

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

Injury No.: 09-049839

Employee: Charles C. Miller

Employer: Cornerstone Services Group

Insurer: Liberty Mutual Insurance/New Hampshire Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 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 section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated May 18, 2010.

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 section 287.510 RSMo.

The award and decision of Administrative Law Judge Emily Fowler, issued May 18, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 28th day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY AWARD

Employee: Charles C. Miller Injury No.: 09-049839
Dependents: N/A
Employer: CORNERSTONE SERVICES GROUP
Additional Party: N/A
Insurer: LIBERTY MUTUAL INS. CO. / NEW HAMPSHIRE INS. CO.
Hearing Date: April 22, 2010 Checked by: ESF/cy

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: series to 5/4/09
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: repetitive lifting, pulling and carrying of building materials and equipment.
12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: back and left leg
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? To be determined.
18. Employee's average weekly wages: sufficient for maximum
19. Weekly compensation rate: TTD \$772.53; PPD \$404.66
20. Method wages computation: Agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Temporary total disability payments in the sum of \$772.53 per week beginning May 5, 2009 and continuing each week until released from treatment or returned to work.
22. Second Injury Fund liability: to be determined at a later date.
23. Future requirements awarded: Employer is to provide Employee with medical care to cure or relieve the symptoms from which he suffers due to the injury of May 4, 2009. Further Employer is ordered to authorize Dr. John Clough to administer such treatment.

The compensation awarded to the employee 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 employee: Michael H. Stang

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Charles C. Miller Injury No.: 09-049839
Dependents: N/A
Employer: CORNERSTONE SERVICES GROUP
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Hearing Date: April 22, 2010 Checked by: ESF/cy

On April 22, 2010, the employee and employer appeared for a hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Charles Miller, appeared in person and with counsel, Michael H. Stang. The employer, Cornerstone Services Group (Cornerstone) appeared through attorney, John D. Jurcyk. The employer and alternate insurer, New Hampshire Insurance Company, were represented by Thomas Clinkenbeard.

STIPULATIONS

The parties stipulated that:

1. The Employer and Employee were operating under and subject to the provisions of the Missouri Workers' Compensation law at all times relevant hereto;
2. The Employer's liability under said law was fully insured by Liberty Mutual Insurance Company;
3. An employer/employee relationship existed on or about May 4, 2009 between the Employer and Employee;
4. A Claim for Compensation was filed within the time prescribed by law;
5. That venue is proper;
6. The Employee's average weekly wage was sufficient for the maximum rates, resulting in a TTD rate of \$772.53 and a PPD rate of \$404.66;
7. Compensation has not been paid by the employer/insurer as a result of the alleged injury of May 4, 2009.

ISSUES

The issues to be resolved in this proceeding are as follows:

1. Whether Employee met his burden of proving that he sustained a compensable injury arising out of and in the course of his employment with Cornerstone;
2. Whether Employee provided timely notice of his alleged injury as required by Missouri law;
3. Whether Employee established that he was entitled to temporary total disability benefits after May 5, 2009;
4. Whether Employee is entitled to receive additional medical treatment with John Clough.

EXHIBITS

The Employee testified in person at the hearing. In addition, the following exhibits were offered and admitted into evidence:

Employee's exhibits:

1. Dr. Poppa Report dated July 21, 2009
 - a. Lundin Chiropractic Medical Records
 - b. Dr. Lopez Medical Records
 - c. Magnetic Resonance Imaging Records

Employer/Insurer's exhibits:

1. Transcript of Dr. Lopez Deposition

Employee is alleging a series of accidents arising out of his employment with the employer, Cornerstone Services Group. Employee testified that his job with employer was insulation installation for heating and cooling systems. Employee had previously worked for employer for approximately 12 years leading up to his accident date. With the exception of a brief episode of back pain in 2005 for which employee received some chiropractic treatment, employee testified that he has never had any back injuries while working for the employer.

During the week prior to Saturday, April 11, 2009, employee had been working on a job at the construction site of St. Luke's East Hospital. During that week, employee testified that he began feeling pain in his low back and into his left leg as a result of his work activities. Specifically, employee testified that the St. Luke's East job was distinct from any other job he had ever performed while working for employer due to the fact that no stairs had yet been installed and, as such, employee had to "rope" all of his materials from floor to floor, essentially tying 40 pound boxes to a rope and hoisting them onto whatever floor he was working. Employee testified that, prior to the St. Luke's East job, he had never been required to perform that type of labor. In

addition, because of the lack of stairs, the use of large ladders was much more prevalent and he was required to personally and repeatedly carry those ladders around the job site.

Starting in the week prior to April 11, 2009, employee began to feel the onset of pain in the aforementioned body parts. By Saturday, April 11, 2009, claimant testified that he woke up in severe pain and decided to consult a chiropractor on April 15, 2009.

Employee received limited benefit from his chiropractic visits. He testified that immediately after consulting with the chiropractor, employee notified his employer of the onset of pain and the fact that he believed the roping activities and the ladder carrying activities were the cause of his problems. He testified that he told his boss Alex Stanwalski this information but was not offered any medical care. He further testified that he kept his employer apprised of the progress of his medical care and turned in his work status slips as well.

Employee continued to work full duty at the St. Luke's East job site and was next seen by his chiropractor's referral, pain management specialist Dr. Melvin Lopez. Employee first saw Dr. Lopez on April 23, 2010. At that first appointment, employee filled out a pain diagram form in which he indicated his symptoms were exacerbated by his work activities. He also indicated that sitting alleviated his symptoms. Dr. Lopez provided conservative treatment to employee until May 4, 2009 when he took the employee off of work entirely. Since that time, employee has received no authorized treatment nor has he received any lost time benefits including temporary total disability and/or unemployment. He has received additional unauthorized treatment with Dr. Lopez who ultimately recommended a neurosurgical referral.

On July 21, 2009, employee was seen by Dr. Michael Poppa who reiterated the work status imposed by Dr. Lopez and also recommended a neurosurgeon. Dr. Poppa specifically found that employee's diagnosis of chronic musculoligamentous sprain with left paracentric disk extrusion at L5-S1 with lower extremity radiculopathy was a direct result of employee's work, specifically noting that employee's work was the "prevailing factor" causing both the work related conditions and disability.

FINDINGS

Section 287.800.1 RSMo (2005) provides that, "[a]ministrative law judges, associate administrative law judges, legal advisers, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly."

Section 287.020.10 RSMo provides that, "[i]n applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident," "occupational disease," "arising out of," and "in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W. 3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W. 2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W. 2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases."

“The language in section 287.020.10 ... serves as clarification of the fact that any construction of the previous definitions by the courts was rejected by the amended definitions contained in section 287.020... [I]t appears from the plain language of the statute, the legislature...intended to clarify its intent to amend the definitions and apply those definitions prospectively.” *Lawson v. Ford Motor Co.*, 217 S.W. 3d 345, 349 (Mo.App. 2007).

In light of the directives of §287.800 and the Missouri Supreme Court, the fact finder’s primary role is to strictly construe the Workers’ Compensation Act giving the words and phrases their ordinary and usual meaning.

Compensability

Section 287.120.1 R.S.Mo provides:

Every 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 the employee’s employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

Employer is liable to employee for workers’ compensation benefits if 1) employee sustained personal injury 2) by accident 3) arising out of and in the course of his employment. The legislature enacted a two-part test for determining if an injury arises out of and in the course of employment. §287.020.3 R.S.Mo. Before we can analyze §287.020.3(2), we must know the definitions of “injury” and “accident.” Both “injury” and “accident” are defined in §287.020.

Definition of Occupational Disease

Section 287.076.1 R.S.Mo defines occupational disease:

An identifiable disease arising with or without human fault out of and in the course of employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

“An identifiable disease” Employee has been diagnosed with an annular tear of the L5-S1 disk.

“Origin in a risk connected with the employment and to have flowed from that source as a rational consequence.” Dr. Poppa indicated that the annular tear resulted from the repetitive mechanical activities resulting from employee’s position as an insulation installer. Dr. Lopez testimony was not as clear as he stated first that he could not determine what caused the tear. However, in his deposition on cross examination (page 49-50) he agreed that the repetitive tasks

employee did on his job as an insulation installer would predispose him to a higher incident of injury to his disc.

In order to make a determination as to whether or not employee's occupational disease qualifies as compensable, one must make an analysis of whether an occupational disease arising from repetitive motion is compensable under the current statutes.

Definition of Repetitive Motion

Section 287.067.3 R.S.Mo defines where repetitive motion is compensable:

An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day to day living shall not be compensable.

There is no evidence employee's injury resulted from aging or "normal" activities of day to day living. Both physicians believe that employee's work was a factor in the development of his annular tear. At this point, we must determine whether the work was the "prevailing factor" as suggested by Dr. Poppa.

Arising Out of and in the Course of Employment – §287.020.3(2)

Section 287.020.3 (2) (a) – Prevailing Factor Test

The legislature defined the prevailing factor for us. "The prevailing factor" means "the primary factor in relation to any other factor, causing both the resulting medical condition and disability." §287.020.3 (1) R.S.Mo.

"Primary" means, "first in rank or importance." *Webster's Third New International Dictionary*, 1800 (3d ed. 1971). "Factor" means, "something (as an element, circumstance, or influence) that contributes to the production of a result." *Id.* at 813. Substituting the above dictionary definitions into the statutory definition, *the prevailing factor is the most important influence, in relation to any other influence, in causing both the resulting medical condition and disability.*

The definition clearly requires a comparison of the strength of causative influences giving rise to employee's injury. Before such a comparison, the court must first determine if employee's activities contributed to causing employee's resulting medical condition and disability. If it did not, there is no need to proceed.

Returning to the dictionary we find: "cause," the verb, means, "to serve as cause or occasion of: bring into existence." *Id.* at 356. "Cause", the noun means, "a person, thing, fact, or condition

that brings about an effect or that produces or calls forth a resultant action or state.” *Id.* “Result” means, “to proceed, spring or rise as a consequence, effect or conclusion: come out or have an issue: TERMINATE END - used with *from* or *in*. *Id.* at 1937. “Condition” means, “the physical status of the body as a whole or one of its parts - usu. Used to indicate abnormality serious; a disturbed mental.” *Id.* at 437.

The only evidence of any type of pre-existing condition is the 2005 episode of pain which was relieved with approximately 3 trips to the chiropractor. Employee testified that he was free of pain and/or symptoms for the subsequent 4 year period. Employer has provided no evidence of any pre-existing condition which could have potentially contributed to his medical condition. It would appear that the purpose of Dr. Lopez’s testimony was to suggest that neither Dr. Lopez nor employee could attribute employee’s work to the onset of his symptoms. However, a close review of the medical records of Dr. Lopez indicate that employee was complaining of an increase in pain due to his work as early as the first appointment, and Dr. Lopez’s notes indicate his belief in the connection between the work activities and the injury.

The fact of the matter is that employee has an annular tear that was caused by something. There is no evidence of the annular tear existing prior to the initial onset of employee’s symptoms and, further, there is no evidence of any non-work cause for the annular tear. Looking at all of the medical evidence as a whole results in my conclusion that employee’s repetitive work resulted in his medical condition, specifically the annular tear at L5-S1.

Next, I must determine if the repetitive injury contributed to employee’s disability.

“Disability” is defined as “inability to do something”; “deprivation or lack of esp. of physical, intellectual, or emotional capacity or fitness”; “the inability to pursue an occupation or perform services for wages because of physical or mental impairment”; “a physical or mental illness, injury, or condition that incapacitates in any way.” *Webster’s Third New International Dictionary* (1976). *Loven v. Greene County*, 63 S.W.3d 278, 284 (Mo.App. 2001).

Employee testified that prior to the onset of his back pain in the week prior to April 11, 2010, he was without symptoms in his back. Since his occupational exposure and repetitive duties, he has testified that he is in frequent pain and experiences considerable weakness in his back and lower left extremity.

In light of these findings, I conclude that the employee’s occupational exposure to repetitive duties contributed to causing employee’s resulting medical condition and disability. I must next consider whether the occupational exposure to repetitive activities was the prevailing factor in causing employee’s resulting medical condition and disability.

“Legislative intent can only be derived from the words of the statute itself.” *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo.banc 1998). *State v. Rowe*, 63 S.W.3d 647, 650 (Mo.banc 2002). Nowhere in the 2005 amendments does the legislature state that the prevailing factor test was enacted to narrow the category of eligible injured workers. Nowhere in the 2005 amendments does the legislature state that the prevailing factor test was enacted to be more

rigorous than the old substantial factor test. "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *Landman v. Ice Cream Specialities, Inc.*, 107 S.W.3d 240, 252 (Mo.banc 2003), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003).

I will review the evidence to determine if the occupational exposure was the primary factor in relation to **any other factor** causing both the resulting medical condition and disability.

The record contains no real evidence of a pre-existing condition with the exception of the employee's brief complaints in 2005. On the other hand, Dr. Poppa specifically finds that the employee's activities were the prevailing cause of his medical condition and disability and suggests no other factors. Dr. Lopez's testimony clearly states that the activities described by the employee were mechanically competent to cause the annular tear which is the subject of employee's complaints. Lastly is the fact that the St. Luke's East job site on which employee had been working for several months leading up to his complaints had a distinct feature that was not present on any other job site on which the employee had previously worked. The St. Luke's East job site was the first time employee had been required to rope up and down the materials necessary to complete his work tasks. He testified that he had to repetitively raise and lower weights in excess of 40 pounds due to the job site's lack of stairs.

Without any suggestion of any pre-existing pathology to the L5-S1 level combined with the compelling testimony regarding employee's work tasks in the weeks leading up to his complaints, this Court concludes that his work duties caused employee's resulting medical condition, the annular tear. As such, employee has established the first prong (subparagraph (a)) of the "arising out of and in the course of employment test."

Section 287.020.3 (2)(b) - The Hazard Test

Next, I consider subparagraph (b) of the test. Employee's injury is compensable so long as it did not come from a "hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life." As always, definitions are in order: "Hazard" means "a thing or condition that might operate against success or safety: a possible source of peril, danger, duress, or difficulty." *Webster's* at 1041. "Risk means, "someone or something that creates or suggests a hazard or adverse change: a dangerous element or factor." *Id.* at 2432. "Equally" means, "to an equal degree." *Id.* at 767. "Exposed" means, "so situated as to invite or make likely an attack, injury, or other adverse development." *Id.* at 802.

Upon analyzing §287.020.3(2) (b) in light of the dictionary definitions, I agree with the conclusion that it provides for four categories of hazards:

1. Hazards or risks related to employment with an equal degree of exposure.
2. Hazards or risks related to employment with an unequal degree of exposure.
3. Hazards or risks unrelated to employment with an equal degree of exposure.

4. Hazards or risks unrelated to employment with an unequal degree of exposure.

Only injuries resultant from #3 - a hazard or risk unrelated to employment to which workers have equal exposure in non-employment life - are denied compensability based upon the second prong of the "arising out of and in the course of employment test."

How do we define hazard? The legislature gave us no direction in this regard. In the instant case, it would appear that the employee is required to lift and lower by rope packages of materials in excess of 40 pounds as well as carry large ladders singlehandedly. These tasks are obviously hazards or risks related exclusively to employee's employment to which the employee is exposed with an unequal degree of exposure. This clearly falls under category 2.

Employee proved that his injury came from a hazard or risk related to employment. Such injuries are never denied compensability under subparagraph (b). Of course by proving that his injury came from a hazard or risk related to employment, employee necessarily proved that his injury did not come from a hazard or risk unrelated to employment. Employee has satisfied his burden under each prong of § 287.020.3 (2). His injury must be judged to have arisen out of and in the course of employment.

NOTICE

Employee testified that when his back problems first appeared he told his employer he was suffering from back pain and that he believed it was caused by his work duties. At the time he was not sure which specific duties had caused his problems. He told Alex Stanwalski, his boss as well as his boss's boss, someone he referred to as "Gopi", that he was having back problems and he felt they were caused by the work he was doing at the job site. He admitted that he did not request medical care but also stated that he did not understand the procedure fully. He further testified that he kept his employer apprised of his medical care. Although it is not clear exactly when he told his supervisors about his back problems, he did state he was taken off work by Dr. Lopez on May 5, 2009 and that he took that work status slip to his employer. It is clear his employer then knew he was injured and from his testimony employee had apprised his supervisors that he felt his work had caused his back problems. This was all by May 5, 2009, within 30 days of the original onset of his problems which he said became worse on April 11, 2009. Employee is claiming injury up to and including May 4, 2009. It is clear from the evidence he told his employer of his injury at least by May 5, 2009 and that he believed it was related to his work activities.

Employer presented no evidence to rebut employee's testimony. Employee's testimony is found to be credible. His statements regarding his physical symptoms match the information in his medical records. There was no inconsistency found within his testimony during the hearing or from any other source. Therefore this Court finds his testimony credible. Based upon employee's testimony this Court finds that he gave timely notice to his employer of his injury as required by law.

TTD

Employee was taken off work by Dr. Lopez on May 5, 2009. He gave his employer notice of his work status and they then laid him off work. The employer offered no evidence to contradict Dr. Lopez's determination that Employee was unable to work from that day forward. This court finds employee is therefore entitled to Temporary Total Disability benefits from May 5, 2009 to present and ongoing until he is released from medical care at maximum medical improvement.

CONCLUSION

Section 287.120.1 RSMo provides:

Every 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 the employee's employment and shall be released from all other liability therefore whatsoever, whether to the employee or any other person.

Based upon the foregoing, the Court concludes that employee has established that he suffered a personal injury by occupational exposure arising out of and in the course of employment. This court thereby orders employer to provide employee workers' compensation benefits, including treatment of his back injury and other temporary benefits including temporary total disability from May 5, 2009 and continuing. This Court further finds that since employer denied employee medical care when asked and such medical care should have been authorized the employer has waived its right to control medical care. Employee has requested Dr. John Clough to provide his medical care. Therefore, Employer is ordered to authorize Dr. John Clough to administer any treatment necessary to relieve the effects of employee's back injury with annular tear.

Finally, the award for compensation is subject to a lien of 25% in favor of Mike Stang, attorney for Employee.

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

This award is dated, attested to and transmitted to the parties this _____ day of _____, 2010,
by:

Naomi Pearson
Division of Workers' Compensation