

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

Injury No.: 01-164895

Employee: Linda Nowlin
Employer: Nordyne, Inc.
Insurer: Self-Insured
Date of Accident: Alleged January 3, 2001
Place and County of Accident: Boonville, Cooper County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 14, 2006, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Hannelore D. Fischer, issued February 14, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 9th day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

I believe the administrative law judge erred in concluding that employee's claim is barred due to lack of written notice. The administrative law judge misconstrued the testimony of the witnesses and misapplied the law.

As to the law, the administrative law judge failed to consider the portion of § 287.420 RSMo addressing the exceptions to the written notice requirement. I recite the first sentence of § 287.420 with the portion ignored by the administrative law judge in bold type:

No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, have been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to give the notice or, that the employer was not prejudiced by failure to receive the notice.

The administrative law judge's failure to consider the bolded portion of § 287.420 RSMo disregards a long history of Missouri case law.

The lack of timely written notice is excused when there is actual notice to the employer. The claimant has the burden of showing that the employer was not prejudiced from not receiving notice within thirty days. A prima facie case of no prejudice to the employer is made if the claimant demonstrates that the employer had actual notice of the injury.

Gander v. Shelby County, 933 S.W.2d 892, 895 (Mo. App. 1996) (citations omitted).

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

Soos v. Mallinckrodt Chem. Co., 19 S.W.3d 683, 686 (Mo. App. 2000) (citations omitted).

[W]ritten notice to the employer of a work-related accident is not a prerequisite for the recovery of the cost of medical services where the employer suffers no prejudice. In examining for prejudice, the issue to be determined is whether [employee's] resulting disability would have been less if [employer] had been afforded the opportunity to promptly furnish her with medical aid.

Farmer-Cummings v. Future Foam, 44 S.W.3d 830, 836 (Mo. App. 2001) (citations omitted).

Employee satisfied her burden of introducing substantial evidence that employer had actual notice of the injury in this case. I find credible the testimony of both employee and her husband. Mr. Nowlin testified credibly that he reported to employer's plant on January 5, 2001. Mr. Nowlin testified that he reported to a woman and a man that employee was injured at work the day before. He believes the woman was a secretary and he believes the man was "Charlie", presumably Charles Melkersman, employer's Human Resources Director.

Employee testified that on or about January 10, 2001, she spoke to Mr. Melkersman and requested that employer pay for her hernia surgery. Employee testified that Mr. Melkersman informed her that since she did not report the hernia to employer within 24 hours, the bills would not be paid through workers' compensation.

The administrative law judge overstated the certainty of Mr. Melkersman's testimony when she concluded that, "Charlie Melkersman testified that he did not discuss a work-related injury with Ms. Nowlin in January of 2001." Mr. Melkersman's testimony was not so direct.

On direct examination by employer's counsel:

Q. And during the course of history, has Linda Nowlin or her husband, Guy Nowlin, ever reported to you a work-related incident of January 3, 2001, or January 4, 2001,...

A. Not that I recall.

(Tr. 107).

On cross examination by employee's counsel:

Q. On January 10, 2005^[1], did you have a conversation with Linda Nowlin?

A. I do not remember such conversation.

Q. Do you recall speaking with Linda Nowlin at any time after she returned to work on or about January 10?

A. No, sir.

(Tr. 109).

Q. You never had any contact with her about the hernia then?

A. No, not that I'm aware of.

Q. And she never came to talk to you about the hernia?

A. No, sir, I don't recall that.

Q. Could she have and you just don't recall?

...

A. It's something I don't recall.

Q. Well, I'll ask you to answer the question.

A. It could have.

(Tr. 111).

On redirect by employer's counsel, Mr. Melkersman directly contradicted his above-quoted testimony.

Q. If Ms. Nowlin or her husband would have reported a work-related injury to you, would you have recalled it?

A. Yes.

(Tr. 114).

The testimony of employee and her husband regarding their conversations with Mr. Melkersman is unequivocal. The same cannot be said of Mr. Melkersman's testimony which is fraught with uncertainty and contradiction. The testimony of employee and her husband is more persuasive.

I believe employer had actual knowledge of employee's injury. The burden shifted to employer to show it was prejudiced by the lack of written notice. *Soos, supra*. Employer failed to do so.

The only evidence employer offered was the general testimony of Mr. Melkersman that it is easier to investigate an incident closer to the date of the incident. Employer offered no evidence regarding whether investigating would have been easier in *this* instance. For example, employer offered no evidence to show that by the time it learned of the alleged work-relatedness of the hernia, witnesses to *this* incident were no longer available or important records related to *this* incident had been destroyed. Employer failed to show that the treatment employee received was not reasonable and necessary or that employee's disability would have been less if employer had been

afforded the opportunity to promptly furnish her with medical treatment. Notice is not a bar to this claim.

Employer's expert, Dr. Cantrell, testified that employee sustained a work-related hernia in January 2001. Dr. Cantrell believes employee suffers a 5% permanent partial disability of the body as a whole due to recurrent hernias. I would reverse the administrative law judge award and award to employee 5% permanent partial disability of the body as a whole.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee:	Linda Nowlin	Injury No. 01-164895
Dependents:		Before the
Employer:	Nordyne, Inc.	DIVISION OF WORKERS'
Additional Party:		COMPENSATION
Insurer:	Self-insured	Department of Labor and Industrial
Hearing Date:	January 12, 2006	Relations of Missouri
		Jefferson City, Missouri
		Checked by: HDF/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No. Claimant failed to prove that she provided notice to employer of a work-related injury.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law?
4. Date of accident or onset of occupational disease: Alleged - January 3, 2001.
5. State location where accident occurred or occupational disease was contracted:
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes.
7. Did employer receive proper notice?
8. Did accident or occupational disease arise out of and in the course of the employment?
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
(see award).
12. Did accident or occupational disease cause death? No. Date of death?
N/a.
13. Part(s) of body injured by accident or occupational disease: Abdomen (hernia)
0. Nature and extent of any permanent disability: N/a.
15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? None.

17. Value necessary medical aid not furnished by employer/insurer?

18. Employee's average weekly wages:

19. Weekly compensation rate: \$212.73 for all benefits.

0. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: N/a.

22. Second Injury Fund liability: N/a.

TOTAL:

23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Linda Nowlin

Injury No: 01164892

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

Dependents:

Employer: Nordyne, Inc.

Additional Party

Insurer: Self-insured

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on January 12, 2006. Memoranda were submitted by February 7, 2006.

The parties stipulated that on or about January 3, 2001, the claimant was in the employment of Nordyne, Inc.; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was self-insured; the rate of compensation on the date of the alleged accident was \$212.73 per week for all benefits; no temporary disability benefits have been paid to the claimant to date; no medical aid has been provided to the claimant to date.

The issues to be resolved by hearing include 1) the occurrence of an accident, 2) whether appropriate notice was given, 3) the causation of the injuries alleged, 4) the liability of the employer/insurer for past medical bills in the amount of \$6,287.81 (University Hospital), 5) the liability of the employer/insurer for past temporary total disability benefits for the period of January 5, 2001, and 6) the nature and extent of permanent disability.

The employer/insurer has stipulated that in the event of a findings favorable to the claimant on the first three issues, the employer/insurer would accept the liability sought with regard to payment of the medical bills and payment of temporary total disability benefits.

FINDINGS OF FACT

The claimant, Linda Nowlin, was employed by Nordyne on the night shift on the evening of January 4, 2001; Ms. Nowlin alleges that she felt abdominal pain while lifting 20-pound doors, two at a time, from a bin. Ms. Nowlin sat down for the remainder of her shift, one-half hour, until 3:30 a.m., when she left. Ms. Nowlin went to the University of Missouri emergency room where she was scheduled for surgery at 6:00 a.m. on January 5, 2001, and sent home pending the surgery.

Ms. Nowlin had no telephone and did not report her injury. Ms. Nowlin never asked Nordyne to pay for her medical treatment. Ms. Nowlin testified that her husband, Guy Nowlin, reported her work injury; however, Ms. Nowlin's husband, Guy Nowlin, testified that he told a secretary at Nordyne on January 5, 2001, that Linda had been hurt the previous day, but testified that he never told the secretary how his wife had gotten hurt.

Ms. Nowlin alleged that she talked to Charlie Melkersman, human resources manager, about her work-related hernia later in January of 2001. Charlie Melkersman testified that he did not discuss a work-related injury with Ms. Nowlin in January of 2001.

Ms. Nowlin also described filling out a form to obtain group health insurance for her hernia surgery within a week of her surgery. Ms. Nowlin described this as reporting her injury in writing.

Dr. Jerome Levy evaluated Ms. Nowlin on November 16, 2004. Dr. Levy's "corrected" report states that he saw Ms. Nowlin regarding her May 7, 2002 injury. Dr. Levy prepared an additional report stating that Ms. Nowlin sustained a January 3, 2001 work-related accident that caused her hernia and subsequent treatment. Dr.

Levy felt that Ms. Nowlin sustained no permanent disability as the result of her January 3, 2001 hernia.

Dr. Russell Cantrell, Orthopedic and Sports Medicine, Inc., evaluated Ms. Nowlin on April 25, 2005, and reviewed her medical records and issued a report of the same date regarding his findings. Dr. Cantrell concluded that Ms. Nowlin sustained a work-related umbilical hernia in January of 2001; however, Dr. Cantrell did not believe that Ms. Nowlin sustained a hernia injury as the result of her work at Nordyne in May of 2002. Dr. Cantrell attributed a five-percent (5%) permanent partial disability to Ms. Nowlin's recurrent umbilical hernias.

APPLICABLE LAW

Section 287.420 of the Missouri Revised Statutes states, in pertinent part, as follows:

“No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of injury, and the name and address of the person injured, have been given to the employer as soon as practicable after the happening thereof but no later than 30 days after the accident . . .”

The purpose of the statutory requirement to give the employer written notice of an injury within 30 days is to give the employer a timely opportunity to investigate facts pertaining to whether the accident occurred and to provide medical attention to minimize disability. Soos v. Mallinckrodt Chemical Company (Mo. App. E.D. 2000) and Willis v. Jewish Hospital, 854 S.W. 2d 82 (Mo. App. E.D. 1993).

AWARD

The claimant, Linda Nowlin, has failed to sustain her burden of proof that she provided notice to her employer of a work injury on her January 3, 2001 shift at Nordyne, Inc. Ms. Nowlin testified that she neither told supervisory personnel about her injury or asked for medical treatment prior to her January 5, 2001 surgery. Ms. Nowlin's testimony that she notified Charlie Melkersman of her injury within a week of the injury is found not credible where Mr. Melkersman denied knowing of Ms. Nowlin's work-related hernia and where Ms. Nowlin described her notification to her employer as her group health insurance form.

All other issues raised for resolution are hereby rendered moot.

Date: February 14, 2006

Made by: /s/Hannelore D. Fischer
HANNELORE D. FISCHER
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secrest
Patricia "Pat" Secrest, Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION

Employee: Linda Nowlin
Employer: Nordyne, Inc.
Insurer: Self-Insured
Date of Accident: Alleged May 7, 2002
Place and County of Accident: Boonville, Cooper County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 14, 2006, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Hannelore D. Fischer, issued February 14, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 9th day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Linda Nowlin
Dependents:
Employer: Nordyne, Inc.
Additional Party:
Insurer: Self-insured

Injury No. 02-074141

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

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No. Claimant failed to prove that she provided notice to employer of a work-related injury.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law?
4. Date of accident or onset of occupational disease: Alleged - May 7, 2002
5. State location where accident occurred or occupational disease was contracted:
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes.
7. Did employer receive proper notice?
8. Did accident or occupational disease arise out of and in the course of the employment?
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
(see award).
12. Did accident or occupational disease cause death? No. Date of death?
N/a.
13. Part(s) of body injured by accident or occupational disease: Abdomen (hernia)
14. Nature and extent of any permanent disability:
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages:
19. Weekly compensation rate: \$271.91 for all benefits.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: N/a.
22. Second Injury Fund liability: N/a.

TOTAL:

23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Linda Nowlin

Injury No: 02-074141

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Nordyne, Inc.

Additional Party

Insurer: Self-insured

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on January 12, 2006. Memoranda were submitted by February 7, 2006.

The parties stipulated that on or about May 7, 2002, the claimant was in the employment of Nordyne, Inc.; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was self-insured; the rate of compensation on the date of the alleged accident was \$271.91 per week for all benefits; no temporary disability benefits have been paid to the claimant to date; no medical aid has been provided to the claimant to date.

The issues to be resolved by hearing include 1) the occurrence of an accident, 2) whether appropriate notice was given, 3) the causation of the injuries alleged, 4) the liability of the employer/insurer for past medical bills, 5) the liability of the employer/insurer for future medical treatment, 6) the liability of the employer/insurer for past temporary total disability benefits for the period of May 8, 2002, through July 7, 2002, and 7) the nature and extent of permanent partial disability.

FINDINGS OF FACT

The claimant, Linda Nowlin, was employed by Nordyne on the night shift on the evening of January 4, 2001; Ms. Nowlin alleges that she felt abdominal pain while lifting 20-pound doors two at a time from a bin. Ms. Nowlin sat down for the remainder of her shift, one-half hour, until 3:30 a.m., when she left. Ms. Nowlin went to the University of Missouri emergency room where she was scheduled for surgery at 6:00 a.m. on January 5, 2001, and sent home pending the surgery.

Ms. Nowlin had a hernia repair on January 5, 2001, and returned to work at Nordyne, Inc., on February 17, 2001.

On May 7, 2002, Ms. Nowlin was working at Nordyne, Inc., putting wiring on air conditioner circuit boards. Ms. Nowlin and a co-employee lifted an air conditioning unit to separate it from another unit on the assembly line when Ms. Nowlin alleges she felt a burning pain in her abdomen. Ms. Nowlin went home, walking off the job, because of her pain and because she wanted to avoid flood water.

Ms. Nowlin returned the next day to talk to Charlie Melkersman, human resources manager, but was taken to Ms. Twenter, who terminated Ms. Nowlin. Ms. Nowlin stated that she never followed up with Mr. Melkersman because she reported her May 7, 2001 work injury to his secretary.

Mr. Melkersman testified that his secretary did not report that Ms. Nowlin had sustained an injury resulting in a hernia.

The records of Dr. J. Ruplinger, Ms. Nowlin's family physician, reflect Ms. Nowlin's visit for a follow-up appointment for abdominal and back pain on May 17, 2002. This is presumably a follow up to an April 22, 2002 visit with Dr. Ruplinger for complaints of back pain. The "chief complaint" states "follow up"; there is no mention of an accident or work incident other than the notation "fired from prior job."

A May 20, 2002 emergency room record for Ms. Nowlin from the University Hospital and Clinics documents an emergency room visit for complaints regarding the umbilical hernia for the past year and a half.

Ms. Nowlin had surgery to repair her umbilical hernia in June of 2003 and again in November of 2003 to repair mesh placed in June of 2003.

Dr. Jerome Levy evaluated Ms. Nowlin on November 16, 2004, regarding her May 7, 2002 injury. Dr. Levy referred to Ms. Nowlin's January 2001 umbilical hernia surgery and to Ms. Nowlin's being seen again "on May 20, 2002, after the hernia repair had broken down in that month." Dr. Levy opined to a twenty-percent (20%) disability of the body as a whole sustained by Ms. Nowlin as the result of her May 7, 2002 injury.

Dr. Russell Cantrell, Orthopedic and Sports Medicine, Inc., evaluated Ms. Nowlin on April 25, 2005, and reviewed her medical records and issued a report of the same date regarding his findings. Dr. Cantrell concluded that Ms. Nowlin sustained a work-related umbilical hernia in January of 2001; however, Dr. Cantrell did not believe that Ms. Nowlin sustained a hernia injury as the result of her work at Nordyne in May of 2002. Dr. Cantrell attributed a five-percent (5%) permanent partial disability to Ms. Nowlin's recurrent umbilical hernias.

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APPLICABLE LAW

Section 287.420 of the Missouri Revised Statutes states, in pertinent part, as follows:

“No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of injury, and the name and address of the person injured, have been given to the employer as soon as practicable after the happening thereof but no later than 30 days after the accident . . .”

The purpose of the statutory requirement to give the employer written notice of an injury within 30 days is to give the employer a timely opportunity to investigate facts pertaining to whether the accident occurred and to provide medical attention to minimize disability. Soos v. Mallinckrodt Chemical Company (Mo. App. E.D. 2000) and Willis v. Jewish Hospital, 854 S.W. 2d 82 (Mo. App. E.D. 1993).

AWARD

The claimant, Linda Nowlin, has failed to sustain her burden of proof that she provided notice to her employer of a work-related injury on May 7, 2002. Ms. Nowlin admitted that she did not tell anyone in a supervisory capacity of her work injury, stating only that she told Mr. Melkersman's secretary. Mr. Melkersman denied being told of Ms. Nowlin's injury. Lending credibility to Mr. Melkersman's denial that he was notified of Ms. Nowlin's alleged work-related injury is the absence of any contemporaneous medical record supporting Ms. Nowlin's claim that she sustained a work related injury May 7, 2002.

All other issues raised for resolution are hereby rendered moot.

Date: February 14, 2006

Made by: /s/Hannelore D. Fischer
HANNELORE D. FISCHER
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secret
Patricia "Pat" Secret, *Director*
Division of Workers' Compensation

[1] Presumably, the year intended was 2001.