

TEMPORARY AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 09-109673

Employee: Tommy Mittenburg
Employer: Missouri Pressed Metals, Inc.
Insurer: Missouri Employers Mutual Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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.

Preliminaries

The issues stipulated at the hearing were: (1) whether employee sustained an accident arising out of and in the course of his employment with employer; (2) whether the notice requirement of § 287.420 RSMo serves as a bar to employee's claim for compensation; (3) whether the accident of November 9, 2009, if found to have been sustained, was the cause of any or all of the injuries and/or conditions alleged by employee; (4) employee's average weekly wage and resultant compensation rates; (5) the employer's responsibility, if any, for the payment of past medical expenses; (6) whether employer shall be ordered to provide additional medical treatment for employee pursuant to § 287.140 RSMo; (7) whether employer shall be ordered to pay temporary total disability benefits and, if so, for what period or periods of time and at what rate; (8) whether notice was properly raised in the employer's answer as an affirmative defense; (9) mileage; and (10) whether the employer waived its right to direct medical treatment under § 287.140.

The administrative law judge found the following: (1) on or about November 9, 2009, employee was dumping a 600 pound barrel of chemicals into a hopper when he felt pain in his neck; (2) employee's neck symptoms have totally resolved; (3) despite employee's testimony to the contrary, employee did not have any symptoms of low back injury due to the incident that occurred on or about November 9, 2009, as employee's statements contained in contemporary treatment records were inconsistent with a back injury on or about November 9, 2009, but instead attribute the onset of low back pain to chiropractic manipulations performed in December 2009; and (4) as employee did not sustain an injury to his low back on or about November 9, 2009, all other issues are moot.

Employee submitted a timely Application for Review with the Commission alleging a number of errors.

For the reasons set forth in this award and decision, we reverse the award of the administrative law judge.

Findings of Fact

Employee alleges that he sustained an injury to his neck, lower back, and leg as a result of performing his work duties on November 9, 2009. Employee testified that he was manipulating a barrel weighing 500 or 600 pounds in order to dump the contents into a tumbler when he felt immediate pain in his lower back and neck. We find this testimony credible and adopt it as our findings of fact regarding the accident of November 9, 2009.

Employee: Tommy Mittenburg

- 2 -

Employee testified that he told Robert Meenen, employee's safety director, that he hurt his neck and back either that same day or the next day. Mr. Meenen testified and acknowledged employee reported an injury to him, and that he even took employee twice to the chiropractor and that employer paid for these visits, but urged that employee only reported a neck injury to him. Mr. Meenen also testified that employee told him on several occasions both before and after November 9, 2009, that he was having back problems, but always made clear they were not related to his work.

We find employee more credible than Mr. Meenen as to this fact issue. The evidence shows employee suffers from borderline mental retardation, took special education classes from the second grade on, is functionally illiterate, and his thought processes are comparable to those of a child. We find it difficult to imagine this employee volunteering the multiple relatively sophisticated and unequivocal disclaimers regarding his back problems described by Mr. Meenen. We also find it difficult to believe that Mr. Meenen would tell employee he could get treatment for the low back during the first authorized visit to the chiropractor if he believed it wasn't a work injury, not to mention take employee back again and pay for even more treatment to the low back. Finally, we note that Mr. Meenen admits he failed to report the neck injury he avers employee reported to him on or about November 9, 2009, even though he also testified he believed it was his responsibility to report any injury that required medical treatment.

We find that on or about November 9, 2009, employee told Mr. Meenen that he hurt his neck and back while manipulating a heavy barrel at work on that date.

Employee presented the medical expert testimony of Dr. Thorkild Norregaard. Dr. Norregaard opined that an accident sustained by employee on November 9, 2009, was the prevailing factor in causing a lumbar sprain, strain, and disc herniation at L4-5. Dr. Norregaard also opined that the accident of November 9, 2009, with the resulting chiropractic treatment, was the prevailing factor causing employee to require medical treatment to the low back, including past treatments and future medical care. Finally, Dr. Norregaard opined employee has been totally disabled since September 3, 2010, and that the accident of November 9, 2009, is the prevailing factor in the cause of employee's total disability. Dr. Norregaard's opinions are offered in a two-page report that provides little analysis or explanation. Employer did not cross-examine Dr. Norregaard.

Employer presented the medical expert testimony of Dr. Adrian Jackson. Dr. Jackson agreed that employee has a herniated disc at L4-5 but declined to offer any medical opinion as to what factors may have caused it. Instead, Dr. Jackson opined that: "This patient underwent numerous treatments from September 2009 into 2010 without any documentation of a specific work related incident reported through workers' compensation. Irregardless of Mr. Mittenburg's work obligations and job duties, without this documentation, I do not feel his work is a prevailing factor in his current clinical condition." *Transcript*, page 706. In other words, Dr. Jackson opined that no matter what occurred at work, he can't find a prevailing factor because of what he perceives as a lack of documentation or reporting through workers' compensation.

We are tasked with determining which of these doctors provides the more credible expert medical testimony. Dr. Norregaard's opinion is somewhat conclusory and provides little explanation. But Dr. Jackson has not provided a competing medical opinion as to what caused employee to sustain a herniated disc at L4-5, instead advancing his own legal conclusion or credibility determination as to the merits of employee's claim. As a result, it appears to us that Dr. Norregaard's opinion stands essentially un rebutted. Given the circumstances, we find Dr. Norregaard more credible than Dr. Jackson.

Employee: Tommy Mittenburg

- 3 -

We credit Dr. Norregaard's testimony that the November 9, 2009, accident was the prevailing factor causing a lumbar sprain, strain, and disc herniation at L4-5. We further credit Dr. Norregaard's opinions as to the issues of employee's need for past and future medical treatment and temporary total disability. We also find credible employee's own testimony that he believes he has been unable to work since September 3, 2010.

Employee provided a Wage Statement setting forth his wages in the thirteen weeks preceding the date of November 9, 2009. Employee and his wife testified that they went through all of the medical bills admitted into evidence and that they represent employee's medical expenses for the work injury. Employee's wife testified employee remains liable on the bills and that bill collectors are calling her. Finally, employee submitted an exhibit showing his mileage incurred in driving from his home in Sedalia, Missouri, to Columbia, Missouri, to get medical treatment following the work injury. Employer did not present any evidence to rebut the amounts reflected in employee's evidence as to his wages, medical expenses, or mileage. We find employee's evidence of his wages, medical bills, and mileage expenses to be credible.

Conclusions of Law

Conflation of the stipulated issues

We have resolved the disputed fact issues and now proceed to the legal questions presented by the parties. First, however, we wish to point out that certain of the issues stipulated by the parties appear to have been imprecisely stated and perhaps have not heretofore been appropriately framed. Some discussion is in order so that further confusion is avoided.

The parties asked the administrative law judge to resolve the issue whether employee "sustained an accident arising out of and in the course of his employment." But § 287.020.3(2) RSMo does not require an employee to prove an "accident" arising out of and in the course of employment, but rather an "injury" arising out of and in the course of employment. The distinction is not merely academic where both "accident" and "injury" have specific definitions for purposes of Chapter 287, and where we are required to strictly construe the provisions of the Missouri Workers' Compensation Law. See § 287.800.1 RSMo. The difficulty with the way in which the parties have stated the issue is that it raises the question whether, by stipulating as a single issue "whether employee sustained an accident arising out of and in the course of his employment," the parties really mean to stipulate *two* issues, i.e., (1) whether employee sustained an "accident" as that term is defined in § 287.020.2 RSMo, and (2) whether the injuries allegedly resulting from that accident "arose out of and in the course of employment" for purposes of § 287.020.3(2) RSMo. Because we are duty-bound to resolve no more and no less than the particular factual and legal issues the parties stipulate as in dispute, the importance of precisely stating those issues on the record can easily be seen.

Although the parties do not explicitly discuss in their briefs the issue whether employee's alleged injuries "arose out of and in the course of his employment," in an effort to give full effect to the stipulations of the parties, we will resolve both the issues of (1) whether employee sustained an "accident," and (2) whether employee's alleged injuries arose out of and in the course of his employment.

Accident

We conclude that employee met his burden of demonstrating he sustained an accident for purposes of the Missouri Workers' Compensation Law. Section 287.020.2 RSMo defines "accident" as:

[A]n 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.

Employee: Tommy Mittenburg

- 4 -

We have found that employee was working for employer on November 9, 2009, performing a task that involved manipulation of a very heavy barrel, when he felt immediate pain in his back and neck. Employee's credible testimony unquestionably establishes that this was a traumatic event, that it was identifiable by time and place, and that it produced objective symptoms of an injury caused by a specific event during a single work shift.

We conclude, therefore, that the November 9, 2009, event meets all of the statutory criteria and constitutes an "accident" for purposes of § 287.020.2.

Injury arising out of and in the course of employment

We have credited Dr. Norregaard's testimony that the November 9, 2009, accident was the prevailing factor causing a lumbar sprain, strain, and disc herniation at L4-5. We conclude that the accident of November 9, 2009, is the prevailing factor causing employee's resulting medical condition and disability. We conclude employee has met his burden on the issue of medical causation. We also conclude that employee met his burden on the issue whether his injuries arose out of and in the course of his employment. Section 287.020.3(2) RSMo provides, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does 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 nonemployment life.

We have already determined that the accident of November 9, 2009, is the prevailing factor in causing employee's injuries. We must now determine whether employee has satisfied the second prong of the foregoing section, namely, that his injuries did not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of work in normal life.

The hazard or risk of manipulating heavy barrels was clearly related to employee's employment as a laborer for employer, and there is no evidence on this record that this was an activity in which employee engaged outside the workplace. We conclude that employee's injuries arose out of and in the course of his employment for purposes of § 287.020.3(2) RSMo.

Notice

As a preliminary matter, we discern no merit in employee's argument that employer waived the issue of notice due to some technical deficiency in employer's answer to employee's claim for compensation. We find instructive the case of *Lawson v. Emerson Electric Co.*, 809 S.W.2d 121 (Mo. App. 1991), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Lawson*, the court held that the employer waived the issue of notice where it filed an answer containing a generalized denial of the allegations in the employee's claim which was "silent with regard to the notice mentioned in § 287.420," and thereafter failed to identify an issue with respect to notice at the hearing before the administrative law judge. *Id.* at 125. Here, employer did file an answer with a generalized assertion that it was without information sufficient to affirm or deny the allegations in employee's claim, but also specifically identified the notice requirement in its list of "issues." The records of the Division of Workers' Compensation (of which we take administrative notice), reveal that employee identified "notice of accident" as an issue to be resolved by hearing in his Request for

Employee: Tommy Mittenburg

- 5 -

Hearing filed on June 2, 2011. At the outset of the hearing, employer unequivocally made clear it was pursuing the affirmative defense of notice, and both parties thereafter presented evidence on the issue. All of these circumstances distinguish this case from the situation in *Lawson*.

We acknowledge employee's objection to notice as an issue, and his disclaimer at the outset of the hearing that, by presenting evidence as to notice, he did not wish to waive his objection. But the objection does not strike us as an assertion that employee was actually surprised or prejudiced by employer's raising the issue of notice. Instead, the objection relies on the same argument employee advances here: that employer should be precluded from defending this claim on the issue of notice simply because of some technical deficiency in the way employer crafted its answer.

In Workers' Compensation proceedings, substantial compliance with the provisions of the Compensation Act is ordinarily sufficient. Procedural rights are considered as subsidiary and substantive rights are to be enforced at the sacrifice of procedural formality.

Loyd v. Ozark Electric Coop., Inc., 4 S.W.3d 579, 586 (Mo. App. 1999) (citation omitted).

Employer filed its answer on January 11, 2011. If there were a legitimate question as to whether employer planned to advance the affirmative defense of notice, it would seem there was adequate opportunity for employee to attempt to clarify the matter before the July 11, 2011, date of hearing. Also, at that hearing, employee could have asked for a continuance if there were a real concern regarding prejudice or surprise, but employee did not. Ultimately, it appears to us that employee could not have failed to understand that employer was contesting the issue of notice, and that employee's argument is an attempt to litigate a procedural formality at the expense of the substantive rights of the parties.

Given the foregoing considerations, we turn now to the substantive issue of notice. Section 287.420 RSMo provides, in pertinent part, as follows:

No proceedings for compensation for any accident under this chapter 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.

Here, it is undisputed that employee did not provide written notice to employer within 30 days of the accident. Thus, the question is whether employee demonstrated that employer was not prejudiced by his failure to provide written notice.

The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. If the employer does not admit actual knowledge, the issue becomes one of fact. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer.

Soos v. Mallinckrodt Chem. Co., 19 S.W.3d 683, 686 (Mo. App. 2000) (citations omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

Employee: Tommy Mittenburg

- 6 -

We have found that employee told Robert Meenen, employer's safety director, that he hurt his low back on or about November 9, 2009. Accordingly, we conclude that employer had actual knowledge of employee's work injury. Because employer had actual knowledge of employee's work injury, the burden shifts to employer to demonstrate that it was prejudiced by employee's failure to provide written notice of employee's work injury. After a thorough review of the record, we are convinced that employer failed to meet that burden.

The record reveals that employer had an opportunity to provide medical treatment to minimize employee's back injury and to investigate the circumstances of the accident as soon as Mr. Meenen was informed about the back injury. Thereafter, as Mr. Meenen acknowledged, employee kept him informed as to each step of his self-directed medical treatment for the low back. At any time, employer could have exercised its right to direct medical treatment, or taken steps to investigate the circumstances of employee's accident.

We conclude that employer was not prejudiced by employee's failure to provide the written notice required under § 287.420, and that, as a result, employee's claim is not barred by that section.

Employee's average weekly wage and compensation rate

Employee's wages were fixed by the hour. Accordingly, we look to § 287.250 RSMo which provides, in relevant part, as follows:

Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows: ...

(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. ...

Employee provided a Wage Statement setting forth his wages in the thirteen weeks immediately preceding the week in which he was injured. We have found this evidence credible. Employee's total earnings for these thirteen weeks is \$6,209.28. That sum divided by thirteen equals \$477.64. We conclude employee's average weekly wage is \$477.64, which yields, pursuant to § 287.170.1(4) RSMo, a resulting compensation rate of \$318.43 for temporary total disability benefits.

Past and future medical expenses and travel expenses

We conclude that employee met his burden of demonstrating employer is liable for his medical expenses flowing from the work injury of November 9, 2009. Section 287.140.1 RSMo provides, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Employee: Tommy Mittenburg

- 7 -

Dr. Norregaard opined that employee is in need of future medical treatment as a result of the work injury. We have found the opinions of Dr. Norregaard credible. We find that employee is entitled to, and employer is obligated to provide, that medical treatment that may reasonably be required to cure and relieve from the effects of the November 9, 2009, work injury.

We are also convinced that employee is entitled to his past medical expenses. Where the parties dispute whether a particular past medical expense comes within the employer's obligation under § 287.140, the burden of proof falls on employee for each claimed past medical expense to provide 1) the medical bill, 2) the medical record reflecting the treatment giving rise to the bill, and 3) testimony establishing that the treatment flowed from the compensable injury. *Martin v. Mid-Am. Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989).

Here, employee provided his bills, medical records, and testimony establishing the treatments flowed from his lower back complaints following the work injury. Employer did not present any evidence to rebut the amounts identified by employee in the exhibits, nor did employer present any evidence that employee is not liable for these amounts, and we have found employee's evidence credible. The charges total \$23,110.76. We conclude employee is entitled to, and employer is obligated to pay, \$23,110.76 for employee's past medical expenses incurred for treatment that was reasonably required to cure and relieve from the effects of the November 9, 2009, work injury.

Employee also seeks compensation for travel expenses incurred in seeking necessary medical treatment. Section 287.140.1 RSMo provides, in relevant part:

When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; ... In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

Employee provided an exhibit showing his mileage incurred in obtaining the necessary medical treatment flowing from his work injury. We have found this evidence credible. That evidence reveals employee made 7 visits between his home in Sedalia and the location of his medical providers in Columbia, travelling a distance of 123 miles each way, for a total of 861 miles. Columbia is outside the local or metropolitan area from employee's principal place of employment in Sedalia, and the distance between employee's home and the location of the medical providers is not greater than 250 miles, so we conclude the language of the foregoing section is applicable here.

Employee's 7 visits occurred between June 11, 2010, and March 24, 2011. The Mileage Reimbursement Rate set by the Division of Workers' Compensation provided for a rate of \$0.50 per mile from July 1, 2009, to June 30, 2011. Utilizing the applicable Mileage Reimbursement Rate, we conclude that employee's total travel expenses amount to \$430.50. We conclude employee is entitled to, and employer is obligated to pay, \$430.50 for his travel expenses pursuant to § 287.140.1.

Finally, we will briefly address employee's argument that employer should be deemed to have waived its right under § 287.140 to direct employee's medical treatment, with the effect that employee has the privilege of choosing his own doctors going forward, while holding employer liable to pay for his self-directed treatment. We find employee's argument without merit.

Employee: Tommy Mittenburg

- 8 -

Section 287.140 charges employer with the duty to “provide” employee’s treatment and gives employer control over the selection of a medical provider. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995). The section also states that an employee is allowed to select his own doctors, but if he does so, he assumes liability for those expenses. An exception to this general rule exists where an employer has notice of an employee’s need for treatment but fails to provide it; in such circumstances the courts have held that the employee is entitled to pursue his own course of treatment while later pursuing an order from an ALJ or this Commission holding employer liable for the expenses. *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 847-48 (Mo. App. 2007).

Employee appears to be arguing that because employer contested this claim, it should be deemed to have “waived” its right to direct treatment in the event employee is able to prove a compensable work injury. But we find no evidence in the present case that employer has ever expressed a willingness to voluntarily “yield” or “waive” its right to direct treatment under § 287.140, as was the case in *Balsamo v. Fisher Body Division-General Motors Corp.*, 481 S.W.2d 536 (Mo. App. 1972). The other cases referring to an employer’s “waiver” of the right to direct treatment deal with issues of *past* medical expenses (i.e. where an employer has previously denied and the employee has previously obtained the disputed treatment before seeking an award holding the employer liable for his expenses) and do not support the proposition that employee may obtain an order from this Commission granting him the *prospective* privilege of selecting any doctor or treatment he chooses with employer liable to pay for such expenses. See *Mashburn v. Chevrolet-Kansas City Div. General Motors Corp.*, 397 S.W.2d 23, 31 (Mo. App. 1965); *Hendricks v. Motor Freight Corp.*, 570 S.W.2d 702, 710 (Mo. App. 1978); *Shores v. General Motors Corp.*, 842 S.W.2d 929, 932 (Mo. App. 1992); and *Dudley v. City of Des Peres*, 72 S.W.3d 134, 138 (Mo. App. 2002).

We are not persuaded that § 287.140, nor any of the relevant cases, contemplate the sort of relief employee seeks here. We deny employee’s request for an order finding that he is entitled to direct his own future medical treatment while holding employer liable under § 287.140.1. Employer shall continue to exercise its right under that section to direct employee’s medical treatment.

Temporary total disability

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee’s healing period following a compensable work injury. Employee testified and presented expert medical evidence to establish that he has been temporarily and totally disabled as a result of the effects of the work injury from September 3, 2010. We have found employee’s evidence credible.

Temporary total disability benefits are intended to cover the claimant’s healing period. Temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress.

Birdsong v. Waste Management, 147 S.W.3d 132, 140 (Mo. App. 2004) (citations and quotations omitted).

We conclude employee is entitled to, and employer is obligated to pay, weekly payments of temporary total disability benefits in the amount of \$318.43, beginning September 3, 2010, and continuing until such time as employee reaches the point of maximum medical improvement.

Conclusion

Based on the foregoing, the Commission concludes and determines that employee met his burden of proof on the issues of accident, medical causation, whether his injuries arose out of and in the course of employment, notice, employer’s liability for past and future medical expenses and travel expenses, and temporary total disability.

Employee: Tommy Mittenburg

- 9 -

Employer is ordered to pay employee \$23,110.76 in past medical expenses, \$430.50 in travel expenses, and to provide future medical treatment consistent with § 287.140.

Beginning September 3, 2010, employer is ordered to pay employee \$318.43 in weekly temporary total disability benefits, which shall continue until such time as employee reaches maximum medical improvement.

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

The award and decision of Chief Administrative Law Judge Robert J. Dierkes issued October 4, 2011, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 26th day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Tommy Mittenburg

Injury No. 09-109673

Employer: Missouri Pressed Metals, Inc.

Insurer: Missouri Employers Mutual Insurance Co.

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Add'l Party: Second Injury Fund

Hearing Date: July 11, 2011

Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged to be November 9, 2009.
5. State location where accident occurred or occupational disease was contracted: Alleged to be Sedalia, Pettis 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? No.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
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: Alleged to be dumping a barrel of chemicals.
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: N/A.
14. Nature and extent of any permanent disability: None..
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.

Employee: Tommy Mittenburg

Injury No. 09-109673

18. Employee's average weekly wages: Undetermined.
19. Weekly compensation rate: Undetermined.
20. Method wages computation:

COMPENSATION PAYABLE

20. Amount of compensation payable from Employer: None. Claim against Employer denied in full.
22. Second Injury Fund liability: None. Claim against the Second Injury Fund denied in full.

Employee: Tommy Mittenburg

Injury No. 09-109673

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tommy Mittenburg

Injury No: 09-109673

Employer: Missouri Pressed Metals, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Insurer: Missouri Employers Mutual Insurance Co.

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

Add'l Party: Second Injury Fund

Checked by: RJD/cs

PRELIMINARIES

An evidentiary hearing was held jointly in these cases (09-109673, 09-111074, 09-111075, and 10-106450) in Sedalia on July 11, 2011, on Claimant's request for a temporary or partial award. Claimant, Tommy Mittenburg, appeared personally and by counsel Rick Koenig; Employer, Missouri Pressed Metals, Inc., appeared by counsel Eric Lanham. Insurer, Missouri Employers Mutual Insurance Company, appeared by counsel Eric Lanham. The Second Injury Fund did not appear.

ISSUES DECIDED

In Injury No. 09-109673, the evidentiary hearing was held to decide the following issues:

1. Whether Claimant sustained an accident arising out of and in the course of his employment with Employer on November 9, 2009;
2. Whether the notice requirement of §287.420, RSMo serves as a bar to Claimant's claim for compensation;
3. Claimant's average weekly wage and compensation rate(s);
4. If found to have been sustained, whether the work accident of November 9, 2009 was the cause of any of the injuries or conditions alleged by Claimant;
5. Employer's responsibility, if any, for payment for medical treatment already incurred;
6. Whether Employer shall be ordered to provide additional medical treatment for Claimant pursuant to §287.140, RSMo;
7. Employer's liability, if any for payment of temporary total disability ("TTD") benefits, and, if so, for what period(s) of time, and at what rate(s);
8. Whether the lack of notice (i.e., the written notice requirement of §287.420) was properly raised in Employer's Answer as an affirmative defense;
9. Employer's liability, if any, for reimbursing Claimant mileage for medical treatment; and

Employee: Tommy Mittenburg

Injury No. 09-109673

10. Whether the Division may order a change in the physician, surgeon, hospital or other requirement, if the Division finds that that the medical requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby.

In Injury No. 09-111074, the evidentiary hearing was held to decide the following issues:

1. Whether Claimant sustained an accident or occupational disease arising out of and in the course of his employment with Employer on November 16, 2009;
2. Whether the notice requirement of §287.420, RSMo serves as a bar to Claimant's claim for compensation;
3. Claimant's average weekly wage and compensation rate(s);
4. If found to have been sustained, whether the work accident or occupational disease of November 16, 2009 was the cause of any of the injuries or conditions alleged by Claimant;
5. Employer's responsibility, if any, for payment for medical treatment already incurred;
6. Whether Employer shall be ordered to provide additional medical treatment for Claimant pursuant to §287.140, RSMo;
7. Employer's liability, if any for payment of temporary total disability ("TTD") benefits, and, if so, for what period(s) of time, and at what rate(s);
8. Whether the lack of notice (i.e., the written notice requirement of §287.420) was properly raised in Employer's Answer as an affirmative defense;
9. Employer's liability, if any, for reimbursing Claimant mileage for medical treatment; and
10. Whether the Division may order a change in the physician, surgeon, hospital or other requirement, if the Division finds that that the medical requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby.

In Injury No. 09-111075, the evidentiary hearing was held to decide the following issues:

1. Whether Claimant sustained an accident arising out of and in the course of his employment with Employer on September 24, 2009;
2. Whether the notice requirement of §287.420, RSMo serves as a bar to Claimant's claim for compensation;
3. Claimant's average weekly wage and compensation rate(s);
4. If found to have been sustained, whether the work accident of September 24, 2009 was the cause of any of the injuries or conditions alleged by Claimant;
5. Employer's responsibility, if any, for payment for medical treatment already incurred;
6. Whether Employer shall be ordered to provide additional medical treatment for Claimant pursuant to §287.140, RSMo;
7. Employer's liability, if any for payment of temporary total disability ("TTD") benefits, and, if so, for what period(s) of time, and at what rate(s);

Employee: Tommy Mittenburg

Injury No. 09-109673

8. Whether the lack of notice (i.e., the written notice requirement of §287.420) was properly raised in Employer's Answer as an affirmative defense;
9. Employer's liability, if any, for reimbursing Claimant mileage for medical treatment; and
10. Whether the Division may order a change in the physician, surgeon, hospital or other requirement, if the Division finds that that the medical requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby.

In Injury No. 10-106450, the evidentiary hearing was held to decide the following issues:

1. Whether Claimant sustained an accident arising out of and in the course of his employment with Employer on September 3, 2010;
2. Whether the notice requirement of §287.420, RSMo serves as a bar to Claimant's claim for compensation;
3. Claimant's average weekly wage and compensation rate(s);
4. If found to have been sustained, whether the work accident of September 3, 2010 was the cause of any of the injuries or conditions alleged by Claimant;
5. Employer's responsibility, if any, for payment for medical treatment already incurred;
6. Whether Employer shall be ordered to provide additional medical treatment for Claimant pursuant to §287.140, RSMo;
7. Employer's liability, if any for payment of temporary total disability ("TTD") benefits, and, if so, for what period(s) of time, and at what rate(s);
8. Whether the lack of notice (i.e., the written notice requirement of §287.420) was properly raised in Employer's Answer as an affirmative defense;
9. Employer's liability, if any, for reimbursing Claimant mileage for medical treatment; and
10. Whether the Division may order a change in the physician, surgeon, hospital or other requirement, if the Division finds that that the medical requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby.

STIPULATIONS

The parties stipulated as follows in all four cases:

1. The Division of Workers' Compensation has jurisdiction over the cases;
2. Venue for the hearing is proper in Pettis County;
3. The claims are not barred by Section 287.430, RSMo (statute of limitations);
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times; and
5. That Missouri Employers Mutual Insurance Company fully insured the Missouri workers' compensation liability of Missouri Pressed Metals, Inc. at all relevant times.

Employee: Tommy Mittenburg

Injury No. 09-109673

EVIDENCE

The evidence consisted of the testimony of Dr. Gary Kitto; the testimony of Ellen Warren; the testimony of Kelly DeBates; the testimony of Claimant, Tommy Mittenburg, including Claimant's deposition testimony; the testimony of Mary Mittenburg, Claimant's ex-wife; the testimony of Robert Meenen; medical records; medical bills; narrative report of Dr. Thorkild Norregaard; the deposition testimony of Dr. Adrian Jackson was allowed into evidence over Claimant's objections; transcript of an interview recorded on June 15, 2010; Reports of Injury; Claims; Answers; and other correspondence and documents.

DISCUSSION

Claimant is alleging four separate dates of injury: September 24, 2009, November 9, 2009, December 16, 2009, and September 3, 2010. Claimant is alleging an injury to his lower back on each of these dates. Employer and Insurer (referred collectively at times herein as "Employer") deny that any of the four alleged accidents occurred and also raise a notice defense on each of the claims. Therefore, an accurate chronology of events is important.

Claimant was born on February 2, 1959, and worked for Employer as a full-time employee for 23 years prior to September 3, 2010. Claimant has a high school diploma, but was in special education classes from second grade onward. Claimant's IQ testing show him to be moderately mentally retarded, and he functions, mentally, as a child in the four-year-old to eight-year-old range. I found Claimant to be a very credible witness; i.e., I believe that he attempted answer each question truthfully to the best of his ability. Robert Meenen testified that Claimant is a "good, honest family person." Nevertheless, as noted below, certain portions of Claimant's testimony were simply inconsistent with the medical evidence.

Robert Meenen is the Environmental Health and Safety Director for Employer, and operated in that capacity at all times relevant herein. Meenan testified at the hearing. I found Meenan's testimony to be truthful, except as herein noted.

It is undisputed that Claimant injured his low back at work in 1997, that Claimant timely reported the accident to Robert Meenan, that Employer provided Claimant with medical treatment, and that Claimant had no back problems from 1997 until 2009.

Claimant testified that on September 24, 2009, he was dumping chemicals into the mixer. The chemicals were in large drums or barrels weighing approximately 500-600 pounds. After the chemicals are mixed, they are put into barrels weighing about 600 pounds; these barrels are then put on a roller. Claimant testified that one of the barrels began to fall off the roller and he had to catch the barrel so that it would not spill onto the floor. Claimant testified that this caused him immediate pain in the center of his back, below the belt line, down to the tailbone. Claimant testified that he immediately went to see Bob Meenan and reported the accident and injury. Claimant is certain that the accident occurred on September 24, 2009; his twenty-year-old son

Employee: Tommy Mittenburg

Injury No. 09-109673

passed away on October 8, 2009, and Claimant remembers the accident occurring exactly two weeks prior to his son's death. Claimant testified that he asked Meenan for medical attention three times before his son's death. Claimant testified that after his son's death, he again spoke to Meenan about medical treatment, and Meenan told him that his symptoms were from the stress of his son's death.

Claimant testified that another accident occurred when he was dumping a 600 pound barrel of chemicals into the tumbler when he felt immediate pain in his low back and neck. Claimant testified that he reported the accident to Bob Meenen the following day. Claimant testified that Meenen "eventually" took Claimant to a chiropractor (Dr. Strouse). Claimant fixed the date of the accident as November 9, 2009 as "the best I can remember". Bob Meenen drove Claimant to Dr. Strouse's office. Claimant believes he saw Dr. Strouse on December 11, 2009 (which date corresponds to Dr. Strouse's records). Claimant testified that Dr. Strouse did a manipulation on his neck, and the neck pain went away. Claimant testified that Dr. Strouse then did a manipulation on his low back, which caused him pain and numbness down his leg. Claimant testified that Dr. Strouse said "don't worry, that will go away". Claimant testified that he told Meenen, as they were driving back to Employer's plant, that his leg was hurting from the chiropractic treatment. Claimant said that Meenen's response was "remember what the doctor said".

Claimant testified that his low back continued to hurt him upon his return to work after the chiropractic treatment. Claimant testified that Meenen was on vacation during this time. (Apparently this was a very short vacation.) Claimant testified that, while Meenen was gone, he (Claimant) told his supervisors that the pain was getting worse. Claimant testified that when Meenen returned, Claimant was again taken to see Dr. Strouse. Claimant testified that he saw Dr. Strouse again on December 16, 2009; Dr. Strouse's records indicate it was December 17, 2009. Claimant testified that Dr. Strouse performed another manipulation on his back, which caused him greater pain. Claimant testified that on the way back to the plant, Meenen told Claimant that he should see his family doctor and to "put it on your health insurance". Claimant saw Dr. Frederickson, his family doctor, on December 21, 2009.

In early 2010, Claimant saw Dr. Ravinder Arora. An MRI and nerve conduction studies were done. Steroid injections were done. Dr. Arora placed Claimant on restricted duties. Physical therapy was done. On May 4, 2010, the physical therapist sent a letter to Dr. Arora stating that Claimant was released from physical therapy. On June 11, 2010, Claimant saw Dr. Thorkild Norregaard, a neurosurgeon in Columbia. A nerve block at L4 was done on June 17, 2010 which made Claimant pain-free for seven days, and Claimant was returned to unrestricted duty.

Claimant testified that, in June 2010, he went to Bob Meenen and Claimant said: "Bob, I think this is the time to turn this in to workers' comp." On June 15, 2010, Claimant gave a recorded statement, by phone, to Chelsea Bertrand.

Claimant testified that he again hurt his low back on September 3, 2010 while lifting a barrel into the hopper. His leg and back pain were worse than before. Claimant testified he told Bob Meenen what happened. Claimant has not worked since September 3, 2010.

Employee: Tommy Mittenburg

Injury No. 09-109673

Robert Meenen testified that in the spring or early summer of 2009, he (Neenen) was aware that Claimant was having problems with his back and shoulder which problems were not work-related. Meenen testified that Claimant did not advise him in September or October 2009 that he had sustained any injuries at work; Meenen did testify that in October 2009 Claimant told Meenen “you owe me a chiropractor visit” because Employer had not provided a hoist as promised.

Meenen took Claimant to see Dr. Strouse on December 11, 2009. Dr. Strouse’s records were admitted as Exhibit A. The first page of Exhibit A is the certification. The next two pages consist of a form that the patient (Claimant) was to fill out. The printing on these two pages was clearly done by Claimant’s hand, possibly with the assistance of Meenen. Despite Claimant’s testimony that the longhand writing on Exhibit A was done by Meenen, there is no question that it was done by Dr. Strouse. The printing on Exhibit A clearly refers to a neck injury. The longhand writing refers to a back injury as well.

Meenen testified that, prior to seeing Dr. Strouse, Claimant asked Meenen if it was alright if Dr. Strouse looked at his back as well; Meenen further testified that Claimant advised Meenen that his back had been hurting over the weekend.

Exhibit TT is a narrative report of Dr. Thorkild Norregaard dated March 13, 2011. That report states (in part):

The accident of November 9, 2009 was the prevailing factor to have caused a lumbar sprain, strain and disc herniation at L4-5. The accidents of December 14, 15, 16, 2009 and September 3, 2010 aggravated the November 2009 injury. ... The November 9, 2009 accident, with the resulting chiropractic therapy, was the prevailing factor to have caused the patient’s need for the medical treatment set forth above.

The “medical treatment set forth above” is an L4-5 discectomy and fusion with instrumentation.

Dr. Frederickson’s office note of 12/21/09 states (in part):

The patient comes in with left low back pain. Apparently last week he had neck discomfort and went to the chiropractor and had a full spine manipulation. He was told his L5 vertebra was out and *despite the fact that he only had neck pain when he went there*, he came out with low back pain. (Italics mine).

Claimant’s first visit to Dr. Ravinder Arora was on April 14, 2010. Dr. Arora’s records are in evidence as Exhibit B. Per Exhibit B, the reason Claimant saw Dr. Arora was “to evaluate back and hip pain”. The section of the 4/14/10 office note entitled “HISTORY OF PRESENT ILLNESS” states, in part:

In 2009 he was evaluated by a chiropractor. ... The wife was in the room who told me the patient received severe chiropractic manipulations. The neck pain improved but he *started having some back discomfort*. (Italics mine.)

Employee: Tommy Mittenburg

Injury No. 09-109673

One of the issues in the case is whether Employer/Insurer properly raised the lack of written statutory (287.420) notice as an affirmative defense. Each Answer contains a paragraph which states:

The employer/insurer is without information sufficient to affirm or deny allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, and 14. This includes insufficient knowledge or information regarding the issues cited below:

Whether claimant has any disability of any kind;

Whether the injuries claimed are the result of the claimed accident;

Whether there is jurisdiction for this claim in Missouri;

Whether claimant met with personal injury by accident arising out of and in the course of his/her employment;

Whether the claimant failed to give notice of the alleged injury as required by law;

Whether claimant has failed to file claim for compensation for benefits within the time required by law;

Whether claimant is entitled to any other compensation or compensation benefits herein;

Whether the alleged accident was the prevailing factor for the injuries or disability claimed.

I find that the italicized portion of each Answer effectively raised the lack of written statutory notice as an affirmative defense.

Claimant clearly did not give written notice to Employer in all four cases. Therefore, each claim is barred unless Employer was not prejudiced by the lack of notice. Claimant has the burden of showing that Employer was not prejudiced. *Gander v. Shelby County*, 933 S.W.2d 892, 895 (Mo.App.E.D. 1996). One way of proving lack of prejudice to the employer is to demonstrate that the employer had actual notice of the accident; however that is not the only method of showing a lack of prejudice. *Seyler v. Spirtas Industrial*, 974 S.W.2d 536, 538 (Mo.App.E.D. 1998). The purpose of the notice requirement is to enable the employer to minimize the injury by providing medical diagnosis and treatment, and to facilitate a timely investigation of the facts surrounding the injury. *Hannick v. Kelly Temporary Services*, 855 S.W.2d 497, 499 (Mo.App.E.D. 1993).

September 24, 2009 and November 9, 2009 claims. (Injury Nos. 09-111075 and 09-109673). Claimant is alleging injury to his "lower back" on September 24, 2009, and to his "neck, lower back and leg" on November 9, 2009. Despite Claimant's testimony that he injured his low back on both of these dates I believe that, while Claimant may have sustained injuries to other body parts (neck, shoulder) on these dates, it is clear from the histories given to Dr. Frederickson and to Dr. Arora that Claimant was only claiming a neck injury (and was not claiming a low back injury) prior to the chiropractic visit of December 11, 2009. Employer (i.e., Robert Neenan) may have had actual notice of a neck injury, but there was no actual notice of a low back injury (which is understandable, since there was no low back injury of which to have actual notice.)

Employee: Tommy Mittenburg

Injury No. 09-109673

It may be argued (although Claimant has not so argued) that Claimant's visits to the chiropractor, Dr. Strouse on December 11 and 17, 2009 constituted authorized treatment under Chapter 287 for the November 9, 2009 neck injury, and that in the course of his chiropractic treatment and manipulation Dr. Strouse severely injured Claimant's low back. While this is certainly a possible and plausible scenario, there was no medical evidence adduced that the chiropractic manipulation caused any specific injury to Claimant's low back, and in particular the herniation of the L4-5 disc for which Claimant now seeks treatment.

Claimant did not present any evidence that the alleged September 24, 2009 accident caused any disability to, or need for treatment for, Claimant's low back.

December 16, 2009 claim. (Injury No. 09-111074). There was no evidence that Claimant sustained any accident on or about December 16, 2009. There was no evidence that Employer had actual notice of this alleged accident/injury.

September 3, 2010 claim. (Injury No. 10-106450). Claimant testified, in both his live testimony and in his deposition testimony, that he reinjured his low back on September 3, 2010 while lifting a barrel into the hopper. He also testified that he immediately informed Robert Meenen of this accident and injury. He also testified that he and his wife took Dr. Norregard's note of September 14, 2010 to Francine, Robert Meenen's assistant. Claimant testified that Francine told Claimant to "listen to Bob; put this on your health insurance." Claimant testified that Meenen "came in" and told Claimant to "submit it to health insurance; it could take workers' compensation five years; you need an operation now." Claimant's testimony in this regard was truthful. Therefore, I find that Employer was not prejudiced by Claimant's lack of written notice of the 9-3-2010 accident and injury, as Employer clearly had actual notice of same.

Dr. Norregaard does not state that the September 3, 2010 injury was the prevailing factor in the need for the surgery he has recommended, but Claimant clearly needs to have such surgery. Dr. Norregaard does state that the September 3, 2010 accident "aggravated" the earlier injury. Claimant was able to work prior to September 3, 2010 (without the recommended surgery), but since the September 3, 2010 accident he is no longer able to work without the surgery.

In that regard, this case is very similar to *Tillotson v. St. Joseph Medical Center*, 2011 WL 2313691 (Mo. App. W.D. June 14, 2011). While the September 3, 2010 accident may not have been the *prevailing* factor in the cause of the need for the recommended surgery, such surgery is "medical (or) surgical treatment ... reasonably required after the injury ... to cure and relieve Claimant from the effects of the injury". In other words, Claimant had a compensable accident and injury to his low back on September 3, 2010. Claimant requires a surgery to his low back. While this surgery may have been reasonably required *prior* to September 3, 2010 injury, it is certainly (still) "reasonably required after the (9-3-2010) injury ... to cure and relieve (Claimant) from the effects of the (9-3-2010) injury". Under the *Tillotson* rationale, Employer should be ordered to provide the needed surgery.

I find that Claimant is entitled to TTD benefits from and after September 4, 2010. Claimant's Exhibit UU documents Claimant's gross earnings for the 13 weeks immediately preceding the September 3, 2010 accident and injury. Pursuant to §287.250.1 (4), Claimant's

Employee: Tommy Mittenburg

Injury No. 09-109673

average weekly wage is computed by averaging these 13 weeks. Claimant's total gross earnings during these 13 weeks were \$6209.28; the average is \$477.64. Pursuant to §287.170.1 (4), Claimant's compensation rate for TTD benefits is sixty-six and two-thirds percent of the average weekly wage. Thus, the compensation rate for TTD benefits is \$318.43.

Per the *Tillotson* case, I find that Employer is responsible for Claimant's necessary and reasonable medical treatment after September 3, 2010. These charges are:

University Physicians (9-10-2010)	\$286.00
University Physicians (9-14-2010)	\$113.00
University Physicians (1-21-2011)	\$128.00
University Physicians (1-25-2011)	\$286.00
University Physicians (3-24-2011)	\$128.00
University Hospital (9-10-2010)	\$1,195.00
University Hospital (9-14-2010)	\$81.00
University Hospital (1-21-2011)	\$59.00
University Hospital (1-25-2011)	\$1,195.00
University Hospital (3-24-2011)	\$59.00
Woods Pharmacy (1-21-2011)	\$13.92
Woods Pharmacy (2-12-2011)	\$8.70
Woods Pharmacy (3-24-2011)	\$8.58
Medical Center Pharmacy (9-9-2010)	\$2.83
Medical Center Pharmacy (9-14-2010)	\$8.91

These charges total \$3,572.94.

Claimant is also asking to be reimbursed for mileage. The records would indicate five trips to Columbia (9-10-2010, 9-14-2010, 1-21-2011, 1-25-2011 and 3-24-2011). Per §287.140.1, Claimant is entitled to expenses from the "local or metropolitan area of employment" (Sedalia) to Columbia. This is five round-trips of 138 miles, a total of 690 miles. A reasonable reimbursement rate is fifty cents per mile, a total of \$345.00.

Section 287.140.2 states:

If it be shown to the division or the commission that the requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, the division or the commission may order a change in the physician, surgeon, hospital or other requirement.

As Employer has not been providing *any* medical treatment, and thus Claimant's necessary surgery has been delayed, it is certainly reasonable to find that Claimant's health and recovery is endangered thereby. The statute uses the permissive "*may order*", rather than the mandatory "*shall order*" or "*must order*"; by use of the permissive term, it would appear that the division or commission should weigh all of the factors in the case before ordering a change in physician. Claimant has made four claims against Employer for low back injury, three of which Claimant has failed to prove; the fourth case, though compensable, was defended on reasonable grounds.

Employee: Tommy Mittenburg

Injury No. 09-109673

Further, *Tillotson* (which is, at this writing, not a final opinion) was decided less than a month before the hearing in this case. Thus, in my view, the earliest point in time at which Employer had a (relatively) clear responsibility for Claimant's medical treatment was June 14, 2011, the date *Tillotson* was decided. I believe Employer should now be given the opportunity to provide Claimant's medical treatment as ordered, and I trust Employer (i.e., Insurer) will do so in good faith.

FINDINGS OF FACT AND RULINGS OF LAW
IN INJURY NO. 09-109673 (ALLEGED INJURY DATE 11-9-09)

In addition to the facts and legal conclusions to which the parties have stipulated, I make the following Findings of Fact and Rulings of Law in Injury No. 09-109673:

1. On or about November 9, 2009, Claimant was dumping a 600 pound barrel of chemicals into the hopper when he felt pain in his neck;
2. Claimant's neck symptoms have totally resolved;
3. Despite Claimant's testimony to the contrary, I find that Claimant did not have any symptoms of low back injury due to the incident that occurred on or about November 9, 2009, as Claimant's statements to Dr. Frederickson on December 21, 2009, and Claimant's statement to Dr. Arora on April 14, 2010 were inconsistent with a back injury on or about November 9, 2009, but instead attribute the onset of low back pain to chiropractic manipulations performed in December 2009;
4. As Claimant did not sustain an injury to his low back on or about November 9, 2009, all other issues are moot.

ORDER IN INJURY NO. 09-109673

Claimant's Claim for Compensation against Employer, Missouri Pressed Metals, Inc., and its Insurer, Missouri Employers Mutual Insurance Company, is denied in full.

Claimant's Claim for Compensation against the Second Injury Fund is likewise denied in full.

Made by: /s/ Robert J. Dierkes – 10/04/11
ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation