

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

Injury No.: 06-126435

Employee: Dennis Payne
Employer: Thompson Sales Company
Insurer: Missouri Automobile Dealers Association
Additional Party: 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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 9, 2008, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Victorine R. Mahon, issued December 9, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17th day of September 2009.

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 on 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 and employee should be awarded past medical expenses, future medical care, and temporary total disability benefits.

First, there is no question that employee suffered a disc herniation requiring surgical repair. However, it is my opinion, based upon the medical records, testimony provided, and other evidence presented that employee met his burden of proof regarding causation. In addition, employer failed to show that it was prejudiced by employee's failure to provide written notice of his injury within thirty days following the accident. Therefore, it is my opinion that employee should be awarded past medical expenses, future medical care, and temporary total disability benefits.

The administrative law judge found that employee was injured while shoveling ice on November 17, 2006, but did not find an accident as defined by statute. However, the administrative law judge gave no reasons or rationale for this inconsistent finding.

The word "accident" is defined by section 287.020.2 RSMo. 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...."

In this case, employee was working at the direction of employer, shoveling and clearing employer's premises of ice and snow when he sustained a sudden and unexpected jolt of pain. The pain caused employee to go down on his right knee for a second or two. Tammy Gibson, Jennifer Gibson, and Ryan Payne, all corroborated employee's testimony that following this work-related accident, he suffered severe pain leading up to his emergency room visit in December 2006.

The administrative law judge did "not believe [employee was] lying about having been hurt while shoveling", but she was not persuaded that the incident was the cause of employee's subsequently identified ruptured disc or the need for the surgery on January 6, 2007. The administrative law judge listed the following in support of her belief: "1) [Employee] did not immediately seek treatment, 2) he continued to work without interruption for a period of six weeks, 3) he did not make complaints of continued pain to most of his co-workers or any supervisors, 4) he did not ask for medical assistance, and 5) he sought no accommodation in his job." The most important thing to note about the administrative law judge's "support" is that none of her fabricated criteria are dispositive in determining whether someone incurred a work-related accident. If the administrative law judge found that employee was "hurt" on November 17, 2006, it is only logical to conclude that that incident caused employee's injuries; especially when there was no subsequent event listed in the record that could have caused the injuries and when you consider Dr. Koprivica's opinions.

In Dr. Koprivica's professional opinion, employee tore the annulus of his herniated disc on November 17, 2006. Dr. Koprivica testified that after the accident occurred, employee rested and the symptoms of the annular tear subsided, but employee had continued discomfort which he likened to a pulled muscle. As the disc material leaked from the annulus, the disc material became large enough to put pressure on the nerve root, causing employee to seek medical attention at the emergency room on December 27, 2006, and the disc herniation shown on the MRI of January 1, 2007.

In addition to finding that employee did not suffer a compensable injury, the administrative law judge also found that employee failed to provide his employer with timely notice as required by section 287.420 RSMo.

Section 287.420 provides, in part:

No proceeding 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 day after the accident, *unless the employer was not prejudiced by failure to receive the notice.*

Employee concedes that he did not provide written notice of the injury to employer until January 12, 2007, more than thirty days following the accident. However, under section 287.420, the required timely notice is not required unless employer can show it was prejudiced by not receiving the notice.

Dr. Koprivica's testimony did not rise to the contention, as stated in the administrative law judge's award, that "immediate medical intervention for cervical disc injuries can provide knowledge to protect against further progression of the disc herniation." Dr. Koprivica actually testified that medical treatment of disc herniations needs to occur within 12 weeks of the injury and that the treatment in this case was right in line with what should have occurred. In addition, it was not until after Christmas 2006 that employee's pain became unbearable, and the condition was duly reported to employer on December 28, 2006. There was no evidence employer was prejudiced by failure to receive written notice of the injury within thirty days, or before December 17, 2006, which was on a Sunday, December 18, 2006. Therefore, the fact that employee failed to provide written notice within thirty days following the accident is irrelevant.

For the foregoing reasons, employee is entitled to past medical expenses, future medical care, and temporary total disability benefits. As such, I would reverse the award of the administrative law judge and award employee medical care and permanent partial disability benefits.

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

John J. Hickey, Member

AWARD

Employee: Dennis Payne

Injury No. 06-126435

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependants: Not Applicable

Employer: Thompson Sales Company

Additional Party: Second Injury Fund

Insurer: Missouri Automobile Dealers Association

Medical Fee Dispute: 06-01167 - Dismissed

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: Alleged November 17, 2006.
5. State location where accident occurred or occupational disease was contracted: Alleged Springfield, 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? No.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within the 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: Claimant alleged an injury to his neck while shoveling ice on employer's premises.
12. Did accident or occupational disease cause death? No. Date of death? Not Applicable.
13. Part(s) of body injured by accident or occupational disease: Neck.
14. Compensation paid to-date for temporary disability: None.
15. Value necessary medical aid paid to date by employer/insurer? None.
16. Value necessary medical aid not paid by employer/insurer? None.
17. Value of necessary medical aid paid to date by employer/insurer? None.
18. Employee's average weekly wages? \$457.52.
19. Weekly compensation rate: \$305.01 (TTD)/\$305.01(PPD).
20. Method of computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

Total: 0

22. Second Injury Fund liability: N/A.

23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Dennis Payne

Injury No. 06-126435

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependants: Not Applicable

Employer: Thompson Sales Company

Additional Party: Second Injury Fund

Insurer: Missouri Automobile Dealers Association

Medical Fee Dispute: 06-01167 - Dismissed

Hearing Date: October 29, 2008

Checked by: VRM/meb

INTRODUCTION

The undersigned Administrative Law Judge heard this workers' compensation claim on a hardship setting on October 29, 2008. Claimant Dennis Payne appeared in person and by his attorneys William Powell and Michael Hendrix. Attorney Christina Schoeppe represented Thompson Sales Co., and its insurer Missouri Automobile Dealers' Association, referenced collectively as Employer. The Second Injury Fund did not participate in this proceeding. Attorney Jason Schafer appeared on behalf of the Cox Medical Center in the Medical Fee Dispute. The evidence demonstrated that the medical care Claimant received through Cox Medical Center, for which the medical fee dispute was filed, was not care authorized by Employer. The Medical Fee Dispute is dismissed.

STIPULATIONS

The parties stipulate that on November 17, 2006, Claimant was a covered employee of Thompson Sales, Co., an Employer subject to the Missouri Workers' Compensation Act. Employer was fully insured through the Missouri Automobile Dealers Association self-administered trust. Claimant's average weekly wage was \$457.52, yielding a compensation rate of \$305.01 for both Temporary Total Disability and Permanent Partial Disability. Employer has denied liability for Claimant's injury and has paid no Temporary Total Disability or medical aid. There is no issue with respect to statute of limitations, jurisdiction, or venue.

ISSUES

1. Did Claimant sustain an accident within the course and scope of employment?
2. Is the prevailing medical cause of Claimant's herniated cervical disc and need for surgery a work injury that occurred on November 17, 2006?
3. Did Claimant provide notice as required by statute, and if not, was Employer prejudiced by the lack of such notice?
4. Is Claimant entitled to the 10 weeks of Temporary Total Disability that he claims?
5. Is Claimant entitled to reimbursement of \$67,055.33 in medical bills?

EHXIBITS

The following exhibits were admitted:

Claimant's Exhibits

1. Letter of January 23, 2007 from Insurer to Claimant
2. Wage Statement
3. Deposition – Dr. Brent Koprivica
4. Medical Records – Cox Medical Center
5. Medical Records – St. John’s Health Center
6. Medical Records – SNSI
7. Medical Records – Dr. Kevin Tulipana
8. Medical Expense Summary
9. Medical Bills – Cox Medical Center
10. Medical Bills – Litton & Giddings Radiological Associates
11. Medical Bills – Ozark Anesthesia Associates
12. Medical Bills – SNSI
13. Prescription Bills
14. Cox ER After Care Instructions – January 1, 2007
15. Off -Work Record – January 29, 2007
16. Return to Work Record – February 23, 2007
17. Payroll Records
18. Report of Injury
19. Division Correspondence – January 30, 2007

Employer’s Exhibits

- A. Deposition – Dr. Charles Mauldin
- B. Employee Statement Form
- C. Time Clock Records

Healthcare Provider’s Exhibits

- HCP1 Medical Bill - \$ 2,951.42
HCP2 Medical Bill - \$ 1,000.63
HCP3 Medical Bill - \$ 46,290.04
HCP4 Medical Bill - \$ 632.66

FINDINGS OF FACT

On September 5, 2006, Dennis Payne was hired as a full-time pre-owned car salesperson for Thompson Sales Co., in Springfield, Missouri. On Friday, November 17, 2006, after an ice or snow storm in Springfield, Claimant and other salespeople were directed to clear the cars and sidewalks of snow, slush, and/or ice.

Events from November 17, 2006 to December 26, 2006

Claimant alleges that while throwing a shovel of ice, he experienced a burning pain in his left shoulder and neck of such severity that he dropped to his right knee. He testified that he told his supervisor, Tyler Thompson, that he thought he had pulled a muscle, although Thompson denies that Claimant told him of any injury. Thompson understood Claimant to state that he was tired and he told Claimant to go inside and rest. Understandably, on a cold day after an ice or snow storm, the pre-owned car business was slow. Claimant spent the remainder of the day in the showroom reading the newspaper and magazines and answering phone calls.

Although Claimant contended he left work around 5:30 or 6:00 p.m., and his fiancé testified that Claimant arrived home early, Employer’s records indicate that Claimant did not leave until nearly 7:00 p.m., a normal departure time. Claimant’s fiancé, his fiancé’s daughter, and Claimant’s son all testified that Claimant appeared to be in pain for several weeks and did not engage in his normal activities after November 17, 2006.

Although Claimant’s family knew of Claimant’s alleged injury, only one co-worker – Ernest Wes Campbell – and no supervisor, was aware that Claimant was suffering any discomfort after the alleged incident on November 17,

2006. And while Campbell observed Claimant to be in discomfort subsequent to that date, even he did not observe the alleged accident.

Ernest Wesley Campbell

Ernest Wesley Campbell, who testified on behalf of Claimant, had been employed with Thompson Sales Company from January 2006 through October 19, 2007, at which time he was discharged due to a lack of sales. Campbell was among the employees who shoveled snow/slush/ice on the morning of November 17, 2006. He observed Claimant in the showroom that date, but he does not know when Claimant quit shoveling, did not see a defining moment when Claimant was injured, and did not observe Claimant reporting the injury. He observed Claimant stretching his arm and noted that Claimant had appeared to be in pain. He did not recall Claimant missing work, and Claimant never asked him for assistance due to an injury. **Terry Davis**

Terry Davis was a full-time salesperson for Employer for three years and was working on November 17, 2006. He remembered the snow/slush/ice removal, but does not have a specific recollection of Claimant's injury or of any complaints Claimant made.

David Hines

David Hines worked seven years for Employer. He was the pre-owned manager and supervised 12 to 15 salespeople, including Claimant. He was in the vicinity of Claimant on the day of the slush/ice/snow removal, but he did not recall Claimant making complaints of neck or shoulder pain. He did not recall Claimant entering the showroom on the day of the snow/slush/ice removal. Although Claimant worked in an office not far from his, and even though he spoke to the sales people several times each day, he had no recollection of Claimant making any complaints of pain to his neck or shoulder. He does not recall Claimant making any requests for assistance or requests for medical attention. Hines had been unaware that Claimant was contending that he had been injured at work and observed no changes in his work routine.

Billy Hackler

Billy Hackler worked as a salesperson for Thompson Sales Company for six years. He had no specific recollection of the snow/slush/ice removal event. He saw Claimant most every day and several times per day, but Claimant made no complaints of pain to him or requested any assistance. Hackler did not observe Claimant holding his hand as if he had been injured.

Jeremy Smith

Jeremy Smith worked as a used-car salesperson for Thompson Sales Company for three years and was working the day of the slush/snow/ice removal. He remembered moving slush, but did not recall where Claimant was working that day. He remembered Claimant went inside the showroom, but does not recall Claimant dropping to his knees or making complaints of pain on that day or any other. Although he worked with Claimant every day, he did not recall Claimant taking time off from work, making complaints of numbness, or requesting assistance.

Anthony Jesse

Anthony Jesse worked for Thompson Sales for nine years. He remembered the snow/slush/ice removal day. He said he was not breaking any ice, but was just removing snow from the cars. Although he was working in the vicinity of Claimant, he did not recall Claimant dropping to his knee or making any complaints that date. He did not thereafter observe Claimant in pain or make complaints of pain. Claimant did not tell Jesse of an injury or request assistance.

Tyler Thompson

Tyler Thompson is one of two General Sales Managers for Thompson Sales. He had been employed eight years with the company. Even though he has 50 employees working under him, he tries to touch base with every salesperson every day. Tyler Thompson said it would be rare for him to be unaware of an employee's absence or the reason for the absence.

He recalled the snow/slush/ice removal project on the morning of November 17, 2006, which was completed in about two hours. Some employees were using shovels. He was working in the vicinity of Claimant, but did not recall seeing Claimant fall onto his right knee. He adamantly denied that Claimant told him he was injured. He said, if he had been aware of an injury, he would have had Claimant treated at urgent care as was company policy. Thompson said there was no alteration in Claimant's work hours after November 17, 2006. He first became aware that Claimant had been injured on December 28, 2006. From November 17, 2006, through December 26, 2006, there had been no change in Claimant's work activity. Claimant had continued to sell vehicles and performed well. Employer has a sick leave policy allowing employees to be off work, albeit without pay. Claimant took off no time prior to December 28, 2006, and requested no accommodation in his job duties due to an injury.

Events of December 27, 2006 and December 28, 2007

Despite his contention of discomfort through the Thanksgiving and Christmas holidays, Claimant continued to work without interruption. Claimant sought emergency medical treatment on December 27, 2006. The medical records report a history of pain for a period of two days rather than several weeks. Claimant did not work on December 27, 2006, because it was his regularly scheduled day off. Claimant was referred to Dr. Ferguson for additional treatment.

On December 28, 2006, Claimant told Miles Thompson (a co-General Manager with Tyler Thompson) that he had been to the emergency room and needed to be off work because he was unable to move his neck. Claimant did not request medical treatment from Employer on that date. Claimant admitted that he never provided Employer with any written notice of the time and place of injury.

Events Beginning January 1, 2007

On New Years Day 2007, Claimant returned to the emergency room because his hand was numb and his arm was limp. He had pain in his neck, shoulder blade, and arm. He was treated with narcotic pain medicine and underwent an MRI. He was given an appointment with Dr. Ferguson on January 8 or 9, 2007; but he again was in the emergency room on January 5, 2007, due to pain. He was admitted to the hospital. Dr. Ferguson performed on Claimant an anterior cervical discectomy and fusion at C5-6 and C6-7 on January 6, 2007. Dr. Ferguson's operative report notes the presence of a "huge ruptured cervical disk at the C6-7 level with spinal cord and thecal sac compression, left greater than right and similar degenerative changes to a lesser extent at C5-6 with associated nerve root and thecal sac compression." (Employee Exhibit 4). The surgery provided some relief of pain and numbness.

Claimant does not recall informing any medical billing person or emergency room personnel prior to January 1, 2007, that he had hurt himself working. Dr. Ferguson makes no reference to a work injury in his treating records. Claimant said he was unaware that his health insurance would not pay for a work injury. However, Claimant previously suffered a work injury to his left shoulder. As a result of that 1988 injury, Claimant was paid 11 weeks of lost time and received a settlement for five percent Permanent Partial Disability to the shoulder.

On January 15, 2007, Claimant provided the Employer with a doctor's excuse and advised Employer that he would not return to work until March 5, 2007. On March 7, 2007, Claimant went to work full time for a different car dealership.

Michelle Everhart, the payroll and human resources coordinator for Employer for the past six years, said all employees are instructed to report work-related injuries immediately. The handbook does not specify to whom to make a report. Everhart is the individual to refer an employee for medical treatment after a report has been made. When Claimant reported a work-related injury to her on January 10, 2007, in a telephone call, the surgery already had been completed and Claimant requested only that Employer pay his deductibles on his health insurance.

Current Complaints

Although Claimant works full time in his chosen occupation as a salesperson, he no longer can ride a motorcycle, drive for long periods of time, or remain on his feet as long as before his alleged injury. He has less range of motion. His thumb is numb. He has experienced a loss of muscle mass in his upper shoulder. He feels better than before his surgery, but still hurts badly when the weather changes. He suffers sleep disturbances. Because of his continuing physical complaints, Claimant saw Kevin Tulipana, D.O., in Nixa, Missouri, who has prescribed medications for him.

Claimant identified his outstanding medical bills related to the surgery and treatment of his neck, as well as the treatment by Dr. Tulipana. He seeks reimbursement for these bills as well as ongoing medical treatment. He further seeks an MRI as was recommended by his rating physician, Dr. Koprivica.

Preexisting Conditions

In addition to the prior shoulder injury noted above, Claimant previously had a disc herniation at C5-6. Dr. Crabtree performed a facetectomy at that level with removal of a free disc fragment on October 23, 1995. Claimant also suffered a disc herniation at the L5-S1 level and underwent a hemilaminectomy and discectomy by Dr. Park on November 14, 1996. Claimant contended that between 1995 and the date of the alleged work injury in 2006, he had no physical limitations in his neck.

Expert Testimony

Dr. Brent Koprivica

Dr. Koprivica, testifying by deposition on behalf of Claimant, said that Claimant's symptoms were not a "straight line progressively getting worse" but had "waxed and waned" and worsened over time. Dr. Koprivica opined that the incident of November 17, 2006, was the prevailing factor in the herniated disc at C6 and C7 levels, necessitating a two-level fusion, Temporary Total Disability, and future medical treatment. Dr. Koprivica believed Claimant needed an additional MRI to rule out a current disc herniation, although clinically he did not think a

herniation was “likely.” He also believed Claimant needed access to a physician to monitor the risk of additional cervical surgery and address the issue of ongoing pain.

Dr. Koprivica conceded that the history he received from Claimant was inconsistent with emergency room records from his initial visit on December 27, 2006. He conceded that the emergency room records from the January 1, 2007, visit contained a different history than the one given in the same emergency room on December 27, 2006. The varying emergency room histories did not alter his opinion that Claimant’s work was the prevailing factor in causing Claimant’s medical condition and disability.

Dr. Koprivica admitted, however, that Claimant had preexisting osteophytic spurs in his cervical spine at the level of herniation that resulted in a preexisting “weakness” that was a factor in his injury. He conceded that Claimant’s prior neck surgery and the structural changes to his cervical spine to treat that procedure were a factor in his injury. He testified that Claimant’s prior C5-C6 herniation made Claimant more likely to develop degenerative changes at that level and at C6-7. He further indicated that immediate medical intervention for cervical injuries can provide knowledge to protect against further progression of the disc herniation.

Dr. Charles Mauldin

Dr. Mauldin performed an independent medical examination of Claimant on behalf of Employer. Claimant gave him a history of experiencing left posterior neck pain while he was shoveling ice on November 17, 2006. Claimant reported that he awoke on December 27, 2006, with severe left neck, shoulder, and back pain. Claimant did not report that his initial pain was so severe that he dropped to the ground. Medical records of the first emergency room visit revealed no history of an acute injury occurring on November 17, 2006. There was no mention of shoveling ice. The record showed no intermittent pain since November 2006. Dr. Mauldin believed Claimant appeared to embellish his physical complaints on examination. Dr. Mauldin found it significant that Claimant previously had experienced what appeared to be spontaneous herniations, preexisting degenerative disease with spurring, and a 32-year history of smoking. Dr. Mauldin said smoking accelerates disc degeneration. He opined that even if Claimant’s injury occurred on November 17, 2006, as Claimant alleged, it was a triggering event only and not the prevailing cause of the Claimant’s current condition. Dr. Mauldin said the prevailing factor in Claimant’s cervical herniation and need for surgery was the preexisting disc degeneration and Claimant’s genetic propensity to spontaneous disc herniations.

CONCLUSIONS OF LAW

I. Did Claimant sustain an injury by accident within the course and scope of employment on November 17, 2006?

While it is true that no other employee or supervisor observed Claimant fall to his knee and sustain an injury while shoveling on November 17, 2006, Claimant’s fiancé and her daughter, and Claimant’s son, all substantiated that Claimant immediately thereafter limited his physical activities due to physical discomfort. I do not believe Claimant is lying about having been hurt while shoveling. But, I am not persuaded that the incident on November 17, 2006, was the cause of Claimant’s subsequently identified ruptured disc or the need for the surgery on January 6, 2007. Thus, I do not find a “compensable” injury.

II. Is the prevailing medical cause of Claimant’s herniated cervical disc an injury that occurred on November 17, 2006?

Whatever occurred on November 17, 2006, is not the prevailing cause of Claimant’s ruptured or herniated cervical disc and subsequent need for surgery. Section 287.020.3 RSMo Cum Supp. 2006, provides that an injury is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. As noted in the recent appellate decision of *Gordon v. City of Ellisville*, ED 91097 (Mo. App. E.D. October 28, 2008), case law preceding the 2005 amendments permitted an employee to recover benefits by establishing a direct causal link between job duties and an “aggravated condition.” (Citing *Rono v. Famous Barr*, 91 S.W.3d 688, 691 (Mo.App. E.D.2002). But, as the appellate court noted, since *Rono*, the legislative amendments changed the criteria for when an injury is compensable. Aggravation of a preexisting condition, alone, even to the point of surgery, does not automatically result in a compensable claim under the amended Workers’ Compensation Law. See e.g., *Leal v. City Wide Transportation, Inc.*, Injury No. 06-010724 (LIRC December 12, 2007) (affirming the Administrative Law Judge’s denial of a left knee replacement after a slip and fall wherein the employee suffered from advanced arthritis in his left knee and meniscus removal 30-plus years earlier).

Here, the evidence suggests that the November 17, 2006, incident was not significant since 1) Claimant did not immediately seek treatment, 2) he continued to work without interruption for a period of six

weeks, 3) he did not make complaints of continued pain to most of his co-workers or any supervisors, 4) he did not ask for medical assistance and 5) he sought no accommodation in his job. There also is a complete lack of any contemporaneous corroborating medical history. Claimant's first visit to the emergency room in December 2006 states nothing of a work incident. Rather, Claimant's initial emergency room visit, made six weeks after the shoveling incident, indicates that Claimant's pain was of two days duration. These facts raise significant doubt as to whether the shoveling incident had anything to do with the cause of the herniation and subsequent need for surgery.

Conversely, Claimant had experienced a prior cervical disc. He had a prior surgery, which required the removal of cervical bone. The surgery resulted in the weakening of the cervical structure. Claimant's own expert, Dr. Koprivica, noted that Claimant had a preexisting weakness that was a factor in his most recent herniated disc. Dr. Mauldin indicated that Claimant's smoking also was a factor in weakening Claimant's cervical disc. Claimant also had suffered a prior lumbar disc herniation. Dr. Mauldin considered Claimant's preexisting degenerative disc disease as a factor in Claimant's disc herniation. Based on all of the testimony and facts of this case, I find credible the opinion of Dr. Mauldin that the prevailing cause of Claimant's herniated disc was the preexisting disc degeneration and Claimant's genetic propensity to have spontaneous disc herniation. I accept Dr. Mauldin's opinion over that of Dr. Koprivica on this issue in this case. Compensation is denied.

III. Did Claimant Provide Timely Notice?

Claimant admitted that he made no attempt to report an injury after November 17, 2006, until he notified Miles Thompson on December 28, 2006. Claimant contended that he did not do so because Tyler Thompson already knew he had been injured. But, I find credible the testimony of Tyler Thompson that he was unaware of Claimant's purported injury of November 17, 2006. No one witnessed the alleged injury and, as Thompson indicated, if he had known that Claimant was injured he would have directed Claimant to urgent care, as was company procedure.

Further, in Exhibit B, identified as the first written notice provided to Employer of a claim of a work injury, Claimant indicated that he reported his injury on December 28, 2006, to Tyler Thompson, not Miles Thompson. Exhibit B contradicts Claimant's testimony at the hearing both as to the date and the person who purportedly received notice.

The current workers' compensation statute provides that "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...has been given to the employer no later than thirty days after the accident..." § 287.420 RSMo Cum. Supp. 2006 (emphasis added). The General Assembly has instructed that workers' compensation statutes are to be strictly construed and no party receives the benefit of the doubt. § 287.800 RSMo Cum. Supp. 2006. This statute does not contain an exception for "actual notice" and provides an exception only if an employer was not prejudiced by the lack of written notice.

It is undisputed that Claimant provided no written notice within 30 days. I have found Employer's witnesses, including Tyler Thompson, credible and conclude that no actual notice was provided within 30 days. As noted in my findings, Dr. Koprivica indicated that immediate medical intervention for cervical disc injuries can provide knowledge to protect against further progression of the disc herniation. If, as Claimant testified, he suffered a worsening of his condition in the six-week period that he did not seek intervention, the Employer was prejudiced in being denied the opportunity to provide prompt direct medical treatment. This provides an additional ground for denying compensation.

Having denied Claimant's claim for compensation on the basis of causation and notice, I do not address the remaining issues relating to reimbursement of medical expenses and Temporary Total Disability.

Date: December 9, 2008

/s/ Victorine R. Mahon
Victorine R. Mahon
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker

Jeffrey W. Buker

Director

Division of Workers' Compensation

I am aware that as of the date of this Award the *Gordon* case is not final. But absent established case law interpreting the amended statute, the Court's reasoning set forth in the *Gordon* case, is instructive in determining the outcome of this case.