

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

Injury No.: 08-061460

Employee: Dwayne Moore

Employer: ICR Construction Services, LLC

Insurer: Accident Fund Insurance Company of America

Additional Parties: 1) Buchheit Concrete
2) Amerisure Insurance Company
3) Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled 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, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated April 9, 2010.

Preliminaries

The issues at the hearing were whether employee sustained an accident; whether employee sustained an injury; whether employee provided notice of injury to employer; medical causation; whether employee is entitled to medical treatment; and whether employee is entitled to costs under § 287.560 RSMo.

The administrative law judge determined and concluded that claimant's testimony regarding the date of the accident was not credible, and that claimant failed to meet his burden of proving that an accident resulting in injury occurred on March 24, 2008; that claimant did not provide notice of his injury to employer, that claimant did not demonstrate good cause for failure to provide notice,¹ and that employer was prejudiced thereby; that Dr. Petkovich's conclusion that employee was injured on March 24, 2008, was not persuasive as to the date of accident and injury; and that employee was not entitled to any penalty or fees under § 287.560 RSMo, because employer did not defend the proceedings without reasonable grounds.

Employee submitted a timely Application for Review with the Commission alleging the following: the administrative law judge ignored competent evidence that employee sustained an accident resulting in compensable injury; the administrative law judge ignored testimony that employer had actual notice of employee's injury; the administrative law judge applied the wrong standard in finding that employer was prejudiced by lack of notice; the administrative law judge's findings as to medical causation are incorrectly conflated with findings regarding employee's credibility; and

¹ We note that the administrative law judge incorrectly applied the law as it existed prior to the 2005 amendments to the Missouri Workers' Compensation Law. Because the alleged date of injury is March 24, 2008, this case falls under the 2005 amendments, which did away with the good cause provision for failure to provide notice of injury. See § 287.420 RSMo (2005).

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that employer's handling of this matter was unreasonable and vexatious and employee is entitled to fees and penalties.

Employer filed a timely Application for Review with the Commission alleging the administrative law judge erred in failing to rule that employee must reimburse employer and insurer for amounts paid for medical expenses and temporary total disability payments. On June 28, 2010, employer filed a Motion to Withdraw Application for Review. On July 1, 2010, this Commission granted employer's request to withdraw its Application for Review.

The issues currently before the Commission are as follows: (1) whether employee met his burden of proving he sustained a compensable injury by accident on March 24, 2008; (2) whether employee provided notice of his injury to employer as required by § 287.420 RSMo, and if not, whether employer was prejudiced thereby; (3) medical causation; (4) whether employee is entitled to medical treatment from the employer; and (5) whether employee is entitled to the costs of the proceeding under § 287.560 RSMo.

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

Findings of Fact

The work injury

Employee started working for Buchheit Concrete in early 2008 as a concrete laborer. Buchheit Concrete routinely "shared" its employees with employer and other contractors who needed concrete laborers for particular jobs and projects. In March 2008, employee was working intermittently for employer at a job site known as the "North Park site." Employee did not perform any work for Buchheit Concrete at the North Park site, but worked exclusively for employer when working there.

At the hearing before the administrative law judge, employee testified as follows. Employee was moving heavy concrete forms at the North Park site when he hurt his back. While pulling one of the forms, employee felt his back tighten on his right side and felt pain go down his right leg. Employee was working with a coworker named Frank Bruno. Frank Bruno witnessed the injury. Employee went to the foreman and told the foreman his back was hurting. The foreman instructed employee to finish the day, and employee did so. The next morning, employee's back was still painful. Employee explained that all of the workers routinely gathered around the work truck in the morning. At this gathering, employee informed the Buchheit foreman, Gerald Nanney, that his back was still painful. Mark Schlogl, employer's representative at the North Park site, was present and within earshot of this exchange. Because employee's back was hurting, Mr. Nanney allowed employee to ride on the concrete rolling machine as weight. Employee would not normally be allowed to perform this task. Rather, employee would have been shoveling that day if his back were not hurting. Employee was able to ride the machine for only a few hours before he had to ask the machine operator to stop the machine. Employee got off the machine and walked around the job site to where Mr. Nanney was and told him he couldn't do the job with his back pain.

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Employee went home early that day because there was no other task employee was able to perform.

Employee testified that March 24, 2008, was the date he was injured at the North Park site. The date employee was injured has been the subject of much confusion in this case. Employee admitted as early as his deposition of March 2, 2009, that he could not be particular with dates and that he did not remember the dates on which the relevant events occurred. Employee's inability to remember the date of injury has resulted in a profusion of conflicting dates of injury in the record: March 24, 2008, May 24, 2008,² April 30, 2008,³ March 28, 2008,⁴ and March 30, 2008.⁵ The correct date would appear to be of special importance, as employee admitted that of the conflicting dates of injury, March 24, 2008, is the only day he can say that he was working for employer.

Notably, however, employee's testimony was unequivocal that he was injured on the North Park site. This testimony was corroborated by the testimony of Frank Bruno. Mr. Bruno's testimony was entered into the record via deposition. Mr. Bruno testified that he saw employee injure himself on the North Park project when employee was moving concrete forms. Mr. Bruno testified that employee grabbed his back and said he thought he pulled something. Mr. Bruno testified that employee came to work the next day and was unable to work because of his hurt back.

Employee's testimony was also corroborated by the testimony of Gerald Nanney. Mr. Nanney testified at the hearing before the administrative law judge. Mr. Nanney confirmed that employee told him he was injured lifting forms while working at the North Park site. Mr. Nanney confirmed that Mark Schlogl was within earshot when employee told everyone that he hurt his back and would need to perform a light duty task, and that Mr. Schlogl was also present when employee asked to stop the concrete rolling machine. Mr. Nanney was also able to identify the relevant dates by referring to a logbook that he carried on the jobsite to record employees' hours. Mr. Nanney confirmed that March 25, 2008, was the date that employee went home after only working a few hours.

The evidence thus far is corroborative of employee's testimony that he injured his back on March 24, 2008, while working for employer at the North Park job site, and the next day told everyone—including employer's representative—what had happened. The only contradictory testimony comes from Mark Schlogl. Mr. Schlogl testified at the hearing before the administrative law judge. Mr. Schlogl denied that employee ever told him he was injured at the North Park site. Mr. Schlogl also denied overhearing employee tell anyone else about the injury. Mr. Schlogl acknowledged that he knew employee had been injured at some point: "I remember asking somebody at a certain time, you know, and they said that [employee] was hurt." Mr. Schlogl testified that he could not remember when this exchange occurred or who told him employee was

² This date was listed on employee's original and two subsequent amended claims for compensation filed with the Division of Workers' Compensation.

³ This date appears in the records from Concentra Medical Centers.

⁴ This date appears in the records from Petkovich Orthopedic and Spine Care.

⁵ This date appears in Dr. Frank Petkovich's report of July 21, 2008.

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injured. Mr. Schlogl explained that he asked about employee because, “when you work with the same guys all the time and then you show up one day, if somebody’s there, you know, somebody’s not there, it’s just, you know, hey, where’s [employee] at.”

We find the testimony of Mr. Nanney credible and more reliable than that of Mr. Schlogl, who could not remember what happened or how he learned of employee’s injury. Accordingly, we find that Mr. Schlogl was present and within earshot when employee reported his injury and asked for a light duty task on March 25, 2008. We further find that Mr. Schlogl was present later that morning when employee asked that the job be stopped due to his back pain.

We disagree with the administrative law judge that employee’s confusion over the date of injury should result in denial of his claim. Employee’s testimony regarding the circumstances of the injury was supported by the firsthand testimony of Mr. Bruno, and was consistent with the history set forth in the treatment records of Concentra Medical Center, Dr. Graham, Dr. Petkovich, and The Work Center. Employee’s testimony regarding the work injury also matches the information set forth in the Report of Injury filed with the Division of Workers’ Compensation (Division), and insurer’s form entitled “Employee’s Report of Injury.” Doubtless, employee is a poor historian with regard to dates, but Mr. Nanney was able to remedy this defect in employee’s evidence by providing credible and convincing testimony that March 24, 2008, was the date of injury.

In sum, we find the hearing testimony of employee and Mr. Nanney, and the deposition testimony of Mr. Bruno, to be credible. We find that employee was working for employer moving concrete forms at the North Park site on March 24, 2008. We find that employee felt his back tighten on his right side and felt pain go down his right leg when he pulled one of the forms. We find that employee came to work the next day and informed everyone at the morning gathering that he hurt his back the day before and needed a light duty task. We find that Mr. Schlogl, a supervisory employee with employer, was present at this gathering and that he heard employee and was aware that employee claimed to have been injured working for employer on March 24, 2008.

Medical treatment

After the work injury of March 24, 2008, employee’s back pain persisted, so he discussed it with his supervisors. Employee’s supervisors told him to “work through it.” Following the instructions of his supervisors, employee returned for work with both Buchheit Concrete and employer, despite ongoing back pain. In May 2008, employee decided he couldn’t continue to work with his level of pain, and contacted both Buchheit Concrete and employer to inquire about medical treatment. Brad Harris, employer’s business manager, discussed the matter with Greg Eilerman, president of Buchheit Concrete. That conversation resulted in Mr. Harris filing an accident report with employer’s workers’ compensation carrier, and directing employee to Concentra Medical Center for treatment.

Mr. Harris testified at the hearing before the administrative law judge. Mr. Harris acknowledged that he could have investigated the circumstances of the work injury simply by referring to employer’s payroll records and rounding up the people who were

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working with employee on the date of injury. Mr. Harris' deposition testimony was also entered into the record. Mr. Harris testified at his deposition that he had investigated the matter to his satisfaction. We find that Mr. Harris was able to investigate the circumstances of employee's work injury to his satisfaction, and that he could have identified witnesses and discussed the circumstances of the work injury with them if he had chosen to do so.

Beginning in May 2008, Concentra provided employee with conservative treatment. On June 10, 2008, employee was released by the treating doctors at Concentra, but employee was unable to successfully return to full-duty work due to his lower back complaints. An MRI on July 3, 2008, revealed broad midline and right side focal disc protrusion with encroachment at L4-5, and additional smaller disc protrusions at L3-4 and L5-S1. Treating doctors at Concentra recommended that employee undergo consultation with an orthopedic surgeon as soon as possible.

Employer sent employee to Dr. Frank Petkovich on July 21, 2008. Dr. Petkovich initially provided conservative treatment including injections, physical therapy, and work hardening. Dr. Petkovich released employee to try to return to work on October 2, 2008, but employee was unable to tolerate full duty and he returned to Dr. Petkovich for further treatment. A myelogram and post-myelogram CT scan were performed on October 27, 2008. These procedures revealed a lumbar disc herniation at the L4-L5 level. In November 2008, Dr. Petkovich recommended surgery. Employer declined to authorize this treatment, but continued payment of temporary total disability benefits through the date of hearing in this matter.

Medical expert testimony

Dr. Petkovich opined that employee sustained an acute muscular and ligamentous lumbosacral strain as a result of the work injury in March 2008. Dr. Petkovich diagnosed a disk herniation at L4-L5 on the right. Dr. Petkovich recommends that employee undergo surgery for a lumbar laminotomy with microdiscectomy at the L4-L5 level. Dr. Petkovich opined that employee's need for surgery is caused by the accident in March 2008.

Employer did not present any competing medical testimony to contradict the opinions of Dr. Petkovich. We find Dr. Petkovich credible, and adopt his testimony, findings, and opinions as fact.

Conclusions of Law

Injury by accident

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

An unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

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Pursuant to § 287.020.3(1) RSMo, an “injury” is defined to be “an injury which has arisen out of and in the course of employment.” Under § 287.020.3(2) RSMo:

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 found that employee was working for employer on March 24, 2008, performing a task that involved pulling concrete forms, when he felt his back tighten on his right side and felt pain go down his right leg. We conclude that this specific event amounted to an “accident” for purposes of § 287.020.2. We have found Dr. Petkovich credible that the March 2008 accident was the prevailing factor causing employee’s injuries. The hazard or risk of pulling heavy concrete forms was clearly related to employee’s employment as a concrete laborer. We conclude that employee suffered an “injury” which arose out of and in the course of employee’s employment for purposes of § 287.020.3(1) RSMo.

Medical causation

We conclude that employee has met his burden on the issue of medical causation. Section 287.020.3(1) RSMo provides as follows:

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

Dr. Petkovich opined that employee suffered an acute muscular and ligamentous lumbosacral strain, and a herniated disk at L4-L5, as a result of the accident in March 2008. Dr. Petkovich did not identify any other causative factor. Employer did not present any expert medical evidence to indicate that employee’s medical condition is the result of any other factor. We have found Dr. Petkovich credible. We conclude that the accident of March 24, 2008, is the prevailing factor in causing employee’s medical condition.

Notice

We conclude that employer had actual notice of employee’s back injury on March 24, 2008, and that employer was not prejudiced by employee’s failure to provide written notice of the injury. 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

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injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

The purpose of the foregoing section is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo. App. 2000), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).⁶ The foregoing section, strictly construed, requires an injured employee to provide written notice to the employer within 30 days of the accident, or show that the employer was not prejudiced by the employee's failure to provide timely notice. Failure to provide notice or, alternatively, show that employer was not prejudiced thereby, bars an employee's claim.

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. *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498, 503 (Mo. App. 1968). If the employer does not admit actual knowledge, the issue becomes one of fact. *Id.* 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. *Id.* at 503-04. See also *Gander*, 933 S.W.2d at 892.

Soos, 19 S.W.3d at 686.

We have found that Mark Schlogl, a supervisory employee and employer's representative at the North Park site, was aware as of March 25, 2008, that employee claimed to have injured his back on March 24, 2008, while working for employer. It is well settled that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652, 654-55 (Mo. App. 1994). Because notice was provided to Mr. Schlogl on March 25, 2008, we find 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. Mr. Harris, employer's business

⁶ *Soos* is one of many cases that were partially overruled by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). We cite other cases herein that were partially overruled by *Hampton*; because these cases are cited for principles unrelated to *Hampton*, we make no further mention of *Hampton's* effect.

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manager, acknowledged that he could have identified witnesses and discussed with them the circumstances of employee's work injury if he had wished to do so. We have found that Mr. Harris was able to investigate the work injury to his satisfaction. Employer has overseen and directed all of employee's medical treatment in connection with the March 2008 injury. We conclude that employer has not met its burden of demonstrating that it was hampered in its ability to investigate the incident, or that it was denied an opportunity to minimize employee's injuries. We conclude that employer was not prejudiced by employee's failure to provide written notice under § 287.420.

Medical treatment

We conclude that employee met his burden of demonstrating he is entitled to medical treatment from the employer. 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.

Dr. Petkovich opined that employee is in need of medical treatment as a result of the work injury. Dr. Petkovich recommended that employee undergo surgery for a lumbar laminotomy with microdiscectomy at the L4-L5 level. Dr. Petkovich opined that employee's need for surgery is caused by the accident in March 2008. Employer did not provide any competing medical evidence, and we have found the opinions of Dr. Petkovich credible. Employee has established by a reasonable probability that he is in need of medical care to cure and relieve from the effects of his injury, and we award same.

Costs under § 287.560 RSMo

We recognize that the parties have placed in dispute the issue whether employee is entitled to costs under § 287.560 RSMo. However, because we have reversed the Final Award of the administrative law judge and instead entered this Temporary Award pursuant to § 287.510 RSMo, we are of the opinion that the issue of costs is unripe for review at this stage of the proceedings. The issue of costs is more appropriately addressed in the event this case proceeds to a final award. Accordingly, we leave open the issue of costs under § 287.560 RSMo.

Conclusion

Based on the foregoing, the Commission concludes and determines that employee met his burden of proof on the issues of accident, injury, medical causation, notice, and employee's entitlement to medical care. We leave open the issue of whether employee is entitled to costs under § 287.560 RSMo.

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.

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This award is subject to a lien in favor of David G. Plufka, Attorney at Law, in the amount of 25% for necessary legal services rendered.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge John A. Tackes, issued April 9, 2010, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 8th day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Dwayne Moore Injury No.: 08-061460
Dependents: N/A
Employer: ICR Construction Services LLC
Insurer: Accident Fund Insurance Company of America
Additional Parties: Buchheit Concrete, and Amerisure Insurance Company
Hearing Date: January 21, 2010

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: JAT

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? Yes
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: March 24, 2008 (alleged)
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of Buchheit Concrete at time of alleged accident or occupational disease? No
7. Was above employee in employ of ICR at time of alleged accident or occupational disease? Yes
8. Did employer ICR receive proper notice? No
9. Did employer Buchheit receive proper notice? No
10. Did accident or occupational disease arise out of and in the course of the employment? No
11. Was claim for compensation filed within time required by Law? Yes
12. Were employers ICR and Buchheit insured by the above named insurers? Yes
13. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant alleged an injury to his low back while performing concrete laborer duties.
14. Did accident or occupational disease cause death? No
15. Part(s) of body injured by accident or occupational disease: Low back (alleged)
16. Nature and extent of any permanent disability: N/A
17. Compensation paid to-date for temporary disability: \$45,158.50 by ICR; \$0.00 by Buchheit

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Dwayne Moore

Injury No.: 08-061460

- 18. Value necessary medical aid paid to date by employer/insurer? \$17,638.28 by ICR; \$0.00 by Buchheit
- 19. Value necessary medical aid not furnished by employer/insurer? N/A
- 20. Employee's average weekly wages: \$821.78
- 21. Weekly compensation rate: \$547.85 TTD/PPD
- 22. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 23. Amount of compensation payable: None
- 24. Second Injury Fund liability: No
- TOTAL: \$0.00
- 25. Future requirements awarded: \$0.00

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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: David Plufka.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Dwayne Moore Injury No.: 08-061460

Dependents: N/A

Employer: ICR Construction Services LLC

Before the
**Division of Workers'
Compensation**

Insurer: Accident Fund Insurance
Company of America

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

Additional Parties: Buchheit Concrete, and
Amerisure Insurance Company

Hearing Date: January 21, 2010

Checked by: JAT

INTRODUCTION

On January 21, 2010, a hearing in the Matter of a claim by Dwayne Moore for workers' compensation benefits was held in St. Louis, Missouri before Administrative Law Judge John A. Tackes. Dwayne Moore personally appeared and testified. Attorney David G. Plufka, represented Claimant. Attorney Dale M. Weppner appeared as counsel for the Employer ICR Construction Services (ICR), and insurer Accident Fund. Christopher T. Archer appeared as attorney on behalf of Buchheit Concrete Inc., (Buchheit) and insurer, Amerisure Insurance. There was no appearance on behalf of the Second Injury Fund which was left open at the time of the hearing.

There were three other witnesses who personally appeared and testified; Brad Harris, Controller for ICR Construction Services Inc., Mark Schlogl, a former ICR supervisor, and Gerald Nanney, supervisor for Buchheit Concrete. Other deposition testimony, medical records, business records, and Division records were admitted on the record as exhibits.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated to the following:

1. ICR Construction Services was operating under and subject to the provisions of the Missouri Workers' Compensation Act and all liability was fully insured by The Accident Fund Insurance Company of America.

2. Buchheit Concrete was operating under and subject to the provisions of the Missouri Workers' Compensation Act and all liability was fully insured by Amerisure Insurance Company.
3. Claimant filed timely claims against ICR Construction Services and Buchheit Concrete.
4. Claimant's average weekly wage is \$821.78; and
5. Claimant's temporary total disability (TTD) rate and permanent partial disability (PPD) rate are both \$547.85.

ISSUES

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

1. Accident
2. Injury
3. Notice
4. Medical Causation
5. Future Medical Care
6. Penalties pursuant to §287.560

FINDINGS OF FACT

Based on the competent and substantial evidence and my observations of Claimant at trial, I find:

Testimony of Dwanye Moore, Claimant

1. At the time of the hearing Claimant was a 30 year old resident of Sunset Hills, Missouri. He is married and has three children. For most of the past ten years he has been employed as a full time concrete laborer in the St. Louis metropolitan area. He is a union member of Local 110.
2. In April, 2005 Claimant began working for Buchheit Concrete as a concrete laborer. His supervisor with Buchheit was Gerald Nanney. In 2008 ICR Construction requested the services of masons and laborers from Buchheit Concrete for work on its North Park project off Hanley Road in St. Louis, Missouri. ICR needed masons from Buchheit because Buchheit had signed a bargained for labor agreement with the masons union and ICR had not. The masons on the project remained employees of Buchheit and were paid directly by Buchheit. Although ICR had not signed the masons labor agreement, it had signed the concrete laborers bargained for labor agreement and therefore could directly employ the concrete laborers, including Claimant, on the North Park project.

3. Under this arrangement Buchheit provided the cement masons and ICR provided laborers. Buchheit sent a supervisor in addition to the cement masons because Buchheit provided a majority of the tools necessary to do the work. Cement masons oversee the project because the onus to make sure the job is done correctly falls on them. As such they do give direction to the laborers specifically regarding how they want something set up.
4. As a concrete laborer, Claimant worked on a crew moving forms, knocking down and shoveling concrete for the masons. The masons then finished the job and had responsibility for the quality and appearance of the finished product. In 2008 Claimant worked for both ICR and Buchheit as a concrete laborer. When he worked for Buchheit he was paid by Buchheit. Likewise, when he did work for ICR he was paid by that employer. Each employer deducted withholdings such as federal taxes, state taxes, and union dues from the Claimant's check.
5. The injury relevant to the claim addressed in this award is a low back injury sustained by Claimant in 2008. The parties disagree as to the date of the accident, who Claimant worked for at the time of the accident, and whether timely notice was given to the appropriate employer. At the hearing in January, 2010, Claimant was able to give, with a reasonable degree of certainty, the date of the accident. That certainty, however, is not reflected consistently in the medical records and deposition testimony by Mr. Moore. In deposition testimony given March, 2009, Claimant alleged his injury occurred on a Thursday and that he worked two hours the next day. March 24, 2008, however, is on a Monday.
6. On July 21, 2008, Claimant filed his original Claim for Compensation. On October 14, 2008, and July 24, 2009, he filed amended claim forms. On all three of these claims the date of injury is pled as May 24, 2008. On his third amended claim for compensation dated October 2, 2009, however, March 24, 2008 is pled as the date of injury. I find this change in date gives rise to a reasonable discrepancy as to the actual date of the injury. The change is more than a mere clerical correction.
7. Gerald Nanney, a supervisor employed by Buchheit, who also worked on the project, kept a log of hours worked by the concrete laborers. He remembers Claimant at some point saying he hurt his back but could not remember the day. In his log of hours worked, Mr. Nanney noted that Claimant worked eight hours on March 24, 2008 and two hours on March 25, 2008. Based on this, he determined March 24, 2008 was the day Claimant *must have* injured himself. The entries in the log do not mention or refer to an injury having been reported by Claimant that day. Another worker, Frank Bruno, recalled seeing Claimant grab his back but could not say with certainty what date this occurred. This testimony is given no weight in this decision.
8. At the North Park project, Claimant was required to lift L-shaped concrete forms that were ten feet in length, one foot in width, and weighed about 150 pounds. Claimant believes that while on this job performing concrete labor, he felt a "tweak" in his back. He stopped working in order to lie on the ground to stretch his back. None of the other

witnesses corroborates this testimony. Claimant returned to work and finished the rest of the day. He was paid for a full day's work on March 24, 2008.

9. At the job site the next morning, prior to assignments being made, Claimant mentioned that he was still in some pain. Both Gerald Nanney of Buchheit and Mark Schlogl, an ICR supervisor were in the area at the time. Claimant believes but is not certain that Mr. Schlogl heard the complaint. Claimant was then assigned a specific job which he typically would not have been given to him based on his lack of seniority. The assignment required him to ride a machine as a counterweight.
10. After about two hours Claimant got off the machine and informed Mr. Nanney that he was leaving because his back hurt too much. Claimant left in his own vehicle. He did not report an injury to his ICR supervisor. Claimant did not ask ICR to fill out a report of injury or request medical treatment at that time or before returning to work on that project in April, 2008.
11. Claimant eventually sought medical treatment through Buchheit. He was later contacted by ICR and sent for examination at Concentra the last week of May, 2008. From April 1, 2008 to May 21, 2008, Claimant worked 85.5 hours on the North Park Project for ICR and 157.5 hours for Buchheit on other jobs. Claimant was seen by Dr. Homan at Concentra on or about May 29, 2008.
12. At the hearing, Claimant's certainty of the date of accident is based in part on that fact that March 24 is his wife's birthday. At a deposition taken March 2, 2009, Claimant said he was injured on May 24 or 25, 2008. Claimant, however, did not work for ICR on May 24 or 25, 2008. In his deposition Claimant indicated that he was sent to a doctor no more than a couple of weeks after his accident. This would not be consistent with an injury date in March, 2008 and an initial doctor visit of May 29, 2008.

Testimony of Gerald Nanney

13. Gerald Nanney is employed as a concrete mason by Buchheit where he has worked for seven years. Like Claimant, Mr. Nanney was assigned to the North Park project in 2008. Mr. Nanney knew Claimant as someone who also worked for Buchheit and spoke with Claimant regularly while on the same job. On the job in question, he was the foreman who specifically supervised the work of other Buchheit masons. He also had supervisory control over the work of the laborers. He did not receive a report of injury nor did he fill out an injury report for Claimant while at this site.
14. On March 24, 2008, Claimant did not tell Mr. Nanney that he had hurt his back and Mr. Nanney did not see Claimant in any apparent pain. The next day Claimant did tell Mr. Nanney that his back still hurt from the day before. I do not find that a specific report of injury was made to Mr. Nanney on March 25, 2008. A worker could be sore or in pain for a variety of reasons. There was no attempt to clarify or ascertain whether an accident or injury had occurred. When Claimant left work early that day because he could not finish the work, there was no discussion of an injury or filling out a report. Claimant did

return to the job in April, 2008 and continued to perform his normal duties. There was no other discussion when he returned to work of the alleged injury or need for any treatment.

Testimony of Mark Schlogl

15. Mark Schlogl is a former supervisor of ICR who knows Claimant from working with him at the North Park project in 2008. Even though Gerald Nanney was an employee of Buchheit, he also had supervisory duties at the location to determine work assignments. Masons likewise could direct the way in which the work was done by the concrete laborers because the masons were ultimately responsible for the outcome of the work. Mr. Schlogl did not see Claimant get injured. He specifically denies having heard Claimant complain of an injury on or about March 25, 2008. Had an injury been reported to him, Mr. Schlogl would have completed a report of injury on forms he kept in his truck.

Testimony of Brad Harris

16. Brad Harris is the Controller for ICR. At the time of the North Park project he was a manager for the company. On or about May 28, 2008, Mr. Harris was informed that Claimant was alleging an injury while on the North Park project. This was the first notice Mr. Harris had of the alleged injury. It is the first confirmed indication that ICR was aware of the injury. After taking the information, he completed a report of injury and notified the company insurer, Accident Fund. According to records of ICR, Claimant did not work for ICR on March 28, April 30, May 23, or May 24, 2008.
17. Payroll records of ICR confirm that Claimant worked a full eight hours on March 24, 2008 and only two hours the next day. He next worked on that job April 2, 2008. During the rest of April, 2008, Claimant worked a total of ten days on the North Park project. His hours worked are consistent with what other concrete laborers were working for ICR on that project during the month of April. ICR also paid Claimant for eight hours of work on May 20, May 21, June 11, and June 12, 2008.

Deposition testimony of Gerald Eilerman

18. Greg Eilerman is President and owner of Buchheit Concrete. On May 29, 2008, the company received an accident investigation report from ICR indicating that an accident had occurred March 24, 2008. Mr. Eilerman is unaware of any notice of an injury being given to Mark Schlogl or anyone with ICR.

Medical Records

19. The medical records reveal that several dates other than March 24, 2008 are recorded for the date of the Claimant's injury. Among the other dates of injury are April 30, 2008 and March 28, 2008. Claimant, however, did not work for ICR on either of these dates. On the original claim for compensation in this matter dated July 21, 2008, the date of injury is listed as May 24, 2008. Two subsequent amended claims list a date of injury as May 24, 2008.

Treatment Records of Concentra

20. On May 29, 2008, Claimant was examined at Concentra by Dr. Homan and diagnosed with a lumbar strain. He was prescribed physical therapy and medication with restrictions on lifting no more than twenty pounds without excessive bending, pushing or pulling greater than twenty pounds. Claimant complained that his pain in his low back and right leg had become greater the week prior to May 29, 2008. Claimant was seen on June 4, 10, 13, and 16, 2008. He continued to describe pain as a level 2 out of 10 in intensity. He had no acute distress and more pain with greater movement. He continued having physical therapy and medication to relieve the pain. On June 16, 2008 he was restricted from lifting greater than 40 pounds and taken off physical therapy.
21. On July 5, 2008, an MRI was performed on his lumbar spine which identified a broad midline and right side focal disc protrusion at L4-5 encroaching on the right lateral recess, and smaller midline focal disc protrusions at L3-4 and L5-S1. On July 8, 2008, Claimant reported some improvement with physical therapy and could walk normally. He was diagnosed with lumbar radiculopathy and strain for which he was prescribed medication and restricted from lifting more than 40 pounds. Claimant was referred to an orthopedic specialist for further treatment.
22. On July 30, 2008 Claimant was seen by Dr. John Graham at the Pain Treatment Center where he received epidural steroid injections and resumed/continued physical therapy and pain medication. On August 11, 2008, Claimant reported significant improvement in his leg and low back and refused a second injection. On August 25, 2008 however Claimant again reported symptoms in his back and leg for which he received a second epidural steroid injection.
23. In September, 2008, Dr. Petkovich continued Claimant on physical therapy, work conditioning and work restrictions. A functional capacity evaluation (FCE) was performed on September 30, 2008. Concrete laborer duties are considered heavy labor. Results of the FCE indicated Claimant was able to safely handle loads within his physical demand level. Claimant was to continue home exercise for strength and endurance.
24. In October, 2008, Dr. Petkovich diagnosed lumbar disc bulge and muscular lumbar strain. He released Claimant to return to his regular job without restrictions. Claimant worked about one week before returning to Dr. Petkovich complaining of pain. Claimant was diagnosed with lumbar disc protrusion with recurring and persistent pain in the lower back and right lower extremity. A lumbar myelogram and post myelogram CT Scan were performed.
25. Dr. Petkovich's report of October 30, 2008 indicates a new diagnosis of muscular lumbosacral strain and lumbar disc herniation. Claimant was returned to light duty with prescription medication. A nerve block at the L5 level was performed on November 3, 2008 at Missouri Baptist Medical Center. Medical records indicate Claimant was seen in November, 2008 for degenerative disc disease, lumbar disc bulge and a herniated disc. He was limited to light duty work, no lifting greater than twenty pounds, and no bending,

stooping, kneeling or squatting. At a follow up visit November 25, 2008, Dr. Petkovich discussed the possible need for lumbar laminectomy and microdiscectomy at L4-5. On December 9, 2008 Dr. Petkovich recommended surgical intervention and referred Claimant to a neurosurgeon.

Opinion Testimony

26. Dr. Petkovich opined that Claimant sustained a work related injury in March, 2008. Claimant has alleged only one incident of an injury by accident in the course of his employment. Dr. Petkovich's medical opinion is based on the information supplied to him by Claimant and Claimant's medical records. He has no independent knowledge of what particular day or month the Claimant was injured. Dr. Petkovich's October, 2008 diagnosis of a disc herniation following a CT myelogram rather than a disc bulge is described by Dr. Petkovich as the same pathology viewed using different technologies (MRI v CT Myelogram) rather than a change in pathology.
27. All treatment at Concentra was scheduled by ICR and its insurer Accident Fund. All TTD benefits and doctor visits with Dr. Petkovich were arranged by ICR. Dr. Petkovich's medical expenses were paid by ICR/Accident Fund. In all, Claimant was seen about 25 times by Dr. Petkovich from August 13, 2008 through August 24, 2009. Records of Accident Fund Insurance Company of America from March 24, 2008 to January 21, 2010, reflect total benefits received by Claimant equal to \$62,796.78.

RULINGS OF LAW

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

The claimant in a workers' compensation proceeding has the burden of proving all the elements of a claim to a reasonable probability. *Cardwell v. Treasurer*, 249 S.W.2d 902,911 (Mo.App.2008); *Van Winkle v. Lewellens Professional Cleaning*, 258 S.W.3d 889, 897 (Mo.App.W.D.2008). To recover benefits Claimant is required to show that he sustained an accident, which resulted in a compensable injury. *Griggs v. A.B. Chance*, 503 S.W.2d 697 .703 (Mo.App. W.D. 1973). The definition of "accident" under the law is,

"...an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor"
RSMo §287.020.2 (2005)¹

For an injury to be compensable, the accident must be the prevailing factor causing the resulting condition and disability. The term "injury" is defined as,

¹ All statutory references are to the Missouri Revised Statutes unless otherwise indicated.

“...an injury which has arisen out of and in the course of employment. 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.”
RSMo §287.0203(1)

As amended, §287.020.3 provides that 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 non-employment life.”
RSMo §287.020.3(2)

Accident, Injury and Notice

Claimant has the burden to prove when and where he had an accident that resulted in a compensable injury. He must demonstrate by a preponderance of the evidence that it is more likely than not he was injured on a particular date. It is insufficient for Claimant to show that an injury occurred on some date. In this matter he has alleged a date of injury on March 24, 2008. This is significant because Claimant worked for more than one employer in March, April, and May, 2008. In this case, the person in the best position to point to the time and place of the accident is the injured worker himself.

Given that Claimant worked for multiple employers during the 2008 calendar year leading up to his claim for compensation, it is vital that the evidence presented by Claimant clearly show the actual date of accident and not simply an educated choice, approximation, or agreement. I find the scenario presented of how the date of accident was decided, however, calls into question the accuracy of the date itself.

The record contains multiple dates provided by Claimant for the possible occurrence of the accident. At some point March 23, 24, 28, 30, April 30, May 23, and May 30, 2008 are given as the date of accident. What is significant about these dates is that Claimant did not work for the same employer on each of these dates. Of these dates, the only date Claimant actually worked for ICR Construction Services is March 24, 2008.

At hearing Claimant testified that the accident occurred on March 24, 2008. He is certain of this date because it is his wife’s birthday. Even though there is no independent confirmation of this fact, Claimant’s testimony is credible. Claimant did not, however, consistently give this date as the date of accident. If in fact the accident had occurred on his wife’s birthday, then it would be reasonable for Claimant to have used this date consistently when reporting the incident to his employer, doctor, and the Division. I find Claimant’s testimony at hearing regarding the actual date of the accident is self serving and not credible.

In addition to the different dates provided by Claimant, he testified on two different occasions to two different mechanisms of injury. At the hearing on January 21, 2010, Claimant testified that he injured his back lifting L-forms weighing over one hundred pounds. At his deposition in March, 2009, he testified that he was moving plastic and gravel off a slab when he injured his back.

There is no competent evidence that Claimant spoke with a supervisor on the job from either Buchheit or ICR regarding an injury on March 24, 2008. Both supervisors testified but neither could corroborate Claimant's allegations regarding a report of accident on March 24, 2008. Also, there were no witnesses to support Claimant's contention that he lay down and stretched his back after feeling a tweak on March 24, 2008.

There was one witness who testified that he saw Claimant grab his back while working on the North Park project. Frank Bruno, a co-worker, recalls seeing Claimant grab his back but could not say with certainty as to the date of this incident. Although Gerald Nanney did not see the alleged accident on March 24, 2008, he did note in his log that Claimant only worked two hours on March 25, 2008. There is no indication in the log of a report of injury that day. The weight of the evidence actually shows the opposite of what Claimant alleges. The evidence is more persuasive that the injury occurred on a date other than March 24, 2008. I find that the late in time selection of the date of March 24, 2008 does not clarify the issue but further confuses the actual date of injury.

Claimant did injure his back at some point prior to May 29, 2008. Claimant however continued to perform his regular duties as a concrete laborer after March 25, 2008. Claimant worked an additional 84.5 hours for ICR on the North Park project between April 1, 2008 and May 21, 2008. He worked 115 hours from the end of March 2008 through June 2008 with Buchheit. Claimant therefore continued to work regular duty as a concrete laborer after the alleged injury on March 24, 2008.

Claimant therefore has not met his burden to prove that an accident resulting in injury occurred on March 24, 2008. The various dates given as the date of injury and the lack of supporting/corroborative testimony fail to persuade that an accident occurred and was reported to a supervisor in a timely manner. It is not clear on what date the accident resulting in Claimant's injuries occurred. In fact, other evidence provides more weight that the accident did not happen in March but rather later. Specifically, Claimant testified that he believes less than a month passed between the date of accident and his first visit to Concentra on May 29, 2008. This would not be the case if his injury occurred on March 24, 2008 which was nearly two months before his visit to Concentra.

If Claimant had done no work after March 25, 2008, but reported a date of injury on a day he was not working, the mistake or confusion would be more obvious. Claimant however continued to work through June, 2008 and provided dates of injury for times he was working with other employers. The alleged date of March 24, 2008 is therefore inconsistent with the weight of evidence as the likely date of injury. Claimant has not met his burden of proof to show an accident on March 24, 2008 resulted in a compensable injury.

ICR argues that Claimant did not provide written, timely notice of his accident. Claimant argues that employer/insurer is precluded from arguing the issue of timely notice because ICR failed to raise the issue as an affirmative defense in its answers to the Claims for Compensation.

No proceeding for compensation for any accident under this chapter shall be maintained unless proper notice of time, place and nature of the injury has been provided to the employer no later than thirty days after the accident unless the employer was not prejudiced by failure to receive the notice. §287.420 RSMo.

The Claims for Compensation specifically plead that timely notice was given to the employer. The Answer filed by attorney for ICR and its insurer lists specific affirmative defenses and attaches a page to the Answer indicating a denial of “each and every *other* allegation contained in the Amended Claim for Compensation not otherwise specifically admitted herein.” (emphasis mine). ICR has therefore denied in its Answer, a specific allegation by Claimant that the notice was timely.

Even if the Employer had not included this denial of other allegations, Employer still would not be precluded from raising notice as an affirmative defense. As an affirmative defense to Claimant’s Claim for Compensation, it is sufficient that the defense has been raised prior to the hearing. Employer’s denial that they had been given statutory notice of Claimant’s injury was made before the Administrative Law Judge in the presence of Employee and his counsel. This amounts to a virtual and de facto amendment of their Answer so as to raise that defense as a justiciable and controverted issue. *Snow v. Hicks Bros. Chevrolet, Inc.* 480 S.W.2d 97, 100 (Mo. App. 1972).

Claimant has the burden to prove that timely notice was given to the Employer. No written notice was provided by Claimant to ICR within 30 days of March 24, 2008. ICR does not admit that it had actual knowledge of the accident. Lack of Notice is not an absolute bar to the Claim if there was good cause for failing to provide notice or Employer was not prejudiced. There is no evidence of good cause for failing to provide notice. Treatment was begun at the end of May, 2008 when ICR sent Claimant to Concentra. From March 24, 2008 to May, 2008, Claimant continued to work and ICR before ICR could investigate any alleged injury. For this reason, ICR was prejudiced by the lack of notice in that they had no reasonable opportunity to investigate the allegations or send Claimant for an examination while he was continuing to work as a concrete laborer for ICR and at least one other company.

On March 25, 2008, Claimant told a Buchheit supervisor that he was going home because his back was still hurting. This is arguably a report of injury but it lacks clarity and specificity. It fails to include necessary elements such as when, where, and how the accident producing an alleged injury occurred. No report of injury was made by a Buchheit supervisor. This is some indication that the supervisor receiving the information from Claimant did not consider notice of accident had been given and therefore no report of injury would have been made. In other words, not every complaint of pain or soreness amounts to a report of injury. In any event, a report of injury to a Buchheit supervisor would not equate to a timely notice given to ICR. Claimant made

no report of injury to ICR until late May, 2008. At that time Claimant was sent by ICR to Concentra for treatment and received benefits.

There is no competent and substantial evidence that on or about March 24, 2008, any ICR supervisor had actual knowledge of Claimant's allegation of an injury while on the North Park project. I find Claimant did not provide ICR timely notice as required by §287.420, and that ICR was prejudiced by this failure. ICR could not therefore make a reasonable investigation of the incident because Claimant had worked so many hours as a concrete laborer after the alleged date.

Having found that Claimant has not met his burden to prove accident, injury, and timely notice, I award no future medical treatment or care in this award.

Medical Causation

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. RSMo. §287.020.3(1). Claimant was first treated by Concentra in late May, 2008. He was then referred to and treated by Dr. Petkovich beginning July 21, 2008. Concentra records reviewed by Dr. Petkovich indicated a date of injury on April 30, 2008. A date of March 28, 2008 was provided to Dr. Petkovich by Claimant on an intake form. Dr. Petkovich could not opine with certainty on which date Claimant was injured, only that he was injured. A conclusion by Dr. Petkovich that Claimant was injured on March 24, 2008 is not persuasive as to the date of accident and injury.

Fees and Penalties

“If the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.” RSMo. §287.560.

The Division or the Commission may assess the whole cost of the proceedings upon a party who, without reasonable ground, brought, prosecuted, or defended a proceeding before the Division or Commission. §287.560; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. Banc 2003) (overruled in part on other grounds by *Hampton*, 121 S.W.3d 220). The Commission should exercise its discretion to assess the cost of the proceedings under this section where the issue is clear and the offense is egregious. *Landman*, 107 S.W.3d at 250. The “whole cost of the proceedings” includes all amounts the innocent party expended throughout the proceeding brought, prosecuted, or defended without reasonable grounds, including attorney's fees. *Landman*, 107 S.W.3d at 252. In *Landman*, the Missouri Supreme Court reasoned that legal fees are the largest cost incurred by an employee who is forced to sue an employer to recover workers' compensation benefits. *Id.* There, the Court further reasoned that including attorney's fees in the whole cost of the proceeding makes the sanction under §287.560 meaningful and furthers the goal of providing a quick recovery to injured employees without the expenses and delays associated with litigation. *Id. Delong v. Hampton Envelope Company*, 149 S.W.3d 549, 555, 556 (Mo.App.E.D. 2004).

I find the proceedings have not been defended by ICR without reasonable ground and therefore do not assess any penalty or fees. The issues of notice, accident, injury, and medical causation are not clear and the actions in defense thereof not egregious let alone unreasonable. In addition to having valid grounds to defend the case against it, ICR provided medical care up to November, 2009 and TTD benefits up to the time of the hearing.

Conclusion

Claimant's request for workers' compensation benefits is denied. Claimant has failed to meet his burdens to prove an accident causing injury occurred March 24, 2008, timely notice, and medical causation. Further, no attorney's fees or expenses pursuant to §287.560 are awarded. The Second Injury Fund is dismissed as a party because there is no employer liability on the primary injury.

Date: _____

John A. Tackes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

Naomi Pearson
Division of Workers' Compensation