

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

Injury No.: 10-101154

Employee: David Luka
Employer: Fed Ex Ground
Insurers: Indemnity Insurance Company of North America
Protective Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

Introduction

The parties submitted the following issues for determination by the administrative law judge: (1) whether employee sustained an accident arising out of and in the course and scope of his employment; (2) whether employee notified the employer of the injuries; (3) whether employee is entitled to temporary total disability benefits beginning December 6, 2010, and ongoing; (4) whether the employer must provide employee with additional medical care; and (5) whether the alleged accident is the prevailing factor in the need for additional medical care.

The administrative law judge rendered the following findings and conclusions: (1) employee sustained an accident arising out of the course and scope of his employment on July 14, 2010; (2) employee's claim is not barred by § 287.420 RSMo; (3) the accident is the prevailing factor in causing employee's back injury; (4) employee's need for medical treatment is related to his back injury; and (5) employer is ordered to pay temporary total disability from December 6, 2010, through the date of the hearing, May 6, 2013, and thereafter until employee has reached maximum medical improvement or is otherwise able to return to work.

Employer filed a timely Application for Review with the Commission challenging the administrative law judge's finding and conclusions with respect to the issues of: (1) accident; and (2) medical causation.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact

In 1986, employee suffered a back injury. Employee underwent a lumbar discectomy surgery. Employee missed several months of work, but returned to full duty.

In March 2000, employee suffered an acute episode of low back pain with radiating pain in his left leg after he bent over in the shower. Treating physicians diagnosed an acute lumbosacral strain. An MRI of March 10, 2000, revealed degenerative disc disease at L4-5 and L5-S1 with superimposed posterior disc herniations. Employee underwent a series of epidural injections.

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Employee worked for employer as a tech specialist. On July 14, 2010, employee was working with a coworker to repair a conveyor belt at employer's facility. Employee heard a snap and felt a sharp pain in his lower back while pulling the belt. Following the incident, employee walked away and sat down on a bucket. Employee did not report the accident to employer because he was concerned about his job.

On July 15, 2010, employee saw his family physician, Dr. Scott Russell, for a previously scheduled appointment in connection with employee's diabetes. During that appointment, employee told Dr. Russell that he had "possibly" hurt his back at work, but did not provide any details of a specific event. Employee asked Dr. Russell not to mention his low back pain in his chart or medical records, as employee was not sure whether he wanted to pursue workers' compensation benefits. Dr. Russell complied with employee's request and did not mention employee's complaint of a back injury at work. In fact, the note contains no mention whatsoever of low back or radicular pain, and instead contains a diagnosis of peripheral neuropathy of mixed etiology.

Employee testified that his low back condition progressively worsened as he continued to perform his duties for employer, and that his left leg weakened so much that he started limping, but the medical records suggest that employee sought no further treatment for these complaints until September 2, 2010. On that date, Dr. Russell took a history of low back pain with pain radiating into the bilateral buttocks and below the knee. Notably, however, Dr. Russell did not take any history of left leg weakness or limping, and indicated that employee's right-sided symptoms were worse than the left.

The September 2, 2010, treatment record contains no reference to an injury at work. Instead, Dr. Russell indicates that employee had visited an emergency room in connection with a "significant exacerbation" of his back pain. The emergency room records are not in evidence, and Dr. Russell's notes contain no history of what might have occurred on or about September 2, 2010, to cause this exacerbation. Dr. Russell diagnosed lumbar disk disease with radiculopathy and a history of L5-S1 discectomy, and recommended an MRI and a possible referral to pain management. An MRI of September 13, 2010, revealed degenerative and postsurgical changes at L5-S1, as well as a diffuse disc bulge contributing to bilateral foraminal narrowing and encroaching on the L5 nerve roots within the neural foramen bilaterally, with encroachment on the S1 nerve roots centrally. The MRI also revealed small disc bulges at L3-4 and L4-5.

Beginning September 23, 2010, employee saw Dr. Anthony Eidelman, who performed a series of lumbar injections. Dr. Eidelman's notes suggest employee reported a history of back pain with radiating pain into the right thigh, and that Dr. Eidelman believed employee's pain was referable to lumbosacral spondylosis, facet degenerative changes, and sacroiliac joint arthritis. Employee returned to Dr. Russell on September 30, 2010, complaining of back pain with right leg radicular symptoms that began four to five weeks previously; we note that this would suggest an onset of low back pain sometime in August 2010.

Employee was off work for treatment in connection with his low back pain beginning September 10, 2010. Employee applied for and received short-term disability benefits

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through his insurance with employer. Employee attempted to return to work sometime in November 2010, but apparently was only able to work for a day and a half. Employee next attempted to return to work in the first part of December 2010.

On December 3, 2010, employee got into an awkward position while working on a machine called a "whisper sorter" at employer's facility. Employee's low back condition permanently worsened following this event. When employee tried to return to work the following Monday, he found himself struggling to walk because of left leg weakness. Employee made it into the maintenance shop, but was unable to do more than sit on the ground. Employee's manager found him and advised him to go speak with human resources. Employee did so and once again applied for and received short-term disability benefits through his insurance with employer.

On December 6, 2010, employee saw Dr. Paul O'Boynick for low back and bilateral leg pain. Dr. O'Boynick's notes suggest that employee complained that his left leg hurt worse than his right, and that employee told Dr. O'Boynick that he injured himself in July pulling a conveyor belt at work. This is the first reference to a work injury in the medical treatment record. Notably, it does not appear that employee advised Dr. O'Boynick of the incident on December 3, 2010, in which he suffered a permanent worsening of his low back condition.

On January 30, 2011, employee saw a neurosurgeon, Dr. Peter Basta, who noted that employee's symptoms had worsened over the last year, and that the onset correlated with a work injury in July 2010. Dr. Basta recommended employee undergo L3, L4, L5, and S1 laminectomies, with bilateral foraminotomies at L3-4, L4-5, and L5-S1, possible left microdiscectomies on the left at L3-4, L4-5, and possible microdiscectomy at L5-S1.

Expert medical opinion evidence

Employee provides the testimony of Dr. William Hopkins, who evaluated employee on January 19, 2011. At that time, employee reported to Dr. Hopkins that he was performing full-time work, but neither Dr. Hopkins's report nor his testimony reveal where employee was working. We note that this conflicts with employee's testimony at the hearing indicating that, apart from a day and a half in November 2010 and a week or so in early December 2010, he has not been able to perform full-time work since September 2010. We note also that Dr. Hopkins testified that he didn't think employee could work in his present physical condition, despite agreeing, earlier in the same deposition, that employee had told him that he was working full-time.

Dr. Hopkins opined that employee sustained an injury to his lumbar spine while pulling the conveyor belt on July 14, 2010. Dr. Hopkins indicated that employee's primary problems are at L3-4 and L4-5, but he did not specify whether he believed the incident of July 14, 2010, caused these problems. We note that Dr. Hopkins's report suggests that he did not review any records referable to employee's treatment in an emergency room on or about September 2, 2010, for an exacerbation of low back pain. We note also that Dr. Hopkins's report and testimony fails to mention the December 3, 2010, incident, in which employee suffered a permanent worsening of his low back condition;

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employee, in his testimony, admitted that he did not apprise Dr. Hopkins of the December 3, 2010, incident.

Employer provides the testimony of Dr. Alexander Bailey, who diagnosed degenerative disc disease and moderate to severe facet arthrosis at L3 through S1 with a history of a herniated disc excision at L5-S1 with a small recurrent disc herniation at the same level. Dr. Bailey opined that the accident of July 14, 2010, is not the prevailing factor nor a contributing factor causing the employee's diagnosis, and that employee is suffering from an underlying personal medical condition.

After careful consideration, we are not persuaded by employee's evidence on the issue of medical causation. This is because the record reveals multiple potential causes for employee's current low back and lower extremity problems, including employee's 1986 surgery, the conveyor belt incident of July 14, 2010, whatever happened to send employee to the emergency room on or about September 2, 2010, and the whisper sorter incident of December 3, 2010. Particularly in the absence of any records or testimony to establish what happened on or about September 2, 2010, and because we are not convinced that we can reasonably rely on employee's history of events where it is in material conflict with the contemporaneous medical treatment record, we are ultimately not persuaded by Dr. Hopkins's testimony in this matter.

Conclusion of Law

Accident

The parties dispute whether employee suffered an "accident," as that term is defined in § 287.020.2 RSMo, which provides, in relevant part, as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

We have found that on July 14, 2010, employee was working with a coworker to repair a conveyor belt at employer's facility, and that employee felt a sharp pain in his lower back while pulling the belt. We are convinced that these facts satisfy the foregoing statutory definition, and we conclude therefore that employee suffered an "accident" for purposes of § 287.020.2.

Medical causation

Section 287.020.3(1) RSMo provides, in relevant part, as follows:

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.

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We have noted the multiple potential causes for employee's current low back and lower extremity problems, including employee's 1986 surgery, the accident of July 14, 2010, whatever happened to send employee to the emergency room on or about September 2, 2010, and the incident of December 3, 2010. We have found the testimony and opinions from employee's expert, Dr. Hopkins, lacking persuasive force in this matter. Accordingly, we conclude that the accident of July 14, 2010, was not the prevailing factor in causing any medical condition of employee's lumbar spine, or any disability referable thereto.

Because employee has failed to prove that he sustained any compensable injury, all other issues are moot.

Conclusion

We reverse the award of the administrative law judge. We conclude that employee's accident of July 14, 2010, was not the prevailing factor in causing him to sustain any compensable injury. Accordingly, employee's claim for benefits is denied.

The award and decision of Administrative Law Judge Emily S. Fowler, issued June 3, 2013, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 17th day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY AWARD

Employee: David Luka Injury No. 10-101154
Dependents: N/A
Employer: Fed Ex Ground
Insurer: Indemnity Insurance Company of North America
Additional Party: N/A
Hearing Date: May 6, 2013 Checked by: ESF/pd

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: July 14, 2010
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment?
Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee and a co-worker were attempting to remove heavy conveyor belt weighing several hundred pounds and in the process of pulling on the conveyor belt, the Claimant felt a sudden pain in his low 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: Low back with radiculopathy to the lower extremities
14. Nature and extent of any permanent disability: not determined at this time
15. Compensation paid to date for temporary 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 wages: \$1,297.71
19. Weekly compensation rate: \$799.11
20. Method wages computation: By agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable: Temporary total disability for 126 weeks from December 6, 2010 until the date of the hearing for a total of \$100,687.86 and thereafter from May 7, 2013 at the rate of \$799.11 until the Claimant has reached maximum medical improvement or is otherwise cleared to return to work.
22. Second Injury Liability: N/A
23. Future requirements awarded: Employer/Insurer is to provide and pay for necessary and reasonable medical treatment to cure and relieve the injury to the lumbar spine. The Claimant did not request any reimbursement for medical treatment at this hearing.

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of John R. Stanley, Employee's attorney, for necessary legal services rendered.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Luka Injury No. 10-101154
Dependents: N/A
Employer: Fed Ex Ground
Insurer: Indemnity Insurance Company of North America
Additional Party: N/A
Hearing Date: May 6, 2013 Checked by: ESF/pd

On May 6, 2013, the Employee and the Employer appeared for a Hardship Hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110. The Employee, David Luka, appeared in person and with counsel, Mr. John R. Stanley. The Employer appeared through its counsel, Mr. R. Kent Schultz.

STIPULATIONS

The parties stipulated to the following:

- 1) that the Employer was operating under and subject to the provisions of Missouri Workers' Compensation Law on July 14, 2010 and the Employer was fully insured through Protective Insurance Company;
- 2) that David Luka was an employee of FedEx Ground and working subject to the law in Kansas City, Jackson County, Missouri;
- 3) that Employee' claim was filed within the time allowed by law;
- 4) that the parties stipulated to an average weekly wage of \$1,297.71, and compensation rate of \$799.11 for temporary total disability, and \$418.58 for permanent partial disability; and,
- 5) that the sum of zero was paid for temporary total disability and medical costs.

ISSUES:

The issues to be resolved by this hearing are as follows:

- 1) whether Employee sustained an accident or occupational disease arising out of and in the course of his employment;
- 2) whether the accident the Employee claims was the prevailing factor for the Employee's current condition and disability, and the need for additional medical care and treatment;
- 3) whether the Employer/Insurer is to provide medical treatment; and
- 4) whether the Employer/Insurer is to provide payment of TTD from December 6, 2010 through the present and continuing.

FINDINGS OF FACT AND RULINGS OF LAW

Claimant testified on his own behalf and presented the following exhibits which were admitted without objection with the exception of Claimant's Exhibit J which was admitted over Employer/Insurer's objection.

Claimant's Exhibit A – Dr. Hopkins' deposition transcript and Exhibit A
Claimant's Exhibit B – Dr. Russell's deposition transcript and Exhibits B1 and B2
Claimant's Exhibit C – Mr. Schweiger's deposition transcript
Claimant's Exhibit D – Olathe Medical Center (Dr. Russell)
Claimant's Exhibit E – MRI reports –brain and cervical (prior) records
Claimant's Exhibit F – MRI reports – lumbar (pre and post injury) and records
Claimant's Exhibit G – Neurology Consultants (Dr. Kelley) records
Claimant's Exhibit H – Neurosurgery associates (Drs. O'Boynick and Basta) records
Claimant's Exhibit I – Research Medical Center records
Claimant's Exhibit J – SSA Disability Award letter
Claimant's Exhibit K – Claim Form – Amended
Claimant's Exhibit L – Personnel file from FedEx Ground

The Employer/Insurer presented the live testimony of Chad Allen, an employee of FedEx Ground, the live testimony of Aimee McLandsborough, former employee of FedEx Gound, and offered the following exhibits, all of which were admitted without objection.

Employer/Insurer's Exhibit 1 – Records of Neurosurgery Associates of Kansas
Employer/Insurer's Exhibit 2 – Records of Kansas City Bone & Joint Clinic
Employer/Insurer's Exhibit 3 – Records of Olathe Medical Services
Employer/Insurer's Exhibit 4 – Records of Olathe Medical Center
Employer/Insurer's Exhibit 5 – Transcript of the testimony of Dr. Alexander Bailey

Based on the above exhibits and testimony of the witnesses, the Court makes the following findings.

David Luka is a 55-year-old single male who lives in Olathe, Kansas. He had worked at FedEx Ground from 1997 to December 6, 2010. He worked in maintenance and his job duties involved being on his feet for a majority of the time as well as heavy lifting, as well as bending, stooping, crouching or crawling. (Exhibit L, page 128) Prior to working at FedEx Ground, the Claimant worked in the warehouse at J.C. Penny's.

The Claimant testified that he injured his low back on July 14, 2010. He and a co-employee, Steven Schweiger, were attempting to remove a damaged conveyor belt from the line. The conveyor belt was extremely heavy, approximately five feet wide and approximately one hundred feet long and weighed several hundred pounds. He felt a sudden sharp pain in his low back and cried out in pain. Mr. Schweiger testified that the Claimant started the day normally, but in the process of the repair, he started complaining about his back hurting during the process and that he was in "a pretty good deal of pain." (Exhibit C, p. 7) He remembers that the job could not be completed because it took two men and the Claimant was unable to do further

lifting. (Id., page 7) He testified that he never remembered the Claimant complaining about back pain in the four prior years that he had worked with Mr. Luka. (Id, page 9)

The Claimant testified that he did not want to make a workers' compensation claim because he was concerned that there would be retaliation. He testified that the working atmosphere was strained and that his supervisor had recently been disciplined and was on probation. Mr. Schweiger substantiated the fact that there had been such concerns. The Claimant testified that he did call his supervisor to tell him about the accident but told the supervisor that he intended to use his own insurance and not make a claim. At the hearing, the Claimant learned that the supervisor, Jeff Wurtz had apparently submitted his resignation a few weeks prior to the date of his injury. The H.R. representative, Aimee McLandsborough, testified that a replacement supervisor for Mr. Wurtz would not have been made for at least 30 days after his departure.

The Claimant testified that although he initially did not want the employer to know he had been hurt on the job or file a claim he ultimately did file a claim in December of 2010. Further he testified that his coworkers all knew he was injured, both Mr. Schweiger as well as others he worked with and told. He ultimately told his supervisor about it and made it known to the H.R. representative. The H.R. representative denied this.

The Claimant was sure that the date of the injury was July 14, 2010 because the next day he had a scheduled appointment with his family physician, Dr. Scott Russell. The records show that on July 15, 2010, the Claimant did see Dr. Russell for treatment of his diabetes. Although the office notes do not mention a work injury to the low back, Dr. Russell wrote a letter affirming that he examined Mr. Luka on July 15, 2010 for back pain which Mr. Luka felt "was related to an injury at work. Although, he did not want that documented or placed in the chart. So, at his request, there was no mention of an injury at work placed in his chart...The patient told me at that time he did not want to file a workman's compensation claim." (Exhibit B, p. 27)

The Claimant testified that at the time he had hoped that his back pain would subside – unfortunately it did not subside but worsened. He testified that after a few weeks his pain increased and he started experiencing leg pain. He returned to Dr. Russell who referred him to pain management and an MRI on September 2, 2010. The Claimant was taken off work and he applied for Short Term Disability. The Application filed on September 10, recites that the condition had been present for "greater than 30 days." (Exhibit L, page 7) This contrasts only slightly with Dr. Russell's September 30, 2010 office notes that state that the back pain began "4 or 5 weeks ago." (Exhibit B, page 23)

Following his MRI and the restrictions placed upon him by Dr. Russell (Exhibit L, page 162), the Claimant applied for Family Leave. He testified that there was no secret about his back injury and his back pain. He testified that he spoke with the H.R. representative, Aimee McLandsborough, about Family Leave and short term disability. The personnel records reflect that the Claimant filed for Family Leave and Short Term Disability. These records document the Claimant's back pain and radiculopathy. Regular reports were sent to Beverly Gray, Antoinette Edwards and two others at FedEx (Exhibit K, pages 22, 38, 42, 43, 50) throughout September through November, 2010.

He testified that he attempted to return to work in November for a couple of days and again in December for a couple of days but was unable to work due to the pain. There was

another incident on December 3, 2010 where he was in an awkward position and aggravated his back pain. The following work day (December 3rd was a Friday), his leg gave out from under him and he fell at work.

He testified that he reported the December 3rd incident to the Ms. McLandsborough but was told to go home since he could not work. It was at this point that he sought the advice of an attorney for the first time. He retained attorney Steve Alberg who filed a claim on his behalf for the July 14, 2010 injury.

The Claimant testified that he was never deposed by the Employer/Insurer until a week before this hearing. The H.R. representative testified that she never knew the Claimant injured his back, although the personnel records show that he had applied for Family Leave and short term disability due to back pain. The Claimant testified that he had discussions with Ms McLandsborough about his back after his symptoms became more severe.

The Employer's evidence included the live testimony of Chad Allen, the Senior Manager of Hubb Operations, who is in charge of their Kansas City, Missouri location. He testified as to the protocol of employee reporting of work related injuries, how the Employee had failed to report the injury, and that their first notice that he was claiming a work related injury was upon their receipt of the Claim for Compensation, approximately three months after the claimed accident date. He testified that Jeff Wurtz was no longer an employee on July 14, 2010. In fact, he resigned effective July 3, 2010 and his last day worked was June 21, 2010. He testified that after the Employee went out on leave of absence in September, 2010 he did not have any contact with him, but the Employee did maintain contact with Aimee McLandsborough of HR. He denied knowledge that the Employee was treating for his back when he was out on leave of absence, adding that it seemed like there was always something wrong with him, such as diabetes, neck problems and arthritis. He denied that during the timeframe leading up to July 14, 2010 there were any firings in the Maintenance Department. When asked about Jeff Wurtz, he responded that he had been placed on probation for falsifying time reports. When asked about the Employee, he responded that his work performance was good other than a couple instances where he was written up.

The Employer's other witness at the Hearing was Aimee McLandsborough. She currently is employed at the Honeywell Institute in Olathe, Kansas. She worked for FedEx Ground from July, 2007 through December, 2011, and during the last four years of her employment with FedEx she worked as Employee Relations Specialists in the HR Department. She described her job duties as consisting of employee relations, orientation, and benefits coordinator. She testified that Aetna Insurance Company handled their short term disability (STD) Plan and her involvement when an employee was entitled to STD benefits, was to direct and assist them in making a claim and to follow up with them regarding their status although she would not be privy nor included in the communications and documents generated between the employee and Aetna.

She testified that she was in constant contact with the Employee several times a day from the time he went out on leave of absence until the last day he worked. She testified that at no time either before or after he went out on leave of absence did he ever mention to her a work related accident. She testified that at no time did he ever mention to her that he was out on leave

of absence due to his back. She thought it was due to his diabetes, neck, or arthritis, for which he had taken leave for in the past.

She denied telling the Employee on or about December 6, 2010 or at any time that if he couldn't work and went home the Employer was going to replace him. She testified that she did contact him in early December, 2010 to inform him that he was getting close to using up his FMLA leave time, which is something she always did and felt compelled to do with any employee. What she told him is what she tells every employee in that circumstance. That is, once their FMLA time is used up, the Employer can replace them if the need arises, but they can apply for any other position that the Employer has available. She testified that it was within days after that communication with the Employee that she learned that he was making a claim for a work related injury and filed a Claim for Compensation. She said that this came as a surprise to everyone.

The first issue to be determined by this Court is whether the Claimant sustained an accident arising out of and in the course of his employment. Employee testified as to what happened on the date he claimed he injured his back while at work. He was working with a coworker putting a conveyor belt which was large, cumbersome and very heavy back into service. While working on this, he had a sudden onset of back pain which became worse as the day progressed. This testimony was corroborated by the co-employee he was working with on that date. Further, although there was no mention of back problems in the initial medical records by Dr. Russell whom he went to see the next day on a routine visit, there is a letter as well as testimony by Dr. Russell that Claimant requested he not put the reported problems in his medical records. Claimant wanted to try to get his treatment under his regular insurance because he was afraid of retaliation from his employer if he filed a workers' compensation claim. The workplace problems were again corroborated by his co employee. Dr. Russell confirmed that Claimant did in fact complain of back symptoms when he saw him the next day and Claimant requested he not put such information in his records. This Court finds the testimony of Employee, Dr. Russell and Mr. Schweiger credible and compelling herein. Based upon this evidence, this Court finds that Claimant did sustain an accident arising out of the course and scope of his employment on July 14, 2010.

The next issue to be determined by this Court is whether the claimant notified his employer of the injury as required by law. The law states under section 287.420.that "no proceedings for compensation for any accident shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice."

The Claimant did not provide written notice of the accident within thirty days of the accident. This is not disputed. There is a dispute as to whether the Employer had actual knowledge of the accident. The Claimant testified that he told Jeff Wurtz about his accident a few days after it happened – however Jeff Wurtz was apparently no longer with the company – unbeknownst to the Claimant. He also testified that "everyone" knew that he hurt himself at work but was going through his private insurance rather than making a workers' compensation claim. He testified, as did Steven Schweiger who witnessed the accident, that the Claimant was unable to continue to work on the belt and the line was shut down all day because it was a two man job to repair it. (Exhibit C, page 7). Because he had been injured and was unable to assist

Mr. Schweiger in placing the guard (a two-man job), there was a disruption that everyone was aware of.

Even though the employer was not given written notice within thirty days of the accident, it did have actual knowledge of the accident. The accident caused the line to go down and a stoppage of work for several employees. The H.R. representative says she was not told; the Claimant testified that she and other fellow employees knew of the work-related injury. The Claimant testified that it was known that he hurt himself at work; it was also known that he was not pursuing a workers' compensation claim because of it.

If no written notice was given within thirty days of the accident, the burden of proof is upon the employer to show that it was prejudiced by the lack of notice. A prima facie case of no prejudice to the employer is made if the claimant demonstrates that the employer had actual notice of the injury. Hall v. G. W. Fiberglass, 873 S.W. 2d 297 at 298 (1994). The issue of whether the claimant has provided the employer with actual notice of a compensable injury is a question of fact to be determined by the Labor and Industrial Relations Commission. Weniger v. Pulitzer Publishing Co., 860 S.W.2d 359, 361 (Mo.App. 1993).

The Court finds the Claimant was a credible witness. Dr. Russell's testimony confirms that the Claimant had reported the following day of the accident that the injury to the back occurred at work. Dr. Russell has no incentive to misstate the facts. This case is not like, Nowlin v. Nordyne, Inc., Injury No. 01-164895 (August 9, 2006) where the Court found that the Claimant's testimony that she told her supervisor's secretary (which the secretary denied) of the accident was not credible because of the "absence of any contemporaneous medical record supporting [the claimed work accident]". In this case, the Claimant's credibility is bolstered by the fact that Dr. Russell acknowledges that he was told the injury resulted from a work accident the day before. It is further bolstered by the testimony of Mr. Schweiger who also corroborated Claimant's version of what happened. Further, in reviewing Dr. Russell's records of 9-2-10, he notes an exacerbation of back pain. This indicates that there was prior back pain that has become worse. There is no indication of back pain related to the lumbar area in any of his prior medical records. This Court therefore concludes that he was referring to the back pain Claimant suffered due to his alleged injury on July 14, 2010. The 9-30-10 reference to pain starting 4-5 weeks earlier appears to be referring to the exacerbation of the already existing back pain. The Claimant testified that "it was no secret" that he hurt himself at work. He thought that the condition would improve and he would be able to return to work. He testified that there was a tense environment at his employment and his supervisor was on probation at the time of his injury.

In light of Dr. Russell's and Mr. Schweiger's testimony, it reflects that the Claimant's testimony is credible and he was indeed concerned about repercussions should he file a claim. On the other hand, the H.R. representative was less than credible when she testified that all the while she remembers that the Claimant was complaining of a neck injury. The neck injury occurred in 2009 and the personnel records show that he was given a full release for the neck injury without restrictions on June 13, 2009 (Exhibit L, page 172). The personnel files clearly reflect that the Family Leave application was made in September of 2010 and that it was for lumbar pain. The H.R. representative testified that she had no knowledge of what was in the Claimant's personnel file.

The Court finds that the Employer did have actual knowledge of the accident. Further the Claimant did ultimately file his claim for compensation approximately five months after the accident giving the employer actual written notice. The statute governing notice clearing states that if no prejudice is shown, then a claim for compensation shall not be barred by the employee's failure to give written notice. The Employer did not offer any evidence of prejudice. The Claimant is not requesting reimbursement for medical treatment prior to the date the Claim was filed. His request for temporary total disability corresponds approximately with the date of his formal claim for compensation. The Employer has had full opportunity to cross-examine the co-worker who witnessed the accident. The Claimant immediately sought medical treatment and after his symptoms began to increase, he was taken off of work. The Employer did not meet its burden of proving that it was prejudiced by the lack of notice and the Court finds that employee's claim is therefore not barred pursuant to MO STAT 287.420.

The next issue to be determined by this Court is whether the accident was the prevailing factor in employee's need for medical care. The Claimant testified that he injured his back while working for J.C. Penny in Kansas in the 1980's. The medical records attest to this as well. He testified that he had a complete recovery and was able to return to full employment working in the warehouse. He testified that he had no further problems with his back until an incident that occurred in 2000. At that time he experienced some leg pain and was seen by Dr. Hess. Dr. Hess referred him for an MRI and he had three epidural injections. Following his third injection on April 11, 2000, the office note indicates that the Claimant called in on April 22nd to report that he was better. The office notes that he could follow up as needed. He did not return. According to the Claimant, following the injections he was able to return to full duty which involved heavy lifting. The extensive medical records reflect that the Claimant saw doctors throughout the years, but never once do the records show that he had any complaints to his low back. On April 24, 2007, there is a note indicating "back pain," but closer examination of the office visit shows that the pain was coming from the upper back and a cervical spine MRI was ordered. Given the extensive records relating to a heart condition and diabetes and the various recitation of medical histories there was never a complaint of back pain from April 22, 2000 to July 14, 2010. The Claimant's testimony was consistent with this as well.

The Claimant's low back condition following the July 14, 2010 injury is well documented. The CT of the Lumbar spine of December 8, 2010 revealed bulging at levels L1 through L5 with "severe central canal stenosis" at L3-4 in addition to post-operative changes at L5-S1 resulting in moderate to severe neuroforaminal narrowing.

Although he had surgery at the L5-S1 level in 1986, he had no further complaints or treatment for his back until 14 years later in 2000. On 3/13/2000 the MRI report noted: "degenerative disc disease particularly at L4-5 and L5-S1 with superimposed posterior disc herniations." The L3-4 level was essentially normal: "There is mild disc bulging. There is no evidence of a superimposed disc herniation. No evidence of central spinal stenosis. Neural foramina and lateral recesses are patent." As stated above, the Claimant had no further problems with his low back for more than 10 years until the work injury of July 14, 2010.

It is significant that medical records and the diagnostic films document that the Claimant's 2010 injury is due in large part to bulging of the L3-4 disc and severe stenosis at the same level. Dr. Peter Basta, a neurosurgeon, has recommended extensive surgery involving "L3, 4, 5 and S1 laminectomies with bilateral foraminotomies at L3/4, L4/5, and L5/S1, and possible

microdisctomies on the left L3/4, L4/5, and a possible reoperative left microdiscectomy at L5/S1. (Exhibit H, p 2) These L3-4 and L4-5 levels were not involved in the 1986 surgery and the 2000 MRI showed only "mild bulging" at L3-4.

In this case, the Claimant saw two orthopedic medical experts for an IME. The expert for the Claimant was Dr. Hopkins; and the expert for the Employer was Dr. Bailey. Dr. Hopkins opined that the injury of July 14, 2010 was the prevailing cause for the change in pathology associated at the L3-4 and L4-5 level. Dr. Bailey opined prevailing factor for the injury and the need for medical treatment "appears to be a pre-existing personal medical condition." Dr. Bailey noted in his deposition page 11, line 17-20 "I think that when you talk about his leg extremity symptoms, the patient has a diagnosis of neuropathy, and neuropathy can effect the lower extremities." However in this Court's review of the medical records there is no indication that Claimant had lower extremity neuropathy, only upper extremity neuropathy for which he was being treated. Regarding his lower extremities the findings included "diminished sensation with light touch and pin prick in the distal left L5, more so than S1 dermatomal distribution" (Claimant's exhibit H, page 1). Also, it was determined he suffered lumbar radiculopathy. Further, Dr. O'Boynick felt that Claimant suffered from a recurrent disc herniation at L5-S1. If, in fact, Dr. Bailey was making his determination that the prevailing factor was Claimant's personal medical condition of neuropathy, he was mistaken. If the personal medical condition he was referring to was Claimant's prior back injuries and treatment, there is ample evidence to the contrary.

In this instance, there is a medical expert who is not associated with the Claimant or the Employer. Indeed, Dr. Basta, who is a treating physician and has not been retained as a medical expert by either party, has noted in his surgical consultation dated January 30, 2012 that the low back and bilateral radiating leg pain worsened over the last year and that the "onset of his symptoms correlate with the work injury in July 2010." (Exhibit H, page 1)

Notwithstanding Claimant's prior back condition, the prior medical records show that the injury to the Claimant's back involved the level of L5-S1 together with degenerative disc disease at L4-5. The only indication of any involvement above L4-5 is the "mild bulging" at L3-4 described in the medical records in March 2000. The record also shows that the Claimant was given no restrictions following the three injections he received in March 2000. The Claimant testified that he continued to perform heavy work following his return to work in 2000 - a period of more than 10 years. He testified that he had no further problems with his low back for these 10 years. It is significant that the chiropractor the Claimant saw for his upper back and cervical pain in 2009 on 11 separate office visits from May 11, 2009 to June 2, 2009 never makes mention that the Claimant even complained of pain in his lumbar spine. (Exhibit L, pages 183-2005).

The Claimant performed heavy labor, asymptotically, without restriction after being released for his 1986 L5-S1 surgery and the 2000 injections to his lumbar spine. Although the Court is cognizant of these treatments involving the lumbar spine, the surgery and the injections, 24 and 10 years prior to the work injury do not constitute the "prevailing factor." In this case, the Claimant was able to perform heavy lifting and bending without any complaint following his release from those procedures. Further, the medical records show that there was a significant injury that changed the pathology of the lumbar spine two levels above the level of the surgery that occurred 24 years prior and a flair up that occurred 10 years prior to the July 14, 2010 injury.

In Wing v. Troostwood Garage & Body Shop, Injury No. 09-044196 MO LIRC, (March 30, 2011), the Commission affirmed ALJ Siedlik who found that work was the prevailing factor for an injury even though the claimant had previously undergone three lumbar surgeries. The Commission found that the claimant had been asymptomatic following a two-level fusion surgery five years prior to the accident. The Commission also cited Savage vs. Treasurer of Missouri, 208 S.W. 771 (2010), where the Claimant's injury to the left knee was found to be the prevailing factor even though the Claimant had undergone two previous surgeries to the same knee.

In Wing v. Troostwood, it was noted that "The Commission has held consistently that the mere existence of asymptomatic degenerative disc disease does not preclude a subsequent injury to the same disc as being the prevailing factor." (citing cases)

I find that Dr. Hopkins' opinion is more credible than Dr. Bailey. Dr. Basta, the treating surgeon who has not been retained by either party, agrees with Dr. Hopkins that the injury to the Claimant is the result of the July 14, 2010 accident.

The next issue to be determined is whether the employer must provide additional medical care to the employee. The medical records clearly support the need for medical treatment. Both retained medical experts state that the Claimant is a surgical candidate. Dr. Bast0a states that he should have extensive surgery and one year ago was ready to proceed. Since this Court has determined that Claimant did sustain an accident in the course and scope of his employment and that such accident was the prevailing factor in causing his back injury this Court finds that his need for medical treatment is related to said back injury. This Court finds that employer must provide to Claimant such medical treatment. The Employer/Insurer is ordered to provide medical treatment pursuant to MO STAT 287.140 as may reasonably be required to cure and relieve the effects of the injury.

The final issue to be determined by this Court is whether the employee is entitled to temporary total disability starting December 6, 2010 and continuing until he has reached maximum medical improvement. The Claimant last worked on December 6, 2010. The records indicate that the Social Security Administration found him to be disabled effective September 6, 2010, approximately the date he went on Family Leave. Dr. Hopkins has opined "he can stand and walk for five minutes. He has trouble lying down, walking, stooping, squatting, bending over, kneeling, lifting, carrying... At home he cannot perform any activities without pain. At work he cannot perform any activities without pain." Dr. Bailey opined that he did not address work ability because he felt that the condition was not work related.

The short term disability provider was provided physical and lifting requirements of the job for purposes of assessing whether the claimant was eligible for short term disability. His job requires that he be on his feet for more than 2/3 of the time; the lifting requirements require that the claimant lift up to fifty pounds less than 1/3 of the time; lift up to 100 lbs less than 1/3 of the time; and lift over 100 lbs less than 1/3 of the time. (Exhibit L, page 124) Dr. Scott Russell placed the Claimant on temporary restrictions on September 16 of no lifting greater than 40 lbs and no repetitive stooping, lifting or bending. (Exhibit L, page 162) The personnel file and the Claimant's testimony reflect that he was approved for short term disability. The Claimant testified that he was able to come back to work less than one week after his short term disability ran out (12 weeks). The temporary restrictions were never removed.

The Claimant is in need of a surgery and clearly is not at MMI. The Employer/Insurer is ordered to pay temporary total disability at the rate of \$799.11 from December 6, 2010 through the date of the hearing, May 6, 2013, a period of 126 weeks in the lump sum of \$100,687.86 and thereafter at the rate of \$799.11 until the Claimant has reached MMI or is otherwise able to return to work.

Finally, this Court awards to Employee's attorney, John R. Stanley, a fee of 25 percent of all benefits awarded herein.

Made by: _____
Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation