

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

Injury No.: 10-106450

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 (Open)

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 September 3, 2010, 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) employee sustained an accident arising out of and in the course of his employment with employer on September 3, 2010; (2) the accident of September 3, 2010, was not the prevailing factor in the need for an L4-5 discectomy and fusion with instrumentation; (3) the work accident of September 3, 2010, aggravated a preexisting lumbar strain and disc herniation at L4-5, causing it to become more symptomatic, and preventing employee from working; (4) a recommended L4-5 discectomy and fusion with instrumentation is reasonably required to cure and relieve employee from the effects of the compensable low back injury he sustained on September 3, 2010; (5) employee's compensation rate for temporary total disability benefits is \$318.43; (6) employee has been unable to work since September 4, 2010, and employer is responsible for temporary total disability benefits from and after September 4, 2010; (7) employer is responsible for employee's necessary and reasonable medical treatment after September 3, 2010, in the amount of \$3,572.94; (8) employee is entitled to expenses from the local or metropolitan area of employment to Columbia for five round-trips of 138 miles, a total of 690 miles; and (9) a reasonable reimbursement rate is fifty cents per mile, or a total of \$345.00.

Employee submitted an Application for Review which we dismissed on November 10, 2011, because the Application for Review failed to comply with the rules for making an application for review of a temporary or partial award pursuant to 8 CSR 20-3.040.

Employer submitted a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employee sustained a compensable injury or accident on September 3, 2010; (2) in finding a need for medical treatment arising from the alleged

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accident; and (3) because employee's claim is barred by failure to provide notice to employer. Employee filed a Motion to Dismiss employer's Application for Review for failing to comply with the specificity requirement set forth in 8 CSR 20-3.030(3)(A). On November 10, 2011, we issued an order denying employee's Motion to Dismiss employer's Application for Review, based on our finding that the employer's allegations were minimally sufficient to overcome employee's challenge.

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 lower back and leg as a result of moving a barrel at work on September 3, 2010. Employee testified that he experienced very bad pain in his back and leg when he was emptying the tumbler at work and trying to catch a barrel that was falling.

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 referred to an accident sustained on September 3, 2010, and opined that this event aggravated the November 2009 injury. Dr. Norregaard's opinion is 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 rebutted. Given the circumstances, we find Dr. Norregaard more credible than Dr. Jackson.

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, and that the accident of September 3, 2010, was an aggravation of the November 2009 injury.

Conclusions of Law

Medical causation

We believe the issue of medical causation is dispositive. Employee alleges an accident on September 3, 2010, caused him to sustain lower back and leg injury. Section 287.020.3(1) RSMo provides, in relevant part, as follows:

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An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

We conclude that employee has failed to meet his burden on the issue of medical causation. We have found credible the testimony from employee's expert that a November 2009 accident was the prevailing factor causing employee's medical condition of lumbar sprain, strain, and a herniated disc at the L4-5 level. Dr. Norregaard did not opine that the alleged accident on September 3, 2010, was the prevailing factor causing any medical condition or disability.

Dr. Norregaard did opine the accident on September 3, 2010, was an "aggravation" of the November 2009 injury, but stopped short at identifying what (if any) medical conditions or disability he believed resulted from this aggravation. *Transcript*, page 449. Given the paucity of discussion in the report, and because medical causation of a herniated disc is involved, we discern no basis for a finding that the September 3, 2010, aggravation identified by Dr. Norregaard was the prevailing factor resulting in any medical condition or disability. See *Wright v. Sports Associated*, 887 S.W.2d 596, 600 (Mo. 1994) (holding that "[m]edical causation of a herniated disc of the spine cannot be considered uncomplicated.").

Given the foregoing considerations, we conclude that the alleged accident of September 3, 2010, was not the prevailing factor in causing employee to sustain any lower back or leg injury.

Conclusion

Based on the foregoing, the Commission concludes that employee failed to meet his burden of proof on the issue of medical causation. Employee's claim for compensation is denied. All other issues are moot.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes issued October 4, 2011, is attached solely for reference and is not incorporated by this decision.

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

TEMPORARY OR PARTIAL AWARD

Employee: Tommy Mittenburg

Injury No. 10-106450

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Missouri Pressed Metals, Inc.

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

Additional Party: Second Injury Fund

Insurer: Missouri Employers Mutual Insurance Co.

Hearing Date: July 11, 2011

Checked by: RJD/cs

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: September 3, 2010.
5. State location where accident occurred or occupational disease contracted: Sedalia, Pettis County, Mo.
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 was lifting a large barrel of chemicals into the hopper when he injured his low back.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Parts of body injured by accident or occupational disease: Low back.
14. Compensation paid to-date for temporary disability: None.
15. Value necessary medical aid paid to date by employer/insurer? None.
16. Value necessary medical aid not furnished by employer/insurer? \$3,572.94.

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- 17. Employee's average weekly wages: \$477.64.
- 18. Weekly compensation rate: \$318.43.
- 19. Method wages computation: Section 287.250.1(4).

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expense: \$3,572.94.

Mileage for medical treatment: \$345.00

Temporary total disability benefits of \$318.43 per week beginning September 4, 2010.

Medical treatment as set forth more fully herein.

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:

Rick Koenig

:

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tommy Mittenburg

Injury No: 10-106450

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Missouri Pressed Metals, Inc.

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Missouri Employers Mutual Insurance Co.

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;

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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. 09-111074, 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;

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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. 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.

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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

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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.

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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.)

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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.)

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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

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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.

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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. 10-106450 (INJURY DATE 9-3-2010)

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. 10-106450:

1. Claimant, Tommy Mittenburg, sustained an accident arising out of and in the course of his employment with Employer, Missouri Pressed Metals, Inc., on September 3, 2010;
2. The accident occurred when Claimant was dumping a 500 pound barrel of chemicals into the hopper, when he felt pain in his low back;
3. Claimant has a lumbar strain and disc herniation at L4-5;
4. Claimant is in need of medical treatment for his low back, including, but not limited to, an L4-5 discectomy and fusion with instrumentation;
5. The work accident and injury of September 3, 2010 was not the prevailing factor in the need for the L4-5 discectomy and fusion with instrumentation;
6. The work accident and injury of September 3, 2010 aggravated the preexisting lumbar strain and disc herniation at L4-5, causing it to become more symptomatic, and preventing Claimant from working;
7. The Missouri Court of Appeals, Western District, stated in *Tillotson v. St. Joseph Medical Center*, 2011 WL 2313691 (Mo. App. W.D. June 14, 2011) at page 6:

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

8. The recommended L4-5 discectomy and fusion with instrumentation is reasonably required to cure and relieve Claimant from the effects of the compensable low back injury he sustained on September 3, 2010;
9. Claimant's Exhibit UU documented 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 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

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- TTD benefits is sixty-six and two-thirds percent of the average weekly wage; the compensation rate for TTD benefits is \$318.43;
10. Claimant has been unable to work since September 4, 2010 and Employer is responsible for TTD benefits from and after September 4, 2010 at the weekly compensation rate of \$318.43;
 11. Employer is responsible for Claimant's necessary and reasonable medical treatment after September 3, 2010 in the amount of \$3,572.94;
 12. Claimant is entitled to expenses from the "local or metropolitan area of employment" (Sedalia) to Columbia for five round-trips of 138 miles, a total of 690 miles;
 13. A reasonable reimbursement rate is fifty cents per mile, or a total of \$345.00.

ORDER IN INJURY NO. 10-106450

Employer and Insurer are ordered to reimburse Claimant for necessary medical expenses in the amount of \$3,572.94, and are ordered to reimburse Claimant for travel expenses in the amount of \$345.00.

Employer and Insurer are ordered to pay Claimant temporary total disability ("TTD") benefits in the amount of \$318.43 per week beginning September 4, 2010 until Claimant's condition reaches maximum medical improvement, or until Claimant is able to compete on the open market for employment, or until Claimant's death, or until 400 weeks of TTD compensation have been paid, or until further order, whichever shall first occur.

Employer and Insurer are ordered to provide all such medical, surgical, chiropractic, and hospital treatment as may reasonably be required to cure and relieve Claimant from the effects of the work related injury of September 3, 2010, including, but not limited to, L4-5 discectomy and fusion with instrumentation.

Claimant's attorney Rick Koenig, is allowed 25% of the amounts awarded for medical and travel expenses, as well as 25% of the TTD benefits awarded (including future TTD benefits), as and for necessary attorney's fees.

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.

Made by: /s/ Robert J. Dierkes – 10/04/11

ROBERT J. DIERKES
Chief Administrative Law Judge

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