

TEMPORARY AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No. 13-063318

Employee: David King

Employer: American Employer Group III
d/b/a Service Stars, LLC

Insurer: Sunz Insurance Company

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Average weekly wage deemed admitted under 8 CSR 50-2.010(8)(B)

The Division of Workers' Compensation (Division) acknowledged employee's claim for compensation on September 3, 2013. Employer filed its answer to employee's claim for compensation on October 11, 2013. As a result, we agree with the administrative law judge's determination that under 8 CSR 50-2.010(8)(B), employer is deemed to have admitted the statements of fact contained in employee's claim for compensation, which includes employee's identification of "sufficient for max rate" as his average weekly wage. See *T.H. v. Sonic Drive in of High Ridge*, 388 S.W.3d 585 (Mo. App. 2012).

To avoid this result, employer argues that employee's claim for compensation was "ineffectively filed" because employee sent it to the wrong address and failed to send it via certified mail. Employer does not cite any authority for the proposition that employee was required to send his claim for compensation to employer.¹ This is understandable, as the applicable regulations at 8 CSR 50-2.010(7) and (8) require only that the employee file his claim for compensation with the Division, and the Division is then tasked with forwarding copies to the employer and its insurer, or third-party administrator, if applicable. It appears, therefore, that the appropriate question is not whether employee filed an "ineffective" claim for compensation, but whether the Division failed to satisfy its obligation to timely notify employer of employee's claim for compensation, such that employer's failure to file an answer within 30 days should be excused. We are not convinced, for the following reasons.

¹ Employer does cite 8 CSR 50-2.010(12)(C) as standing for the proposition that employee should have sent a copy of his claim for compensation to employer via certified mail, but that regulation speaks to the type of notice the Division must send to parties (particularly in cases where a claim for compensation is dismissed or a default award is issued) and does not suggest any duty on the part of an employee to send a claim for compensation to an employer, via certified mail or otherwise, and thus is in no way supportive of employer's arguments herein.

Employee: David King

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It was employer's burden to prove that it did not timely receive a copy of employee's claim for compensation. *Ward v. Mid-America Fittings*, 974 S.W.2d 586, 588 (Mo. App. 1998). The only evidence employer presented on this issue was testimony from Rolf Rathmann, employee's supervisor. Mr. Rathmann testified that he had not ever personally seen employee's claim for compensation, but did not offer any foundational testimony to suggest that he would have been the individual with employer who was actually designated to receive or handle such mailings from the Division. Elsewhere in his testimony, Mr. Rathmann indicated that "another department" would be in charge of dealing with workers' compensation issues such as whether to take steps to have employee sent for authorized medical treatment. The fact that Mr. Rathmann did not ever personally see employee's claim for compensation thus appears to be largely irrelevant, and there is no other evidence on this record that would permit us to make any finding as to when employer received employee's claim for compensation, much less that the Division failed to send it to employer in a timely manner.

Nevertheless, employer asks us to *assume* that it did not timely receive a copy of employee's claim for compensation, based on its argument that employee incorrectly identified 2342 LaSalle Street, St. Louis, MO 63104 as employer's mailing address in his claim for compensation, pointing to Mr. Rathmann's testimony that the correct address as of August 2013 would have been 222 S. 21st Street, St. Louis, MO 63103.² Yet, in employer's answer filed with the Division on October 11, 2013, employer listed 2342 LaSalle Street, St. Louis, MO 63104 as its mailing address. Employer cannot reasonably complain that others used the 2342 LaSalle Street address where employer itself identified that address as correct as late as October 2013.³

Perhaps more importantly, it is uncontested that employer had immediate and actual notice, through Mr. Rathmann, of employee's accident of August 10, 2013, that the accident rendered employee unable to work for employer, and that as a result of the accident, employee was in need of medical treatment. It is further uncontested that Mr. Rathmann knew at least as of August 29, 2013, that employee had retained legal counsel and was seeking to exercise his rights under the Missouri Workers' Compensation Law. Yet, employer did not file a report of injury in this matter until January 20, 2014, thus violating § 287.380 RSMo, which placed a duty upon employer to notify the Division of employee's injury within 30 days of the employer's obtaining knowledge of the injury. If employer had timely filed its notice of injury with the Division, it is likely that any confusion on the part of the Division with respect to employer's correct mailing address could have been seasonably rectified.

Finally, we note that employer was not without a remedy if in fact it did not receive timely notice of employee's claim for compensation. Under 8 CSR 50-2.010(8)(A), employer could have filed with the Division an application for an extension of time to answer employee's claim for compensation, and for good cause shown, that application would have been granted. That employer declined to make use of the provisions of 8 CSR 50-2.010(8)(A) suggests either a failure to timely exercise its rights under that

² Elsewhere in his testimony, Mr. Rathmann admitted that in business emails he sent for the employer in late August 2013, his signature block included the 2342 LaSalle Street address.

³ We note that employer's answer also lists the employer as "American Employer Group d/b/a Service Stars," belying employer's related argument that employee failed to identify the correct corporate entity in his claim for compensation.

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regulation or an implied concession that it lacked good cause for such an extension. Either possibility does nothing to advance employer's arguments herein.

In sum, employer has failed to provide any evidence to suggest (let alone prove) that the Division failed to timely notify it of the filing of employee's claim for compensation. As a result, we discern no basis for disturbing the administrative law judge's conclusion that the statements of fact in employee's claim for compensation shall be deemed admitted by the employer by application of 8 CSR 50-2.010(8)(B).

Costs under § 287.560 RSMo

Section 287.560 RSMo authorizes an assessment of the whole cost of the proceedings (including attorney's fees) upon the party that brings, prosecutes, or defends any proceedings without reasonable ground. See *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 252 (Mo. 2003). We are not unsympathetic to employee's argument that employer unreasonably defends this matter in arguing that employee's workers' compensation benefits should be deemed forfeited under § 287.120.6(3) RSMo where there is no dispute that employer gave employee an *option* whether to (1) take a drug test after his work accident or (2) sign a document which purported to constitute a waiver of his workers' compensation benefits and which made no mention whatsoever of a drug test or refusal to test. We will defer the issue of costs, however, until a final award can be entered in this matter.

Decision

We affirm and adopt the findings, conclusions, decision, and award of the administrative law judge to the extent they are not inconsistent with this supplemental opinion.

The award and decision of Administrative Law Judge Suzette Carlisle, issued August 1, 2014, is attached and incorporated by this reference.

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

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 30th day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: David King

Injury No.: 13-063318

Dependents: N/A

Employer: American Employer Group III- d/b/a
Service Stars, LLC.

Additional (Open)

Insurer: Sunz Insurance Company

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Hearing Date: May 13, 2014

Checked by: SC

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: August 10, 2013
5. State location where accident occurred or occupational disease contracted: St. Louis County
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:
Claimant slipped, fell, and injured his low back.
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: \$0
15. Value necessary medical aid paid to date by employer/insurer? \$3,564.57
16. Value necessary medical aid not furnished by employer/insurer? N/A

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for maximum rate
- 19. Weekly compensation rate: \$853.08
- 19. Method wages computation: Pursuant to 8 C.S.R. 50-2.010(8) and *Aldridge v. Southern Missouri Gas Co.*, 131 S.W.3d 876 (Mo.App. 2004).

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:

36 2/7 weeks of temporary total disability	\$30,954.62
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TOTAL:	\$30,954.62
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Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	David King	Injury No.: 13-063318
Dependents:	N/A	Before the
Employer:	American Employer Group III-d/b/a Service Stars, LLC.	Division of Workers' Compensation
Additional	(Open)	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Sunz Insurance Company	

PRELIMINARIES

The parties listed below appeared before the undersigned administrative law judge on May 13, 2014, for a hardship hearing at the request of David King (“Claimant”) for medical treatment. Claimant was represented by Attorney Daniel Keefe. Attorney Michael Kauphusman represented American Employer Group III, Inc. (“AEG”) (“Employer”) – d/b/a Service Stars, LLC. (“Service Stars”), and their Insurer, Sunz Insurance Company. The Second Injury Fund is a party to the case but did not participate in the proceeding. The court reporter was Jennifer Jett. The record closed at the after presentation of the evidence.

STIPULATIONS

The parties stipulated to the following:

On or about August 10, 2013,

1. Claimant was employed and sustained an accident which arose out of and in the course of employment in St. Louis County,¹
2. Employer and Claimant operated under the Missouri Workers’ Compensation Law,²
3. Employer’s liability was fully insured,
4. Employer received notice of the injury,
5. A claim for compensation was timely filed,
6. Employer paid no TTD benefits,
7. Employer paid medical benefits totaling \$3,564.57, and

¹ References in this award to the Employer also refer to the Insurer unless otherwise stated.

² Statutory references in this award are to Chapter 287 of the Revised Statutes of Missouri (2005), unless otherwise stated.

8. If the case is not compensable, a final award will be issued.

ISSUES

At the hearing, the parties identified the following issues for disposition (although not in this order):

1. Was Claimant employed solely by AEG on August 10, 2013 or was he employed by Service Stars?
2. Was the August 10, 2013 work accident the prevailing factor in causing an injury to Claimant's low back?
3. Was Claimant's low back treatment reasonable and necessary to cure and relieve the effects of the work injury?
4. Did Claimant forfeit his right to compensation under Section 287.120.6.3 for failure to take alcohol and substance abuse tests?
5. Is Claimant entitled to TTD benefits from August 10, 2013 to the present and continuing at the rate of \$853.08 per week?
6. What is the Claimant's average weekly wage?
7. Did Employer or Claimant violate Section 287.560 for unreasonable defense or frivolous prosecution?

EXHIBITS

Claimant's Exhibits A and B and Employer's Exhibits 1 through 7 were offered and received into evidence without objection. Any notations contained in the exhibits were present when admitted, and were not placed there by the undersigned administrative law judge. Any objections contained in the exhibits or made during the hearing, but not ruled on during the hearing or in this award, are now overruled.

SUMMARY OF EVIDENCE

All evidence was reviewed but only evidence that supports this award is discussed below. On August 10, 2013, Claimant testified he worked for a temporary staffing agency, as a banquet cook, server, and bartender. Employer assigned Claimant work based on his availability. For the 12 weeks before August 10, 2013, Claimant worked between 5.5 hours per week and 35.75 hours. Some weeks he worked one or two days as needed.

Claimant applied to work for with Service Stars, and his paychecks listed Service Stars as the employer. However, Claimant's W-4 withholding form lists the employer as AEG, and Form I-9 lists his employer as Service Stars. Both forms are dated April 29, 2013.

Preexisting disability

Claimant testified in person at the hearing. Claimant testified that in 1994, he injured his low back when he lifted a heavy item and felt a pop in his back. He received physical therapy, injections, and missed several months from work. Claimant recovered, and returned to work full time. To relieve flare-up pain to his low back and left leg before August 2013, Claimant rested, used Bengay, and sought chiropractic treatment. Claimant sustained no additional low back injuries until August 10, 2013.

In 2011, Dr. David Richards diagnosed fibromyalgia, a muscle pain throughout the body, including his back and legs, and recommended Cymbalta. Claimant described the pain as:

“a tingling feeling, like bugs crawling on your skin and it flares into little pinpricks and then feeling bee stings and it feels like someone is, like I’m getting 100 shots all at the same time.”

However, Claimant was not taking the medication in August 2013. Instead, he used marijuana. Claimant has a pending claim with Social Security Disability for fibromyalgia and low back pain.

In 1996, a right ocular implant was inserted into Claimant’s right eye.

On June 19, 2013, Claimant sought treatment from Logan Chiropractic College with a history of low back pain that began in 1994 after he felt a pop in his back and his legs gave out. Claimant reported “recurring minor incidents occasionally producing short/intermittent burning-shooting pain down [L] leg and muscle spasms.” Recent complaints included constant sharp pain radiating into his left leg, on a pain scale of 9-10/10, increased with bending forward, turning, and lying on his stomach. Pain prevented him from working.

Claimant gave a history of taking 10 to 12 Aleve daily without relief. Also, the pain prevented him from working as much as he needed to. The last time Claimant sought treatment for this condition prior to August 10, 2013 was August 7, 2013. Logan College diagnosed a lumbar disc herniation and muscle spasm.

On July 12, 2013, July 16, 2013, August 7, 2013, August 13, 2013, and August 26, 2013, Claimant reported low back pain that radiated to his toes, and on August 27, 2013, he reported pain into his left leg.

On August 15, 2013, Claimant reported a fall earlier that week onto his left buttocks, with exquisite low back pain, worst over his sacral region. Claimant was observed to walk slowly.

The work accident

While walking at work on August 10, 2013, Claimant slipped and fell onto his tailbone and left hip. St. Mary’s Emergency Department gave Claimant Dilaudid-Valium cocktail, despite his request not to have narcotic pain medication because he is a recovering heroin addict. After taking the medication, Claimant testified he became intoxicated.

Claimant testified he asked Mr. Rolf Rathmann for additional medical treatment for his low back, but did not get a response.

Claimant hired an attorney and continued to seek his own medical treatment for his low back from Logan Chiropractic through the St. Patrick Center.

Claimant testified he last smoked marijuana three days before he was injured on August 10, 2013. Claimant testified he knew a drug test was “standard operating procedure” after an accident, and knew marijuana would still be in his system, but did not refuse to take a drug test.

Claimant testified he heard Mr. Rathmann ask the nurse about a drug test, but he was told it was not available.

Since the work accident, Claimant testified he has constant soreness, pain with walking or sitting more than 40 minutes, moderate to severe muscle spasms radiating and tingling and burning down both legs to the knee and to the left foot, and constant soreness. Also, flare-ups are more intense.

Claimant testified he has not worked since the fall.

Witness 2 – Mr. Rolf Rathmann

Mr. Rathmann testified he works for Service Stars, a temporary staffing agency and linen company, and AEG is the parent company. He works as the staffing and sales manager for Service Stars. Mr. Rathmann supervised Claimant who worked one or two days per week as needed.

AEG generates payroll, and performs administrative functions, but not the day-to-day operations. Service Stars issues payroll checks.

Mr. Rathmann testified Claimant was employed by AEG. In the past, Claimant worked for Service Stars but on January 1, 2013, Service Stars officially became AEG, so Claimant had to recomplete paperwork. Claimant completed the employee agreement form used by AEG on April 29, 2013.

In late 2012, Mr. Rathmann testified Service Stars moved from 2342 LaSalle Street, to 222 South 21st, where they were located in August 2013, and they did not receive a copy of Claimant’s claim for compensation.

Prior to the August 2013 accident, Mr. Rathmann testified Claimant was vocal about his fibromyalgia and back pain, and he observed Claimant walk carefully.

On August 10, 2013, Claimant called him and reported an injury on the job. Mr. Rathmann arrived at the hospital after Claimant was medicated. At the hospital, Mr. Rathmann asked the nurse about drug testing as required by the company for injuries to be covered under workers’ compensation.

After Claimant was released from the hospital, Mr. Rathmann took Claimant to the store, because he did not want him to drive because of his pain level. Also, they stopped by the office before he took Claimant home.

Mr. Rathmann testified he informed Claimant he needed to take a drug test, which could have been administered by Quest that night or within 24 hours of the accident. The test requirement was set by Service Stars and AEG. Also, he informed Claimant his workers' compensation case may not be handled if the drug test was positive. Initially, Claimant hesitated because he might test positive. Later, he refused to be tested.

As an alternative to taking the test, Mr. Rathmann testified he offered to write a waiver statement (Exhibit 1) for Claimant to avoid testing positive. Mr. Rathmann testified he typed Exhibit 1 which states Claimant gave up the right to file a workers' compensation claim and he understands he will be responsible for his own medical expenses. He further waived all rights to file future claims against Service Stars that may arise from the accident.³ Claimant signed the agreement.

Mr. Rathmann testified Claimant appeared lucid, communicated clearly, and seemed to understand Mr. Rathmann's comments on the waiver. Mr. Rathmann further testified Claimant agreed to waive his workers' compensation rights because Medicaid would take care of it.

Mr. Rathmann testified he thought Claimant's decision not to file a workers' compensation case was proof he refused to take a drug test. However, Mr. Rathmann could not explain why he did not include that statement in the document.

Mr. Rathmann completed the supervisor's accident form which stated Claimant reinjured an old back injury.

Medical treatment after August 10, 2013

On August 10, 2013, Claimant presented to St. Mary's Hospital with "acute on chronic lower back pain post a mechanical fall while walking down a loading ramp at work." Claimant gave a history of current physical therapy for chronic low back pain and sciatica. Claimant was diagnosed with low back pain, and prescribed and injected with medication, and taken off work until August 14, 2013. X-rays were unremarkable.

Expert medical evidence

On November 13, 2013, Claimant reported the following complaints to James J. Coyle, M.D.: 35% pain in his left leg, 5% pain in the right leg, and 60% pain in his low back, made worse by twisting, bending forward at the waist, left leg numbness to the toes in "patches" and right leg numbness and needles to the calf.

Physical examination revealed an antalgic gait on the left, trace reflexes at the left patella and ankle, hyperreflexic on the right, paralumbar tenderness, left outer toe numbness, increased back

³ Attorney Kauphusman noted on the record that the Employer does not allege Claimant waived his right to file a claim based on Exhibit 1.

pain on hyperextension and side bending, posterior thigh dysesthesia, left plantar flexion weakness, and decreased sensation of the left thigh. X-rays revealed compensatory trunk shift to the right, and no evidence of significant degenerative disc disease.

Dr. Coyle diagnosed low back pain, and left lower extremity sciatica, requested the chiropractic records, and opined Claimant could not work as a server, dishwasher or bartender.

After reviewing chiropractic records, Dr. Coyle concluded the work accident exacerbated Claimant's back pain and left leg sciatica.

On February 25, 2014, David G. Kennedy, M.D., examined Claimant at the request of his attorney, reviewed Logan Chiropractic College records, and concluded Claimant's symptoms changed after the fall. Before the fall, medical records show a history of lumbar pain and one episode of leg pain. After the fall, Claimant reported "significant worsening" [of lumbar pain] after the fall."

During examination, Dr. Kennedy noted severely reduced forward flexion, "strongly positive" straight leg raise, and scatter sensory loss over the dorsum of the left foot.

Dr. Kennedy diagnosed severe sciatica after the fall, and opined the fall on August 10, 2013 was the prevailing cause of Claimant's injury. Dr. Kennedy recommended a lumbar myelogram to determine the appropriate medical treatment.

Dr. Kennedy concluded Claimant should be off work pending further evaluation.

Additional evidence

Exhibit 4-1 is a "New Employee Information" document which shows AEG's logo as "The Business Behind Your Business...Made Simple." The top of the document lists Claimant as a new hire effective April 26, 2013. Also included was personal data, and Claimant's signature dated April 29, 2013.

The bottom of the page listed the client as Service Stars, Banquet Department, with a position as server, with a Work Comp. code of 9082, rate of pay - \$10.00 per hour, paid weekly. Supervisor Robin Rooney and Claimant signed on April 29, 2013.

Exhibit 4-2 is the AEG "Employee Agreement" Claimant signed April 29, 2013 which states:

- a) Claimant was hired as an at-will employee of AEG;
- b) Claimant is also co-employed by AEG's assigned client;
- c) Claimant's duties and responsibilities are found in the Service Agreement between AEG's client and AEG;⁴
- d) There is no employment contract between Claimant and AEG;
- e) AEG has no liability for any agreement between the client and Claimant;
- f) The co-employment relationship may be terminated by AEG or Claimant at any time;
- g) AEG's client is liable for all payments to Claimant, not AEG;

⁴ Not in evidence.

- h) Claimant agreed to “waive and forever release” any rights to make claims or bring suit against clients or customers of AEG or AEG for injuries covered under workers’ compensation statutes;
- i) Claimant agreed to comply with drug testing, and post-accident drug tests in particular;
- j) Claimant should report all discrimination to “an appropriate person in the client company” which AEG does not control but may attempt to facilitate resolution;
- k) Claimant is an assigned employee of AEG,
- l) If Claimant performs client work outside this state, he may not be provided workers’ compensation benefits through AEG or the insurance carrier

Exhibit 4-5 is the I-9 Form signed by Robin Rooney, Manager for Service Stars on April 29, 2013.

Exhibit 4-7 is the Missouri W-4 Form which lists AEG as the employer, dated April 29, 2013.

Exhibit 4-8 on AEG letterhead addressed “To All Service Stars Applicants:” states [The employee] understands a voluntary termination occurs if the employee has not completed a work assignment within 60 days and must reapply to continue working.

Exhibit 4-9 is the Service Stars “Authorization/Release Form” to obtain information about Claimant’s work history, credit, etc., signed by Claimant and dated April 29, 2013.

Exhibit 5 is the Service Stars “Employee Handbook,” which states:

- a) Claimant has been hired by Service Stars
- b) Employment is at will and may be terminated by Claimant or Service Stars at anytime
- c) Claimant should call to get his work schedule, and to schedule time off, but typically not on holidays or weekends
- d) The procedure to report an absence was outlined
- e) Appearance standards were explained; i.e. makeup, hair, clothes tattoos, uniforms, etc.
- f) Personal conduct standards were outlined, and procedure to report unacceptable behavior
- g) Drug and Alcohol policy; drug test to start employment, at anytime during employment and after a work injury
- h) Reporting procedure for work injuries: required to test for drugs and alcohol by customer and Service Stars, LLC. Failure to comply within 24 hours from injury may result in ineligibility for workers’ compensation and termination
- i) Pay periods, rate of pay, and checks explained- checks come from Service Stars. Direct all questions to Service Stars, and penalties for not keeping track of hours, locations, and positions
- j) Harassment reporting policies
- k) Hepatitis A vaccine required
- l) Termination policy

The employee agreement was not signed

FINDINGS OF FACT and RULINGS OF LAW

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I make the following findings:

1. Claimant was employed by AEG and Service Stars

Claimant asserts he is employed by Service Stars. Employer contends Claimant was employed by AEG and they were not named in the claim for compensation. Furthermore, Service Stars did not receive proper notice of a claim.

Section 287. 030.1 provides the word “**employer**” ... shall be construed to mean:

Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;

Wigger v. Consumers Co-op. Ass'n, 301 S.W.2d 56, 61 (Mo.App.1957) cited 58 Am.Jur. Sec. 343, page 813 which provides; where the subject of the liability of a general and a special employer is discussed, it is said: ‘Both the general and the special employer may be held liable for compensation when each shares in the control *or the benefits of the work being done*’. (Italics supplied.) In Larson Workmen's Compensation Law, Sec. 48.40, in discussing the same subject, it is said: ‘There has always been a noticeable reluctance on the part of Anglo-American courts to emulate the wisdom of Solomon and decree that the baby be divided in half. Courts are showing an increasing tendency, however, to dispose of close lent-employee cases by adopting this sensible compromise, rather than by insisting on an all-or-nothing choice between two employers both bearing a close relation to the employee’.

I find AEG and Service Stars were joint employers. Claimant’s I-9 Form was signed by Robin Rooney, Manager for Service Stars on April 29, 2013. The Missouri W-4 Form listed AEG as the employer on the same date.

At the top of AEG’s “New Employee Information” document, their logo read: “The Business Behind Your Business...Made Simple.” Claimant’s name was listed as a new hire of the company, effective April 26, 2013. The bottom of the “New Employee Information” document listed the client as Service Stars, LLC, with the Banquet Department, position - server, with a Workers’ Compensation code of 9082, rate of pay - \$10.00 per hour, paid weekly.

The AEG Employee Agreement form signed by Claimant on April 26, 2013 stated Claimant was an assigned employee of AEG. The agreement states Claimant is co-employed by AEG’s assigned client; and his duties and responsibilities were found in the Service Agreement between AEG’s client and AEG. Although that agreement is not in evidence, I find there is sufficient evidence to show AEG and Service Stars jointly employed Claimant.

Also, AEG required Claimant to contact them within 48 hours if Service Stars terminated him.

The Service Stars Employee Handbook read “Congratulations! you have been hired by Service Stars, LLC,” and provided an extensive list of work-related expectations about appearance, conduct, and reporting absences. AEG required Claimant to report all discrimination to “an appropriate person in the client company” which AEG did not control but offered to facilitate resolution; and AEG’s client was liable for all payments to Claimant, not AEG.

Both companies had drug and alcohol testing provisions in their agreements, and either Claimant or the companies could terminate the agreement at will. In addition, Service Stars was expected to pay AEG, but AEG was not responsible for paying Claimant should Service Stars fail to do so.

Also, Mr. Kauphusman answered the claim as the attorney for AEG, d/b/a Service Stars, and called Mr. Rathmann, a Service Stars employee, as a witness at the hearing. Mr. Rathmann testified all Service Stars employees became AEG employees as of January 1, 2013.

Based upon all these facts, I find that AEG and Service Stars entered into a joint enterprise where both expected to receive benefits; and they jointly employed Claimant.

2. Claimant sustained a compensable injury

Claimant asserts Employer admitted the accident caused injury to his low back because the employer failed to timely respond to the Claim for Compensation as required by 8 C.S.R. 50-2.010(8)(B). Also, both experts agree the accident caused *an* injury to Mr. King’s back. Employer contends the August 10, 2013 accident was not the prevailing factor in causing any low back condition or disability.

Under the Missouri Workers’ Compensation Law, the employee bears the burden to prove all the essential elements of his claim, including medical causation. *Roberts v. Mo. Highway & Trans. Comm.*, 222 S.W.3d 322, 331 (Mo. App. 2007).

Section 287.120.1 states in part that: “[e]very employer subject to the provisions of this chapter shall be liable, irrespective of negligence, ***to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of employee's employment.***” (Emphasis added.)

In *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 517 (Mo.App. 2011), the Court explained Section 287.120.1 requires two independent inquiries. First, it must be determined whether an employee has suffered a compensable injury “by accident arising out of and in the course of employee's employment.” Second, *if* a compensable injury has been sustained by an employee, the appropriate compensation to be furnished must be determined. *Id.*

Section 287.020.3(1) states: in part:

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.

For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. *Roberts v. Mo. Highway & Trans. Comm.*, 222 S.W.3d 322, 331 (Mo. App. 2007).

Here, the parties stipulated at the start of the hearing that Claimant sustained an accident which arose out of and in the course of employment. St. Mary's Hospital noted "acute on chronic" low back pain after the fall, and prescribed medication. Dr. Kennedy diagnosed severe sciatica after the fall, and Dr. Coyle opined the fall exacerbated Claimant's back and left leg sciatica. In addition, Claimant developed right leg radiculopathy after the fall. Therefore, I find the August 10, 2013 accident was the prevailing factor that caused acute symptoms to Claimant's back and legs. I find Claimant sustained a compensable injury.

3. Treatment is reasonable and necessary to cure and relieve the effects of the work injury

The compensation Claimant seeks is medical treatment. Section 287.140.1 RSMo states:

[T]he employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

The *Tillotson* Court noted Section 287.140.1 makes no reference to a "prevailing factor" test and, ... presumes of necessity the presence of a compensable injury under section 287.020.3(1) (which does require application of the prevailing factor test) has already been demonstrated. The legal standard for determining an employer's obligation to afford medical care is clearly and plainly articulated in section 287.140.1 as whether the treatment is ***reasonably required to cure and relieve the effects of the injury.*** (*Emphasis added*)

Once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo. App.2006). The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. *Id.*

Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor in the absence of expert opinion is the finding of causation within the competency of the administrative tribunal. *Silman v. William Montgomery & Associates*, 891 S.W.2d 173, 175 (Mo.App. 1995). The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102, 105 (Mo.App.1991).⁵

⁵ Several cases herein were overruled by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003) on grounds other than those for which the cases are cited. No further reference will be made to *Hampton* in this award.

I find Dr. Kennedy's opinion is more persuasive that Claimant had a "severe worsening" of pain" in direct relationship to the fall that required an emergency room visit. Dr. Kennedy noted Claimant's symptoms changed after the accident. In June and July 2013, most of Claimant's complaints were in his back with one leg reference. However, after the accident, Claimant reported a severe increase in lumbar spine pain. Before the accident, Claimant could function; after the accident, he could not. In addition, chiropractic records in evidence reveal Claimant developed right leg radiculopathy after the accident.

Prior to reviewing the chiropractic records, Dr. Coyle suspected claimant had a lumbar disc herniation. After reviewing the records, Dr. Coyle diagnosed an exacerbation of Claimant's back pain and left leg, but did not recommend treatment. In contrast, Dr. Kennedy recommended a myelogram to determine treatment options because Claimant cannot have an MRI.

At the hearing, Claimant credibly testified that since the accident he has more soreness, pain with walking or sitting more than 40 minutes, moderate to severe muscle spasms radiating and tingling and burning down both legs to the knee and to the left foot, and constant soreness. Flare-ups are more intense.

Based on credible testimony by Claimant and Dr. Kennedy's persuasive medical opinion, I find medical treatment is reasonable and necessary to cure and relieve the effects of the work injury. I find Employer shall direct and provide additional medical treatment, including testing, as needed.

4. Claimant did not forfeit Workers' Compensation benefits

Claimant asserts the Employer did not prove Claimant refused to take a drug test, and therefore his workers' compensation benefits cannot be forfeited under Section 287.120.6(3). Employer contends Claimant's signed waiver represents an explicit refusal to take a drug test and thus forgo workers' compensation benefits based on Mr. Rathmann's testimony and other evidence. I find Claimant did not forfeit his benefits for the reasons stated below.

Section 287.808 states:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Here, the factual proposition centers around whether Employer proved Claimant refused to take a drug test. The answer turns on the credibility of testimony provided by Claimant and Mr. Rathmann.

I find Claimant's testimony is more credible than Mr. Rathmann's testimony. Claimant testified he told Mr. Rathmann he may test positive because of the narcotic drugs he was given at the hospital and marijuana ingested three days earlier, but he denied refusing to take the drug test.

On the other hand, Mr. Rathmann, testified he told Claimant he had to take the drug test, and Claimant could not decide if he wanted to because he may test positive. So, Mr. Rathmann suggested Claimant sign a waiver of benefits to avoid testing positive. Mr. Rathmann typed the waiver which stated Claimant gave up the right to file a workers' compensation claim, understood he would be responsible for his own medical expenses, and waived all rights to file future claims against Service Stars that may arise from the accident.

I find Mr. Rathmann's testimony is not credible that he typed the release (Exhibit 1) because Claimant decided not to take the drug test. The release contains no reference to the refusal and Mr. Rathmann could not explain why he failed to include it in the release. I further find Mr. Rathmann's testimony is not credible that he thought Claimant's decision not to file a workers' compensation case was proof he refused to take a drug test.

Section 287.120.6. (3) states in part:

...An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section 195.010, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

Service Stars reserved the right to test after a work injury, and the employee handbook does not state supervisors may offer alternatives to avoid a positive drug test. Based on Claimant's credible testimony and less than credible testimony by Mr. Rathmann, and information contained in Exhibit 1, I find Employer failed to prove Claimant refused to take a drug test.

5. Claimant is entitled to TTD benefits

Claimant asserts he is liable for TTD benefits from August 10, 2013 through the present time as both medical experts concluded he could not work as a banquet server, a dishwasher, or a bartender in his current condition. Employer contends Claimant is not entitled to TTD benefits because the work accident was not the prevailing factor that caused injury to his low back; and Claimant forfeited benefits under the Workers' Compensation Act pursuant to §287.120.6(3). As discussed supra, I find Employer's contentions regarding causation and forfeiture are not persuasive. I find Claimant did meet his burden.

Claimant bore the burden of proving his entitlement to TTD benefits by a reasonable probability. *Cooper v. Med. Ctr. Of Independence*, 955 SW 2d 570, 574-75 (Mo. App. 1997). 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).

The test for entitlement to TTD benefits "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 424 (Mo.App. 2000). TTD benefits are intended to cover the employee's healing period from a work-related accident until he can find employment or his condition has reached a level of maximum medical improvement. *Id.*

Once further medical progress is no longer expected, a temporary award is no longer warranted. *Id.*

St. Mary's Hospital returned Claimant to work on August 14, 2013. Both experts in this case concluded Claimant could not return to his work with Service Stars at this time. Dr. Coyle reached that conclusion on November 13, 2013, and Dr. Kennedy concluded Claimant should be off work pending further evaluation as of February 25, 2014.

At the hearing, Claimant testified he hired an attorney after he received no response from Mr. Rathmann about his request for additional treatment. Attorney Keefe requested additional treatment in an email dated August 29, 2013. Claimant testified he had flare-ups before the fall in August 2013, but the symptoms are more severe now, and he has tingling and burning down both legs.

Based on credible evidence by Drs. Coyle and Kennedy, and Claimant, I find Claimant is not able to compete in the open labor market in his present condition. I further find Employer liable for TTD benefits beginning November 13, 2013, and continuing until Claimant can find employment or his condition has reached a level of maximum medical improvement.

6. Average weekly wage

Claimant asserts Employer's late answer forfeited any right to contest the average weekly wage rate as "sufficient for max rate," which is contained in the claim for compensation. Employer contends the max wage rate should not apply because the claim for compensation was not sent certified mail, and was sent to the wrong address, to the wrong Employer.

In the case of *Aldridge v. Southern Missouri Gas Co.*, 131 S.W.3d 876 (Mo.App. 2004), the Court found it was undisputed that Employer's answer was untimely pursuant to 8 CSR 50-2.010(8) (1999) because it was not filed within thirty days from the date of the Division's acknowledgement of Claimant's claim for compensation. Therefore, the Court held "Wage rate is a question of fact, to be determined by the Commission according to the computations provided by statute. Given that [employer] failed to file a timely answer, the wage rate as stated on [c]laimant's claim for compensation is to be deemed as admitted by [employer]." *Id.* at 882-83. (Citations omitted).

In this case, Claimant filed a workers' compensation claim against Employer, which the Division acknowledged on September 3, 2013. The claim alleged Claimant suffered injuries to his low back and hips. In the section of the claim form titled "average weekly wage," Claimant alleged "sufficient for max rate." Employer filed its answer on October 16, 2013, which was received and date stamped by the Division on that date.

I find Employer's contention is not persuasive that the notice of a claim should have been mailed certified notice, pursuant to by 8 C.S.R. 50-2.010(12) (C). That section of the Regulations refers to the notice given after a dismissal or default award have been issued.

Judicial notice is taken of the Answer to the claim filed and date stamped October 16, 2013 by Mr. Kauphusman which listed the Employer's address as 2342 LaSalle St., the same

address Mr. Rathmann testified Service Stars moved from in late 2012. Additionally, an email from Mr. Rathmann to Claimant's attorney three days after the accident reflects a different LaSalle address, 2346.

Finally, Employer contends the notice was sent to the wrong employer, Service Stars. However, the Answer submitted by Mr. Kauphusman listed the Employer as American Employer Group, d/b/a Service Stars, and Mr. Rathmann testified Service Stars employees became AEG employees on January 1, 2013.

Based on this credible evidence, I find Employer failed to file a timely answer. I further find the "max" wage rate as alleged in Claimant's claim for compensation was a factual allegation deemed admitted by Employer. Therefore, Claimant is entitled to receive the maximum rate of compensation for TTD benefits for that date of accident, which is \$853.08 per week.

7. Costs and fees under 287.560

Claimant asserts Employer did not defend the case on reasonable grounds, and is liable for costs and fees under Section 287.560. Employer contends Claimant prosecuted the case on unreasonable grounds and seeks an award of attorneys' fees and costs.

Section 287.560 provides:

...All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. ...

The whole cost of the proceedings consists of "all amounts the innocent party expended throughout the proceeding brought, prosecuted or defended without reasonable grounds, including attorney's fees." *DeLong v. Hampton Envelope Co.*, 149 S.W.3d 549, 555 (Mo. App. 2004). However, "[t]he commission should only exercise its discretion to order the cost of proceedings under section 287.560 where the issue is clear and the offense egregious." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003).

I find Claimant has not met his burden. In this case, Claimant asserts Employer defended the claim on unreasonable grounds because they ignored its duty to provide medical treatment for nine months by the time of the hearing. However, prior to the hearing Employer obtained an independent medical evaluation and Dr. Coyle did not recommend additional treatment.

I find Employer has not met his burden. Employer asserts Claimant filed a claim for compensation at a location where the Employer had not been located for almost one year, failed to send the claim by certified mail, and misrepresented Claimant's average weekly wage. Employer's contentions are not persuasive as discussed above.

CONCLUSION

1. Claimant was jointly employed by American Employer Group III, Inc. and Service Stars, LLC.
2. The August 10, 2013 accident was the prevailing factor that caused injury to Claimant's low back.
3. Treatment to Claimant's low back is reasonable and necessary.
4. Claimant did not forfeit his right to compensation under Section 287.120.6.(3).
5. Claimant is entitled to receive TTD benefits as outlined in this award.
6. Claimant's average weekly wage rate is deemed to be sufficient for the maximum wage rate.
7. The Employer and Claimant did not violate Section 287.560 for unreasonable defense or prosecution.

The Division retains jurisdiction over this temporary award until such time as all issues are resolved.

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation