

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 09-107157

Employee: Manfred Meadows
Employer: John Bender
Insurer: Seabright Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated March 22, 2012.

This award is only temporary or partial, 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.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued March 22, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of July 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Manfred Meadows

Injury No.: 09-107157

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: John Bender

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: None

Insurer: Seabright Insurance Company

Hearing Date: January 4, 2012

Checked by: KMH

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 29, 2009
5. State location where accident occurred or occupational disease contracted: St. Louis
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 injured his neck and body as a whole while lifting door jambs at work.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Parts of body injured by accident or occupational disease: Neck and body as a whole
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? \$7,424.50
16. Value necessary medical aid not furnished by employer/insurer? unknown

Employee: Manfred Meadows

Injury No.: 09-107157

- 17. Employee's average weekly wages: unknown
- 18. Weekly compensation rate: \$807.48/\$422.97
- 19. Method wages computation: Stipulation

COMPENSATION PAYABLE

20. Amount of compensation payable:

| | |
|--|------|
| future temporary total or temporary partial disability | * |
| future medical care | ** |
| TOTAL: | * ** |

(use of an asterisk (*) denotes an uncertain contingent future benefit)

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:

Lynn Barnett

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Manfred Meadows

Injury No.: 09-107157

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: John Bender

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: None

Insurer: Seabright Insurance

Checked by: KMH

A hearing was held on the above captioned matter January 4, 2012. Manfred Meadows (Claimant) was represented by attorney Lynn Barnett. John Bender (Employer) was represented by attorney Jennifer Weller. The Second Injury Fund was left open.

Claimant alleges he needs additional medical treatment related to injuries sustained from repetitive work leading up to March 2008 and a work accident in July 2009. Employer denies liability for further treatment.

STIPULATIONS

The parties stipulated to the following:

1. Venue is proper in St. Louis
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully insured by Seabright Insurance.
4. A claim for compensation was timely filed.
5. Claimant's rates for TTD and PPD are \$807.48 and \$422.97 respectively.
6. Employer has paid no TTD and has paid \$7,424.50 in medical benefits.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Accident/Occupational Disease
2. Medical Causation
3. Future medical care
4. Future temporary total disability
5. PPD
6. Employer raised notice as an issue. Claimant objected as a notice defense was not pled in Employer/Insurer's Answer to Claim and had not been asserted until the date of hearing.

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 38 year-old, married male who has worked as a carpenter for Employer nearly 15 years. He works with drywall, wood, insulation, cabinets, doors, door frames, trim material, and many other construction supplies and power tools on a daily basis. When installing materials, Claimant often holds them at shoulder level and overhead. His duties also include working with metal framing studs that come in different sizes and weigh from five to two hundred pounds.
2. In January 2008, Claimant became an Estimator for Employer. He was not in the field as much, and spent most of his time in the office estimating jobs. He climbed ladders and performed some physical work when he went into the field to review jobs. Claimant testified he had neck pain when climbing ladders and when looking down at his desk. Claimant worked as an Estimator for one year and then returned to work in the field.
3. Claimant testified he had no neck injuries or complaints prior to 2007. His testimony was unrefuted and is corroborated by his prior medical records. In December 2007, he developed pain at the base of his neck on the left side. Claimant told his supervisor, Todd Bender, that he had neck pain and was going to take care of it himself without filing a workers' compensation claim. He went to his chiropractor, who ordered x-rays January 4, 2008, to evaluate his complaints of neck pain. She did not provide treatment for Claimant's neck, and referred him to his primary care physician, Dr. Kairuz.
4. Claimant saw Dr. Kairuz February 11, 2008, for complaints of neck and left shoulder pain, with numbness radiating into the left arm and fingers. Dr. Kairuz ordered physical therapy and an MRI to rule out cervical spine compression. The March 20, 2008, MRI report indicates Claimant had a small left paracentral disc herniation at C6-7 slightly restricting the neural foramen. No other disc herniations were present. Dr. Kairuz referred Claimant to Dr. Wetherington, a neurosurgeon.
5. Claimant saw Dr. Wetherington April 10, 2008. The records show complaints of neck pain and left upper extremity numbness and tingling for the past four months with no precipitating event. Dr. Wetherington opined the MRI showed degenerative disc disease changes at C5-6 and C6-7 with no spinal cord compression. Since conservative treatment had failed to relieve Claimant's symptoms, Dr. Wetherington recommended cervical epidural steroid injections.
6. Dr. Coleman performed two cervical epidural steroid injections in April and May 2008. Dr. Coleman's records indicate Claimant reported neck pain radiating into his left arm since December 2007. The pain came on gradually. Dr. Coleman diagnosed cervicalgia, cervical degenerative disc disease, and myofascial pain. He noted Claimant was not treating under workers' compensation, was not on disability, and had no plans for legal action.

7. Claimant continued to work throughout this treatment but he had difficulties and pain in his neck at work. Claimant had no more treatment on his neck until after his July 2009 work injury.
8. On July 29, 2009, Claimant and a co-worker were unloading commercial door jambs, which are the metal framework of a door. These weigh approximately 150 pounds and are eight feet tall by five feet wide. Claimant and his co-worker carried the door jambs overhead to get them up a narrow stairwell to the third floor. As they were carrying the fifth or sixth door jamb, it slid towards Claimant. He had to quickly jerk his head to the right to avoid getting hit. Claimant felt an immediate pain in his neck.
9. Claimant saw his chiropractor, Dr. Kreidler, at the end of that day with complaints of severe left shoulder pain and pain into both sides of his neck, which occurred while lifting/carrying a 100 pound door jamb over his head at work. Claimant testified when the pain did not improve in a few weeks, he reported the injury to Todd Bender. Mr. Bender told Claimant to let him know what the doctor said. Claimant did not demand treatment from Employer, and Employer did not offer treatment.
10. Claimant continued to treat with Dr. Kreidler through mid September 2009. His complaints worsened, and Claimant developed left arm numbness. Dr. Kreidler recommended a neurological consultation.
11. Claimant returned to Dr. Kairuz September 15, 2009. He noted Claimant's history of C6-7 problems that were treated with physical therapy and injections. The pain returned over the last few weeks and was worse. His left hand and arm were numb and he had neck pain. He referred Claimant to Dr. Shitut. Claimant testified he advised Mr. Bender of the referral.
12. Dr. Shitut saw Claimant September 17, 2009. He noted Claimant's neck had been bothering him since late July with no particular injury other than sharply twisting his neck when he carried something up the steps. Following that incident, Claimant developed neck pain and numbness in his left hand. Dr. Shitut opined Claimant had classic distribution of pain from the left C6 nerve root. He noted Claimant had a herniated disc in 2008 but was doing well until recently. He ordered another MRI September 22, 2009, which showed a herniation at C6-7 and a small herniation at C5-6. Claimant testified, and Dr. Shitut's records corroborate, Claimant's supervisor and was in the exam room when Dr. Shitut advised Claimant what the MRI showed and that he recommended a fusion.
13. Claimant requested a second opinion, and Employer sent him to Dr. Chabot. He did not recommend treatment. Claimant testified he talked to the workers' compensation insurance company, but they did not refer him to anyone for treatment. He testified the insurance company did not deny treatment until after his visit with Dr. Chabot. This testimony was also unrefuted. Claimant had two more injections after he saw Dr. Chabot, and Employer paid for those procedures. Claimant has had no further treatment.

14. Claimant continues to have almost daily sharp pain in the lower part of his neck. He has daily pain in his left shoulder and arm with constant numbness and tingling radiating into his finger. He also has soreness in his left shoulder blade. When lifting, he has pain in the back of his left upper arm into his forearm and fingers. His symptoms are aggravated by lifting and looking overhead, turning his head side to side, reaching, and bending over. He takes over the counter anti-inflammatories and uses ice to reduce swelling. He has difficulty driving due to reduced range of motion in his neck. His symptoms were similar following the 2008 injury and worsened after the 2009 injury.
15. Claimant continues to work full duty as a carpenter. He would like another evaluation to determine if he needs surgery or if other treatment will fix his neck.
16. Employer's expert, Dr. Chabot reviewed the records, the MRI films, and examined Claimant. He testified he was unsure if the MRIs were done at the same facility, and resolution varies from machine to machine. His report states the MRIs were done at different facilities, and that is why Dr. Shitut did not compare the two studies.
17. Dr. Chabot opined the 2008 MRI showed a left sided disc herniation at C6-7. The 2009 MRI showed that herniation plus bilateral foraminal narrowing at C5-6. He opined the two MRIs are not appreciably different, and there is no anatomic difference to indicate acute changes in the two MRIs. Dr. Chabot opined the records show Claimant's complaints developed gradually in late 2007, supporting that his complaints were chronic and degenerative in nature. The underlying degeneration is responsible for his ongoing complaints.
18. He opined the disc pathology found on the MRIs pre-existed the 2009 injury and is associated with disc pathology that was recognized in 2008. The 2008 disc pathology is not associated with a work injury or work duties because there is no mention in the early 2008 records of a specific work injury or duty that is responsible for his complaints, and his duties as an estimator beginning in early 2008 were less physically demanding.
19. Claimant's expert, Dr. Volarich, reviewed the records, examined Claimant and issued a report. Dr. Volarich testified there is an anatomic difference between the two MRIs. He opined Claimant developed a herniation at C6-7 as a result of repetitive trauma from his work leading up to 2008. Claimant lifts heavy items at work and rests 125 pound sheets of drywall with his head while putting in the drywall screws. That is significant strain to the neck, and led to his herniation. The 2009 injury caused that herniation to worsen and Claimant developed a disc protrusion at C5-6. Dr. Volarich opined Claimant needs additional treatment.
20. Dr. Volarich testified the C6-7 disc herniation was caused by repetitive trauma at work, and was not degenerative. A herniation usually takes some sort of traumatic event to occur. Claimant also had an annular tear which is typically from trauma and not degeneration. The 2009 MRI showed the C5-6 disc was now protruding. He testified that degeneration would not have caused that much of a change in pathology in the short time frame between the two MRIs.

21. Claimant is credible.

RULINGS OF LAW

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

1. Employer had actual notice of Claimant's injury.

Section 287.420 (RSMo 2005) requires a claimant to provide written notice of an injury within thirty days, "unless the Employer was not prejudiced by the failure to receive notice."

In *Doerr v. Teton Transportation, Inc.* 258 S.W. 3d 514 (Mo.App. S.D. 2008), the court reviewed the notice provision and found a failure to give timely written notice may be excused if the failure did not prejudice Employer. A claimant may show a lack of prejudice where the evidence of actual notice was uncontradicted. Notice is imputed to the employer when it is given to a supervisory employee.

Claimant credibly testified he told his supervisor he had neck pain and he was going to the doctor. His supervisor told him to let him know what the doctor said. As with his prior compensable injury, Employer did not require Claimant complete an accident report. Claimant underwent conservative treatment and then was referred to Dr. Shitut. Employer was aware of the referral. Dr. Shitut ordered an MRI. Claimant's supervisor went with him to a September 2009 appointment with Dr. Shitut to discuss the findings on the MRI. Dr. Shitut recommended surgery, and Employer sent Claimant to Dr. Chabot. Claimant credibly testified Employer did not deny treatment until after his visit with Dr. Chabot, and Employer paid for additional treatment after Dr. Chabot's examination. No evidence was introduced at trial to refute Claimant's testimony or to show Employer was prejudiced by failure to provide timely written notice.

I find Claimant met his burden of proving he provided actual notice to Employer of his injury.

2. Claimant sustained an injury by accident July 29, 2009, causing a worsening of his prior neck condition and additional disc pathology in his neck.

On the date of injury, Claimant and a co-worker were carrying heavy door jambs overhead. Claimant developed neck pain when he suddenly jerked and twisted his neck to avoid getting hit by a falling door jamb. He felt immediate pain in his neck and saw his chiropractor

that day for complaints of neck and left shoulder pain. Conservative treatment failed, his complaints worsened, and Claimant was referred to Dr. Shitut who ordered an updated MRI. Dr. Shitut opined the new MRI showed additional pathology and Claimant needed more treatment.

Employer's expert, Dr. Chabot, reviewed the MRI films and concluded there is no anatomic difference between the 2008 and 2009 MRIs to indicate an acute change in Claimant's condition. Although Dr. Chabot reviewed the MRI films, the MRIs were done at different facilities, and Dr. Chabot agreed resolution varies among machines. His records indicate this variation is why Dr. Shitut did not compare the two studies. Dr. Chabot opined the 2009 work injury may have aggravated or exacerbated Claimant's prior condition, but the disc pathology predated his 2009 injury, was recognized in 2008, and was not associated with a work injury or work duties. He opined the prevailing factor in the development of Claimant's condition was advanced disc degeneration that preexisted the 2008 case.

Claimant's expert, Dr. Volarich, opined the 2009 MRI showed a worsening of his prior herniation and a new herniation at C5-6 with new bulging at C4-5. He opined the work accident in July 2009 was the prevailing factor in causing the changes at the C6-7 and C5-6 levels. He opined the new MRI showed definite changes. The C5-6 disc was bulging in 2008, and now was protruding. Dr. Volarich opined a year and a half was not enough time for that amount of change to be the result of degeneration.

I find the opinion of Dr. Volarich more persuasive. Claimant clearly had a work accident for which Employer provided treatment. His 2009 accident caused a change in his condition and a need for immediate medical treatment. Claimant's 2009 work injury was the prevailing factor in causing a worsening of his prior herniation and a new herniation and need for treatment.

3. Claimant is entitled to further medical treatment.

Claimant testified he continues to have neck and upper extremity complaints. While his symptoms improved after conservative treatment in 2008, he continued to have pain in his neck and left arm with tingling in his fingers. The 2009 injury caused additional pathology in his neck and an increase in his complaints. Each medical expert opined Claimant would benefit from updated diagnostic studies, and may need additional treatment. Claimant is entitled to additional medical treatment to cure and relieve the effects of this injury.

4. Claimant is entitled to future TTD.

Pursuant to this award, Claimant will receive additional medical care. Employer is ordered to provide TTD benefits to cover the healing period associated with such treatment if Claimant is unable to work during that period.

CONCLUSION

Claimant sustained an injury by accident in the course and scope of his work as a carpenter. He is entitled to additional medical treatment and TTD if he is unable to work while undergoing treatment. All remaining issues are left open for future determination.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation