

FINAL AWARD DENYING COMPENSATION
(Affirming Award of Administrative Law Judge with Supplemental Opinion)

Injury No.: 05-105298

Employee: Darren Ottobre
Employer: Timberlake Care Center
Insurer: Missouri Nursing Home Insurance Trust
Date of Accident: September 30, 2005

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 July 5, 2006. The award of Administrative Law Judge Emily Fowler is attached hereto for reference. Except as indicated otherwise below, this Commission adopts the Findings of Fact as set forth in the award.

INTRODUCTION

Administrative Law Judge Fowler's award found that employee's testimony was not credible and held that employee did not sustain a compensable accident or injury arising out of and in the course of employment on September 30, 2005. The award, thus, denied employee's request for benefits. Employee filed an Application for Review with the Commission.

DISCUSSION

We agree with the administrative law judge's ruling; however, because our reasoning is somewhat different, we will set forth those differences.

The applicable provisions of section 287.020 RSMo. in effect at the time of the incidents relevant to this matter read as follows:

2. The word "accident" as used in this chapter shall mean 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.
3. (1) In this chapter the term "injury" is hereby defined to be 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.

(Emphasis added.)

Thus, employee had the burden of proving that he sustained an identifiable accident and that the accident was the prevailing factor in causing his back problems and any resulting disability. We conclude that employee has not satisfied his burden of proving that an accident occurred on September 30, 2005.

While the administrative law judge found that employee's testimony was not altogether credible, she nonetheless seems to accept that an event occurred on September 30, 2005, that triggered a prior back problem. We are not so persuaded.

As noted in the Final Award, the information that employee provided to his physicians changed regarding the event that allegedly caused his back trouble and the progression of pain during the course of a day. Employer's witnesses also pointed out discrepancies in employee's stories. Employee had told another employee that he previously hurt his back

lifting weights. As early as March 2005, employee had made inquiries about the new medical insurance coverages because of his previous back problems. In July or August 2005, employee had even called the insurance company to ask about a specific back procedure called IDD. Employee testified that he did so only out of curiosity.

Employee also testified that his previous trip to the chiropractor on approximately September 7, 2005, was due to power washing at work. Yet, employee never told his supervisor that such work was causing him pain. The chiropractor's notes similarly reveal no cause for employee's low back pain. Furthermore, even though the chiropractor's notes reveal that employee was suffering unbearable and constant pain at the time of this visit, employee contends he was symptom-free after that time and up until September 30, 2005.

These types of discrepancies lead us to a finding that employee's testimony about his September 30, 2005 accident was not credible. Accordingly, since employee has not proved that he suffered an identifiable accident at work on September 30, 2005, the administrative law judge's award to deny him benefits should be affirmed.

DECISION

The Commission affirms the award of the administrative law judge dated July 5, 2006, and awards no compensation.

Given at Jefferson City, State of Missouri, this 23rd day of March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Darren Ottobre

Injury No. 05-105298

Dependents: N/A

Employer: Timberlake Care Center

Insurer: Missouri Nursing Home Insurance Trust

Additional Party: N/A

Hearing Date: June 2, 2006

Checked by: MSS/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.

3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: September 30, 2005
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Employee stated that while he was lifting a lawnmower out of the back of a pickup truck to set it down on the ground he felt a pulling in his back causing the injuries he complained of.
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: Body as a whole.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$2,050.56.
17. Value necessary medical aid not furnished by employer/insurer? \$None.
18. Employee's average weekly wages: \$468.75.
19. Weekly compensation rate: \$312.50/\$312.50.
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: None
 22. Second Injury Fund liability: None.
 23. Future requirements awarded: None.
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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Darren Ottobre

Injury No: 05-105298

Dependents: N/A

Employer: Timberlake Care Center

Insurer: Missouri Nursing Home Insurance Trust

Additional Party: N/A

Hearing Date: June 2, 2006

Checked by:MMS/lh

On June 2nd, 2006, the Employee and the Employer appeared for a hardship hearing. The Employee, Darren Ottobre, appeared in person and was represented by John Redmond. The Employer/Insurer was represented by Patrick Reidy.

STIPULATIONS

1. That on or about September 5th, 2005, the Employer was an employer operating subject to the Missouri Workers' Compensation law and its liability was fully insured by Missouri Nursing Home Insurance Trust;
2. That Darren Ottobre was its employee working subject to the law in Kansas City, Jackson County, Missouri, and that Employee's contract for employment was made in Missouri;
3. That the Employee notified the Employer of his alleged injury as required by law;
4. That the Employee's claim was filed within the time allowed by law;
5. That the parties stipulated to an average weekly wage of \$468.75 resulting in a compensation rate of \$312.50 for temporary total and \$312.50 for permanent partial disability compensation;
6. That the Employer has paid no temporary total disability compensation to date.
7. That the Employer has provided medical care costing \$2, 050.56.
8. That the Employee does not seek reimbursement for medical expenses.

ISSUES

The parties request the Division to determine:

1. Whether the Employee sustained an accident or occupational disease arising out of or in the course of his employment;
2. Whether the Employee is entitled to temporary total disability benefits from December 16th, 2005, to present day;
3. Whether the Employer must provide the Employee with additional medical care.

FINDINGS AND RULINGS

The Employee testified on his own behalf and presented the following exhibits, all of which were admitted in evidence without objection.

- A. Eckert Chiropractic Center (9/7/05);
- B. OHS Comp Care;
- C. MRI dated 11/10/05;
- D. Kansas City Pain Center (12/16/05)
- E. Narrative medical report of Ronald Zipper, D.O., (3/31/06);
- F. Curriculum vitae of Ronald Zipper, D.O

The Employer presented the live testimony of Michelle Peterson, who is a speech pathologist at Timberlake Care Center, Kevin Robertson, a maintenance supervisor at Timberlake Care Center, and Marsha Sanders, a representative of Claridge Insurance Agency. The Employer further offered the following exhibits which were admitted into evidence over Employee's objection:

1. Statement by Marsha Saunders (11/22/05).

Darren Ottobre (hereinafter referred to as Employee) testified that he was 31 years old at the time of hearing, living in Raymore, Missouri. He had been an employee of Timberlake Care Center from approximately September 1st of 2004 and was ultimately laid off on December 2nd of 2005. His job title was as maintenance assistant, which required him to do complete building maintenance and grounds maintenance inside and out. He did everything from deal with leaks in the roof to electrical problems as well as mowing and other outdoor grounds activities. He was given a pre-employment physical where he stated he had no back problems, had had no injuries and had no medical treatment for his back. On approximately September 7th of 2005 he sought chiropractic treatment, stating that he was having complications in his back from work duties. He was doing a lot of power washing over a two to three week period, approximately four hours each morning. He also was required to take doors off and plane them down and reattach them, all requiring heavy lifting. He began having a dull ache in his back and his hamstrings were getting tight and his pain would progress as the day went on. He went to the chiropractor one time and had an adjustment and never went back, stating that he did not have to go back again. He testified that he spoke to Marsha at Blue Cross and Blue Shield about possible treatments for his back. He also spoke to a physical therapist named Dee at Timberlake Care Center about exercise regimens for his low back and hamstring problems, wanting to have stretching exercises to see if that would help him. He stated that when he spoke to Dee there was nobody else in the area. He was asked about whether he had spoken to a Michelle Bradford. He stated he had never told her that he had hurt himself lifting weights. He also stated that he had never seen a doctor for his back problems prior to this time. He admitted that he was involved in outside activities including playing tennis and weightlifting. He quit doing any weightlifting after his treatment at Eckert Chiropractic on November 7th, 2005. He stated that his supervisor, Kevin Robertson was not present on September 30th of 2005 and he never told him what happened and was never asked about how he hurt his back, and he also stated he never told Mr. Robertson he hurt his back weightlifting.

On September 30th of 2005 Employee stated his normal work duties on Friday were to mow the courtyard area, which required loading the mower into the back of a pickup truck, driving it the particular building and pushing it through the building to mow the courtyard. This lawnmower weighed approximately 75 to 80 pounds and he encountered a problem when he was unloading it. He pulled it off the back of the pickup and bent his knees to kneel down to lower it to the ground and felt a pulling or snapping sensation in his back but didn't feel any pain right away. He took a lunch break and after the lunch break was over, approximately 30 minutes later, tried to get up and had extreme pain in his back and what he described as inflammation around his hips and a burning sensation as well as pain in his legs. He said that this had never happened before and he did report it to his employer who sent him to OHS Comp Care. His legs were bothering him and there was a swelling feeling. He eventually had pain down to his feet, which occurred after he was required to go up to the attic and do some work in the attic crawling around. He was sent to physical therapy and they suggested he might have a

disc bulge. An MRI was suggested and he stated it did show a disc bulging of the L4-L5 and L5-S1 level and that additional medical treatment was suggested. He was referred to the spine center for epidural injections. At that point his medical care was discontinued by the Employer. He went on his own to get an epidural injection from Dr. Chaplick. He stated it did not help him and it was extremely painful.

His current complaints included spasms down to the bottom of the spine, fatigue and numbness, tingling down to both feet and his feet are cold and sweaty. He attempted to take a job with DirecTV in March. He had three days of training watching videos and then two days in the field so there was not much actual physical requirement at that time and he still could not complete his job tasks. He currently has pain down to his feet and a burning sensation in his hips.

Upon cross examination he was questioned about his enrollment in the Blue Cross- Blue Shield program which he joined after 90 days of employment, sometime in February of 2005. He stated nobody had witnessed his accident. He reiterated he had never said that he'd hurt his back weightlifting. He admitted that he was looking for someone who could talk to him about a procedure called IDD prior to the date of his alleged accident.

In reviewing the additional exhibits presented by the Employee, Exhibit A is the medical records from Eckert Chiropractic Clinic dated September 7th, 2005. He went to the clinic for lower back pain, complaining of a dull ache that was a 10 on a scale of 10 as far as severity of symptoms, that it was a constant problem and getting worse, and had interfered with his work quite a bit. This condition interfered with his social activities most of the time. He noted that he did perform regular strenuous exercise. The date of onset for these back problems was listed as unknown. He had slight difficulty with his carriage and gait and restricted movement but had no antalgic positioning. His flexion was less than 60 degrees with pain. Extension was less than 25 degrees with pain. However, everything else was within normal limits. He apparently had some spasms and tenderness at the L5 level but all other tests were within normal limits.

Claimant's Exhibit B are the medical records from OHS Comp Care dated October 3rd, 2005. In these medical records it is noted that Employee complained that he injured his low back on September 30th of 2005 while pushing a lawnmower, describing that he was taking it out of the back of a pickup truck. He developed low back discomfort, 10 out of 10, that he had not taken any medication up to that point and he was also having cramping on the right side of his neck the day before the exam. The doctor noted that in reviewing the patient's past medical history medical form he did not find any past or present health problems that would adversely impact treatment for this current injury. Dr. Breeden noted that the patient demonstrated an ability to walk on heels and toes with no discernable weakness or reported low back discomfort. He had an active range of motion for lumbar spine as demonstrated to forward bending of 80 degrees to backward bending of 30 degrees, side bending and rotation bilaterally at the waist to 30 degrees, all with mild if any reported low back discomfort. Employee's range of motion was decreased secondary to self-limiting behavior. Standing hip flexion test is normal at 90 degrees bilaterally, seated leg extension test negative at 90 degrees bilaterally and straight-leg raising test was negative to 90 degrees bilaterally. He did report a pulling sensation in the low back with his testing activity. He had no pain or paresthesia to the lower extremities with his testing activity and was able to get up and down from the exam table without acute distress, without need for assistance. X-rays were obtained and showed a normal radiographic study. Disc spaces and foramen were normal. Dr. Breeden felt that he could return to full work duty status. He was encouraged to take Tylenol or ibuprofen as need, to use ice packs for 30-minute intervals with half-hour breaks and to follow up on 10/6 for reevaluation. Dr. Breeden determined that Employee was suffering from a mild lumbosacral strain.

Employee was seen again on 10/6, 10/13, 10/28 and 11/4. With each visit he apparently was having more symptoms, more pain and the problems were slowly working their way down the back of his legs to his knees. On 10/6 of 2005 he stated that in the morning the pain felt just okay, just low-level soreness on the right side of the lower back but after working all day he felt a lot of pain, especially in the evening. However, on 10/28 of 2005 he stated that he was very stiff in the morning and then if he got up moving around through the day he then felt a little better. Over this time period of examination Employee continued to complain that he was getting worse until Dr. Hallgrimson recommended an MRI which was performed on November 10th, 2005. The MRI revealed that the vertebral bodies are normal in height. A small vertebral body hemangioma was noted at S1. Changes of disc desiccation are at L4-L5 and L5-S1. No conus abnormality was appreciated. The final impression was that there was a disc desiccation and mild disc protrusions at L4-L5 and L5-S1. Dr. Doris Zhong saw him finally on November 11th of 2005 recommending he follow up with a spine center for possible epidural injection. Employee was seen at the spine center on December 16th, 2005, whereupon he was given an epidural injection by Dr. Chaplick.

Claimant's Exhibit E is a rating report by Dr. Zipper who describes Employee's problems prior to the date of injury as well as the injury itself and did a physical exam on Employee as well as reviewing the records of OHS Comp Care, Eckert Chiropractic and Diagnostic Imaging Center. Dr. Zipper opined that based on the history, physical examination and

review of the records he felt there was no symptom magnification on symptom distraction testing, that Employee, by his history, sustained a lumbar strain with at least a referred pattern of disc injury to his low back in late August or early September of 2005 preceding the evaluation treatment by Dr. Eckert. The Employee sustained lumbar radiculitis with broad-based herniated disc at L4-L5 and right sided herniated disc at L5-S1 with thecal indentation at both levels and the radiculitis following the September 30th, 2005, date of injury. He felt that both injuries occurred while employed at Timberlake Care Center and felt that Employee was not at maximum medical improvement. Dr. Zipper recommended that Employee have no repetitive bending at the waist, no pushing or pulling on an occasional basis of greater than 50 pounds, no lifting from floor or knuckle height of greater than 35 pounds occasionally and no working at heights. He recommended Employee should take non-steroidal anti-inflammatory medications and if there is no improvement an EMG/NCV should be obtained. Dr. Zipper also opined a rating of 8 percent whole person impairment.

Employer's evidence included the testimony of Michelle Peterson who is a speech pathologist at Timberlake Care Center and has worked there for the past four years. She described a day when Employee came into the department early in the morning to speak to Dee. She believed it was sometime in the first week of September 2005. She remembers it because it was the week before the MS150. She was sitting at a desk right next to Dee's desk and overheard the conversation that Employee had with Dee. She described a conversation wherein Employee discussed having back trouble, that he'd hurt his back previously lifting weights and wanted to have hot packs and have Dee show him some different stretches. Dee pointed out that she could not do any treatment without a doctor's approval but was willing to show him some stretches for his back. On another date which is not clear she stated that she was outside spray painting some chairs and asked for some help and Employee said he couldn't help bring the chairs in because his back was bothering him. On cross examination Miss Peterson reiterated that Dee and herself were present when Employee talked to Dee. When asked exactly what words were used she stated that he had said previously he had hurt his back lifting weights and it was hurting again. She said that she talked to a Doug Holt in the administration and that she wrote up a version of her conversation with Employee. She stated that Dee left in October of 2005 and is now the manager of another health care facility. She admitted she had no personal knowledge of the injury and that she had heard about it later as Employee was on light duty.

The next witness for the Employer was Kevin Robertson. He had been working for Timberlake Care Center for approximately 12 years as a maintenance supervisor. He admitted that sometimes they worked together and sometimes they did tasks separately, as there is nobody else in the maintenance department. He recalled changing over to Blue Cross and Blue Shield in February or March of 2005 when a salesperson came in and signed people up on the new insurance. He stated that Employee had talked to him about the insurance program because Employee wanted to know whether or not there was chiropractic treatment available, stating that he had had back problems before and wanted to know if the insurance would cover chiropractic. This conversation took place approximately two or three weeks after the change which occurred in February or March of 2005. He stated that Employee was a good employee. He admitted that in late summer of 2005 he and Employee were doing power washing on the buildings sometime in late summer, around in August, and which went on for approximately two or three weeks. He said that Employee never complained to him about his back bothering him because of the power washing. He does not know anybody who witnessed Employee's accident and learned the next working day that it had occurred. He stated that Employee told him how the accident had happened, when he was loading a mower into the pickup. There was no written policy as to how the mower should be loaded or how the mower should be taken to the buildings or through the buildings. Employee never told him he hurt his back lifting weights. On cross examination Mr. Robertson stated that the Employee had told him he was interested in chiropractic coverage because he said his back was bothering him and he had seen chiropractors before.

Employer's final witness was Marsha Sanders from Claridge Insurance Agency. They became the insurer for Employer in approximately February of 2005 during the open enrollment. She said Employee called her office sometime in July or August of 2005 asking her about a procedure called IDD (Intra Disc Decompression) and whether or not she could help find a provider who could explain it to him. There were numerous telephone calls back and forth. She stated she found a chiropractor that did the procedure. He had mentioned to her that his back was bothering him but didn't explain exactly why, just that he had seen a provider who suggested that particular procedure. She stated she was asked to provide a statement, which she did, which was admitted as Employer's Exhibit 1. On cross examination she confirmed that the conversations were in July or August and that she had found one provider, a Dr. Epple, who gave the procedure, it could have been a Dr. Eckert but she wasn't sure.

Finally there was a recall of Employee confirming that he had heard Miss Sanders testify, and that the conversations were in July or August. He reiterated that Miss Peterson was not present during his conversations with Dee and further the power washing did cause him back problems.

The first issue to be determined is whether Employee sustained an accident or occupational disease arising out of and in the course of employment. The evidence herein shows that there are two possible scenarios with regard to what caused

Employee's back problems. The first one was when Employee was power washing in July or August of 2005 when he started complaining of problems with his back and a subsequent time, September 30th of 2005, when he lowered the mower to the ground, feeling a sudden onset of pain. Employee sought treatment for his back September 7th of 2005 complaining of pain which was 10 out of 10 on a scale of 1 to 10, that was constant, was interfering with his work and his social activities. However, in the medical records there is no explanation for what caused this back pain. Employee then sought medical treatment after September 30th, stating that he had injured his back lifting a mower and that again his back pain was 10 out of 10 and his symptoms continued to get worse over time. There is also testimony from Employer's witnesses that showed that Employee spoke to a physical therapist about back exercises because his back was bothering him due to weight lifting. There is also evidence from the Employer through Miss Sanders that Employee was questioning procedures for the back as early as mid-summer, July or August of 2005, and further that in speaking with Mr. Robertson in February of 2005 was asking about chiropractic coverage for back problems. This Court does not question that Employee has some type of back problems as shown by MRI which showed disc desiccation as well as a possible tear and bulges at L4-L5 and L5-S1. The biggest problem this Court has is determining exactly where those problems came from and when they initially occurred. It is clear to this Court that Employee has a history of back problems. The Employee's pleading in his claim states that they occurred due to lowering a mower to the ground from the back of a pickup truck with a sudden onset of pain. However, there is medical evidence as well as witness evidence that Employee had back problems well preceding that date. Therefore, although this Court may believe that Employee could have sustained some type of injury to his back while lowering the mower to the ground from the back of a pickup truck, this Court also believes that Employee had serious back injury prior to this time. The accident on September 30, 2005 appears to have been merely a precipitating or triggering factor and not the substantial factor regarding his injuries. Employee states that the one chiropractic treatment took care of his back problems in early September but there is simply too much evidence showing that Employee had constant and recurring problems to his back and constant questioning as to whether he could get coverage well prior to the alleged injury date of September 30th, 2005. This Court does not find Employee's testimony credible. His symptoms as reported in the medical records were not consistent. His explanation that he was just curious about the IDD procedure is too convenient and appears ingenious in the face of the other evidence regarding his recurring back problems. This court does find Employer's witnesses credible. They were not confused on dates or times, their testimony was clear and concise. In the case of Ms. Sanders her testimony tracked that of her former written statement. Wherefore this Court finds that Employee did not sustain an accident or injury on September 30th, 2005, arising out of and in the course of employment that would be compensable.

The other two issues with regard to unpaid temporary total disability benefits and provision of additional medical care by Employer to Employee are hereby rendered moot as this Court finds that there was no accident or injury that is compensable on September 30th of 2005. Wherefore this Court denies benefits to Employee.

Date: _____

Made by: _____

Emily Fowler
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation