back for a long period of time. He had injured his back pole-vaulting while he was in high school. He had several prior workers' compensation claims and had his back operated on at L-4/L-5 twice, the last being a fusion in the 1990s. As a result of this, he always suffered back pain and no doubt had some permanent partial disability. He had prior settlements that totaled 15.75% body as a whole.

He said he had thought that his back would improve on its own and that medical treatment would not improve his back pain. He did not think this was a serious injury. He said the employer was a small family operation and he didn't want to increase their workers' compensation insurance expense. He thought he could get treatment with his health insurance.

His back continued to get worse. He purchased a back brace and wore it under his shirt. He had never wore a back brace previously. On June 10 of 2009, he claimant was again lifting freight and felt severe pain in his lower back. He did not notify his employer of this. He said he thought it was just a sprain and was just an aggravation of his old injury.

This time he started to feel numbness down his left leg. He had previously had numbness in his right leg but not his left leg.

The claimant went to his personal healthcare provider and was told this was just an aggravation of his pre-existing back problem and was diagnosed with a back strain.

Mr. Johnson's back continued to worsen. Eventually, he was referred for an MRI that revealed a large disk herniation at the L5/S1 level. This is one level below the claimant's previous back fusion.

His healthcare provider referred him to Dr. James Montone in September 2009. Dr. Montone performed a discectomy at the L5/S1 level on September 30, 2009.

The claimant said his back pain continued to increase until September 16, 2009. This was the last day the claimant was able to work. He said on that date his back hurt so much he was no longer able to work. September 16, 2009 was the last date the claimant was able to work.

The diagnosis of Dr. Jason A. Montone, D.O. taken on June 24, 2010 was admitted into evidence as Claimant's Exhibit A. All objections thereto are hereby overruled. Dr. Montone testified that a lay person would have difficulty discerning the difference between pain from an injury to the L4/L5 level and an injury to the L5/S1 level. Dr. Montone had suspected that Mr. Johnson had

suffered a work-related injury early in his treatment of Mr. Johnson. He did not discuss that suspicion with Mr. Johnson until after the surgery.

The deciding factor in this case was that Dr. Montone noted that the disc herniation at the L5/S1 level had become calcified. This did not indicate that an old injury had been healed and then aggravated. It indicated that several months had occurred after the injury. He said that the claimant's lifting at work in December of 2008 had caused a disk herniation, which further deteriorated into an extrusion that developed into a large extruded fragment.

He testified that the claimant's injury was worse than he had originally thought and the claimant required further diagnostic testing in the form of an MRI with gadolinium contrast to observe the state of the disc currently in preparation for a possible spinal fusion.

Dr. Montone restricted the claimant to not lift over 10 pounds, push or pull over 25 pounds, , not to sit or stand over 30 minutes, and not to bend or twist.

Dr. Glenn Martin Amundson, M.D., testified by deposition taken on September 1, 2010 and admitted into evidence taken on September 1, 2010 and admitted into evidence as Employer and Insurer's Exhibit Number 3. All objections thereto are hereby overruled.

Dr. Amundson examined the claimant on August 4, 2010 and found it was difficult to determine what the cause of the claimant's injury was. He seemed to blame it on the fact that the claimant had a prior fusion at the neighboring L4-5 level nine years earlier.

George Schneller testified for the employer. He is the terminal manager for Franklin Trucking. He held the same position for Land Air Express. Mr. Schenller admitted that on December 1, 2008, Mr. Johnson had told him that he had injured his back at work. He had offered to send claimant to a doctor but the claimant had declined treatment. He had not ordered the claimant to be examined by a doctor.

He said he answered to his sister as his boss. The ownership of Franklins and that of Land Air Express, if not identical were similar. Much of Mr. Schneller's testimony is about the sale and transfer of ownership of the business. I do not believe the sale of the business is the determining factor in this case.

The deferred ruling on objections to Claimant's Exhibits D, E, F and G and Employer/Insurer's Exhibit 17 are hereby overruled and admitted into evidence.

I believe Dr. Montone. He is the treating doctor and had a closer examination of the claimant's calcification than did Dr. Amundson. I find it significant that the claimant notified Mr. Schneller of his accident and injury on the date it occurred, December 1, 2008. The claimant's fusion at another level nine years previously may have been a factor but I do not find it to be the primary or prevailing factor.

The claimant may have very well aggravated his herniated disc in May or June 2009 after the transfer to Franklin Trucking. Aggravation of a pre-existing condition is not compensable and

whether the employer had notice of the aggravation is not a defense. The May or June aggravation may have been a factor but it was not the prevailing factor.

I also believe Dr. Montone in that as a result of the claimant's accident on December 1, 2008, he required additional medical treatment. I order and direct Land Air Express, Inc. to provide such additional medical treatment as may be necessary to cure and relieve the conditions caused by his accident on December 1, 2008. Such treatment shall include an MRI with gadolinium contrast to observe the state of the disc currently in preparation of a possible spinal fusion.

I do not find the claimant is liable for the employer's expenses nor do I order any sanctions against the claimant.

I do find that the claimant has been temporarily totally disabled and unable to compete in the open labor market from September 17, 2009. I order and direct the employer, Land Air Express, Inc., to pay to the claimant the sum of \$356.79 per week commencing September 17, 2009 until such time as he has recovered and is able to compete for employment in the open labor market.

The claim in Injury No. 08-107387 against Franklin Company is denied. The date of injury in 08-123291 is incorrect. The claim in Injury No. 08-123291 is denied against all parties. The Claimant's injury is covered under Injury Number 08-107387.

Mr. Keith V. Yarwood is hereby assigned a lien in the amount of 25% of this Award for necessary legal services provided claimant.

This award is temporary in nature and Injury Number 08-107387 shall remain open until such time as a final award is entered.

Date: December 20, 2010

Made by: /s/ Nelson G. Allen

Nelson G. Allen

Chief Administrative Law Judge

Division of Workers' Compensation

This Award is dated and attested to this 20th day of December, 2010.

/s/ Naomi Pearson

Naomi Pearson

Division of Workers' Compensation