

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

Injury No.: 06-077430

Employee: Roger Patterson
Employer: Midstate Painting & Drywall
Insurer: American Home Assurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)
Date of Accident: Alleged February 6, 2006
Place and County of Accident: St. Louis

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 June 4, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued June 4, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and 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 failed to meet his burden proving that he gave proper notice under section 287.420 RSMo (2005).

Section 287.420 RSMo (2005), provides:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

If employee fails to provide employer written notice, it is employee's burden to show that the employer was not prejudiced by the failure to give timely notice. Therefore, employee's failure to provide written notice may be excused if employee demonstrates that employer was not prejudiced by his failure to do so. Employee met his burden as he was able to show that he verbally reported his back condition to employer which put employer on notice of his occupational disease. Employee testified that he met with the owner and his supervisor to report his back condition and informed them at that time that he was being referred to a neurosurgeon. Employee testified that he asked his treating neurosurgeon, Dr. Kennedy, if his back condition could be work-related and Dr. Kennedy told him that his employment could have caused his condition. Employee testified that he reported this information to the owner within a couple of days of his appointment with Dr. Kennedy. Therefore, employer was provided actual notice within the thirty day time frame.

The purpose of giving employer notice of a potentially work-related condition is to allow the employer the opportunity to conduct a timely investigation and to minimize any resulting disability by providing medical attention. Since employer had actual notice of employee's condition it was not prejudiced by employee's failure to provide written notice. Employer was neither deprived of its opportunity to timely investigate the facts surrounding the occupational disease or the opportunity to control medical treatment. I find employee credible and believe the evidence shows that employer was not prejudiced by employee's failure to give written notice as he did provide employer with actual notice of his condition.

Section 287.067.3 RSMo (2005), provides:

An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.

Employee met his burden by establishing that he contracted an occupational disease. Through expert testimony, employee was able to establish that his employment was the prevailing factor in causing his resulting medical condition and disability. Dr. Kennedy, employee's treating surgeon, testified that employee's duties exposed him to the contraction of an occupational disease. Dr. Kennedy testified that employee's back condition was medically causally related to his work activities and that his work was the prevailing factor in causing his condition. There is sufficient evidence to establish that employee's employment was the prevailing factor in the development of his back condition.

Furthermore, employee has shown that he is entitled to payment for past medical expenses. Dr. Kennedy testified that the treatment employee received was necessary and reasonable to cure and relieve him from the effects of the occupational disease. Employee offered into evidence the medical bills that were the product of his work-related condition and provided testimony relating the medical bills to his condition. Therefore, an award of past medical expenses is justified.

Additionally, employee is entitled to future medical care and treatment. Employee testified that he has not been released by Dr. Kennedy and that Dr. Kennedy referred him to Dr. Feinberg for further medical care and treatment. Employee testified that he is still seeing Dr. Feinberg for treatment for his work-related condition. Employee has shown by reasonable probability that he is in need of additional medical treatment as a result of his work-related condition.

Based on the foregoing, I conclude that employee provided notice to employer by reporting his condition; that employee's work was the prevailing factor in causing the resulting medical condition; and that employee is entitled

to past medical expenses as well as future medical care and treatment.

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

John J. Hickey, Member

AWARD

Employee:	Roger Patterson	Injury No.:	06-077430
Dependents:	N/A		
Employer:	Midstate Painting & Drywall		
Additional Party:	Second Injury Fund (Dismissed)		
Insurer:	American Home Assurance		
Hearing Date:	April 18, 2007	Checked by:	MDL:tr

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
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? N/A
4. Date of accident or onset of occupational disease: Alleged February 6, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
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:
Employee alleged repetitive injury to his back from installing drywall.
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: Alleged low back
14. Nature and extent of any permanent disability: -0-
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee:	Roger Patterson	Injury No.:	06-077430
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- 17. Value necessary medical aid not furnished by employer/insurer? \$120,672.99
- 18. Employee's average weekly wages: \$562.94
- 19. Weekly compensation rate: \$375.29/\$365.08
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None

- 22. Second Injury Fund liability: No

- TOTAL: -0-

- 23. Future requirements awarded: None

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Roger Patterson	Injury No.: 06-077430
Dependents:	N/A	Before the
		Division of Workers'
		Compensation
Employer:	Midstate Painting & Drywall	Department of Labor and Industrial
Additional Party:	Second Injury Fund (Dismissed)	Relations of Missouri
		Jefferson City, Missouri
Insurer:	American Home Assurance	Checked by: MDL:tr

PRELIMINARIES

A hearing was held on April 18, 2007, at the Division of Workers' Compensation in the City of St. Louis. Roger Patterson (Claimant) was represented by Mr. Dean Christianson. Midstate Painting & Drywall (Employer) and its Insurer, American Home Assurance, were represented by Mr. John Dietrick. Although the Second Injury Fund is a party to this case, pursuant to the temporary nature of this proceeding, the Fund did not participate at the hearing and the claim against the Second Injury Fund is dismissed. Mr. Christianson requested a fee of 25% of any benefits awarded.

The parties stipulated that on or about February 6, 2006, Claimant was earning an average weekly wage of \$562.94 resulting in applicable rates of compensation of \$375.29 for total disability benefits and \$365.08 for permanent partial disability benefits. Employer denied this case and has paid no benefits.

The issues for resolution by hearing are whether Claimant gave requisite notice pursuant to §287.420 RSMo (2005); whether Claimant sustained an occupational disease arising out of and in the course of employment; medical causation; liability of Employer for past medical benefits of \$120,672.99; whether Employer is liable for future medical treatment; and whether Claimant is entitled to temporary total disability benefits from February 2, 2006 to the present.

SUMMARY OF EVIDENCE

Live Testimony

Claimant is a 24 year old male who last worked for Employer in February 2006. Claimant began working for Employer approximately five to six years ago. Claimant worked as a drywall hanger. His responsibilities included lifting heavy drywall weighing from 95 to 112 pounds. After hanging the drywall, Claimant was required to nail it and screw it into the wall. Claimant normally did from 30 to 35 sheets of drywall a day. If the drywall sheets were 6 to 7 feet or shorter, Claimant would do the entire job by himself. If the sheets were longer, he would get a partner. Installing drywall required Claimant to get into awkward positions. It required squatting and twisting, and lying on his stomach or flat on his back.

Claimant first remembers having back problems approximately three and one-half years ago. It felt like his back was out of alignment, or he had a slightly pinched nerve. Leading up to February 6, 2006, Claimant was having bladder problems. In early February 2006, Claimant first sought treatment with a chiropractor, Dr. Carpenter. Dr. Carpenter called Claimant's doctor who referred him to the emergency room. Claimant reported to the emergency room, and an MRI and CT scan were performed. Claimant was taken off work.

Before Claimant went to Dr. Carpenter, he testified he notified his supervisor, James Patterson, who is also his father. Claimant testified he told his father he was going to see a chiropractor because his back was out of alignment. He testified he made an appointment, then called his father at home, and told him the next morning at the shop, and his father told him that was fine. Claimant testified after he had an MRI, he went to a neurologist at Jefferson Memorial Hospital who showed him that he had a slightly herniated disc, but told him not to worry because he had spinal stenosis. Claimant testified after he learned he had a slightly herniated disc he told Tim Logan, the owner of the company, as well as his father about the findings. After informing his Employer about the findings, he went to see Dr. Shaw, and was then referred to Dr. Kennedy.

Claimant testified Employer did not direct him to medical treatment, and he did not ask to be sent for treatment. Claimant saw Dr. Kennedy in mid to late February or early March 2006. Claimant testified Dr. Kennedy took him off work the first time he saw him. Claimant testified Dr. Kennedy told him his injury was work related, so he then spoke to Tim Logan and told him it was a herniated disc, and it was work related. He asked Mr. Logan if he could fill out paperwork, and Mr. Logan told him no because he was being treated for spinal stenosis. Claimant testified he did not fill out any paperwork.

Claimant testified Dr. Kennedy referred him to Dr. Feinberg for conservative treatment. He received two epidural steroid injections, neither of which did him any good. He also had a nerve root block injection, which

didn't help. The conservative treatment was followed by a myelogram and CT, then a discogram. Following the diagnostic tests, he had surgery. The first time he was admitted for surgery, they went in through his stomach and tried to do a fusion, but that didn't work and he was discharged. Two days later, he returned to the hospital and they did the fusion through his back.

Following his surgery, Claimant had physical therapy, and he remains under the care of Dr. Kennedy. He is currently having physical therapy twice a week. Claimant has not returned to work since February 2006, and as far as he knows Dr. Kennedy has him on a 60-pound weight restriction.

Claimant incurred numerous hospital and medical bills in connection with this injury. Claimant testified all of the medical bills in evidence were incurred as a result of his back problems, with the exception of a bill from Prevention First on May 25, which was for an EKG which was erroneously performed on Claimant when he appeared at the wrong office.

Currently, Claimant's back hurts constantly. It has affected his right hip and his motion. He is unable to do a lot of walking. His hip and back keep him from doing housework, laundry, and cooking. Almost any activity he performs makes his back worse. Claimant testified he had a couple of auto accidents in the past, but he never hurt his back in those accidents.

Tim Logan testified on behalf of Employer. Mr. Logan owns Midstate Painting & Drywall and has been in business for 25 years. In February 2006, Mr. Logan had between 30 and 40 employees. He knows Claimant because Claimant has worked for him for three years. Mr. Logan testified the first week of February 2006 was the last time Claimant worked for him. Mr. Logan is responsible for workers' compensation in his company. He is the person to whom workers should report injuries. During his employment, Claimant never reported any low back problems to Mr. Logan that were related to his work.

The first time Mr. Logan became aware Claimant was injured was when Claimant and his supervisor, who is his father, came in for a meeting because of Claimant's work absences. Mr. Logan testified Claimant told him he had an injury, but it was not work related. This meeting took place on February 15, 2006, at 7:35. Mr. Logan testified it is his practice to always have witnesses at meetings with employees, and to never meet with an employee by himself. In August 2006, Mr. Logan was informed Claimant had retained an attorney and he was claiming a work related injury. At that time, Mr. Logan notified his insurance company. Before August 2006, Mr. Logan never had a conversation with Claimant about Claimant meeting with Dr. Kennedy. Mr. Logan always takes notes and puts them in employee's files. When someone reports a work injury to Mr. Logan, he automatically contacts his insurance company or calls 911 if it is an emergency. Mr. Logan testified he never spoke to Claimant, and Claimant never made a request in writing for medical treatment for a work related injury.

Medical Evidence

On February 2, 2006, Claimant reported to the emergency room at Jefferson Memorial Hospital with a chief complaint of lower back pain. At that time, Claimant had some right leg and knee pain with occasional right leg numbness, and difficulty controlling his bowels, and urinary incontinence. Claimant reported that he had an MRI at Vista Imaging a couple of months before which revealed a small herniation. A repeat MRI was ordered and Claimant was advised to follow up, if necessary, with the Neurosurgery Clinic at Barnes. Claimant was given work restrictions through February 7, 2006.

An MRI performed on February 6, 2006, revealed mild posterior disc protrusion at T11-12, L2-3 mild posterior disc protrusion, relatively prominent posterior disc protrusion at L3-4, milder central posterior disc protrusions at L4-5 and L5-S1, and spinal stenosis changes as noted.

Dr. Kennedy first saw Claimant on February 21, 2006. He reviewed the February 6, 2006, MRI and diagnosed lumbar radiculopathy with documented disc herniation. Dr. Kennedy referred Claimant for epidural steroid injections. After Claimant did not improve following his injections, Dr. Kennedy recommended a lumbar myelogram which was performed on March 22, 2006. The impression was stenosis, a little more prominent at L3-4 than at L4-5. A post-myelogram CT revealed overall smallish lumbar canal and mild multilevel stenosis, more prominent at the L3-4 level. On April 25, 2006, Dr. Kennedy ordered a discogram. Following the discogram, Dr.

Kennedy attempted to perform a fusion on June 5, 2006, but was unable to complete it. On June 8, 2006, Claimant underwent an L3-4 laminectomy, a facetectomy, foraminotomy, insertion of cage with pedicle screw fixation and fusion at L3-4, and left iliac bone graft with bone marrow aspiration. Following his surgery, Claimant underwent physical therapy and continues to treat with Dr. Kennedy.

Dr. David Kennedy, a board-certified neurosurgeon, testified on behalf of Claimant. Dr. Kennedy testified Claimant has a congenital abnormality in which he has a smaller than average spinal canal diameter, which normally isn't a problem, but Claimant doesn't have much margin for disc bulges. Dr. Kennedy testified it doesn't take much disc abnormality to produce symptoms in that context. Dr. Kennedy testified the discogram revealed Claimant had an annular tear at L3-4. Dr. Kennedy testified Claimant had annular tear with internal disc derangement, and subsequent radiculopathy. Dr. Kennedy testified Claimant's work as a drywall hanger was the prevailing factor in causing that injury. He testified Claimant's treatment was reasonable and necessary to cure and relieve from the effects of that injury. He further testified the bills and payments for the care and treatment of Claimant was reasonable and necessary to cure and relieve the effects of the diagnosis.

Dr. Peter Mirkin testified on behalf of Employer. Dr. Mirkin is board-certified in orthopedics. Dr. Mirkin examined Claimant on January 26, 2007. Based upon the history given by Claimant, Dr. Mirkin's physical examination, and review of the records and deposition testimony as well as the x-rays, Dr. Mirkin diagnosed degenerative spine disease, some spinal stenosis noted by the small spinal canal that is documented on his radiographs. Dr. Mirkin also diagnosed a disc protrusion that contributed to the spinal stenosis at L3-4. Dr. Mirkin testified Claimant's work activities for Employer were not the prevailing factor in his low back condition. Dr. Mirkin based his opinion on the fact Claimant did not relate a specific incident that happened during his work activities. Dr. Mirkin did not believe that the repetitive drywall hanging was the mechanism of herniating a disc. Dr. Mirkin testified that in his opinion the repetitive nature of Claimant's drywall activities were not the prevailing factor in his low back condition. After rendering his first report, Dr. Mirkin had the opportunity to review Claimant's MRI. Dr. Mirkin testified that the MRI revealed Claimant has degenerative disease at multiple levels in his back, and stenosis at several levels which substantiated his initial opinion.

RULINGS OF LAW

Based upon my observation of Claimant at hearing, the review of the medical evidence, and the application of Missouri law, I find:

Notice

Section 287.420 RSMo (2005) states as follows:

..."No proceedings for compensation for any occupational disease or repetitive trauma under this Chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice".

No written notice of the time, place, and nature of the injury and the name and address of Claimant was provided to Employer within thirty days after the diagnosis of Claimant's low back condition.

The first time Claimant's back condition was diagnosed was at Jefferson Memorial Hospital on February 2, 2006. At that time, he was diagnosed with back pain with radiculopathy as well as urinary and bowel incontinence. Therefore, Claimant would have had thirty days from February 2, 2006 in which to provide Employer with written notice, and he failed to do so. Claimant testified Dr. Kennedy informed him his condition was work related in late February or early March 2006. Even using Dr. Kennedy's date of diagnosis in late February or early March 2006, Claimant still did not provide notice to Employer within thirty days. The first written notice provided to Employer was the filing of the Claim for Compensation on August 24, 2006. Consequently, Claimant has not met his burden of notifying Employer in writing of this injury in a timely manner. The provisions of Chapter 287 shall be

strictly construed. Section 287.800 RSMo 2005.

Claimant has failed to prove Employer was not prejudiced by the failure to notify. Employer testified that typically once notice is provided, depending on the circumstances, they would either send an injured worker out for emergency care, or direct them to the insurance company for referral to a physician. Given the lack of notice in this case, Employer did not have an opportunity to control the medical treatment. Claimant admitted he did not ask Employer to send him to a doctor for treatment for the alleged work related condition, and that he went to the emergency room at Jefferson Memorial Hospital and to Dr. Kennedy on his own. Therefore, given the lack of notice, Employer had no opportunity to provide medical treatment to Claimant and therefore lost control of medical treatment under §287.140.1 RSMo 2005.

The evidence taken as a whole establishes Claimant failed to provide the required written notice that he was alleging his low back problems were related to his job for Employer. Since Claimant has not established his burden of proving proper notice under §287.420 RSMo 2005, the Claim for Compensation in this case is hereby denied, and the claim against the Second Injury Fund is dismissed. The remaining issues are moot.

Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation