

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

Injury No.: 10-073936

Employee: JB Pounds
Employer: Gilster-Mary Lee Corporation
Insurer: Self-Insured
Additional Party: Brain & Neurospine Clinic of Missouri, LLC

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Employee alleges he suffered an injury by accident in the course of performing his duties for employer. The administrative law judge denied the claim, finding employee's testimony regarding the accident to lack persuasive force in light of the numerous alternative histories and inconsistencies contained in the medical treatment records. We have carefully reviewed employee's testimony in conjunction with the medical treatment record, and we share the administrative law judge's concern. While some ambiguity or discrepancy in medical histories is understandable, and "[t]here is no requirement that the medical records report employment as the source of injury," *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254, 259 (Mo. App. 2010), there are simply so many unexplained inconsistencies here that we ultimately agree with the administrative law judge that employee has failed to meet his burden of proving he suffered an accident at work.

Having denied the claim on the issue of accident, there is no need to address the other issues, as they are moot, although we would defer to the administrative law judge's credibility determinations as to the issue of notice.

Finally, we note that employer is not liable for employee's past medical bills not merely because they weren't authorized, but because employee has failed to prove that they were incurred for treatment of a work-related injury.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

Employee: JB Pounds

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The award and decision of Administrative Law Judge Gary L. Robbins, issued January 8, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of August 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: JB Pounds Injury No. 10-073936
Dependents: N/A
Employer: Gilster-Mary Lee Corporation
Insurer: Self Insured
Appearances: Mark A. Cordes, attorney for the employee.
David M. Remley, attorney for the employer-insurer.
Jason Comstock, attorney for Brain and NeuroSpine Clinic of Missouri, L.L.C
Hearing Date: September 9, 2013 Checked by: GLR/rm

SUMMARY OF FINDINGS

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 to be January 15, 2010.
5. State location where accident occurred or occupational disease contracted: Perry 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? 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 time required by law? Yes.
10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee claims that he fell on his buttocks and back when he was attempting to get on a forklift.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Alleged low back.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to date for temporary total disability: \$0.
16. Value necessary medical aid paid to date by employer-insurer: \$0.
17. Value necessary medical aid not furnished by employer-insurer: \$18,857.74.
18. Employee's average weekly wage: \$347.12.
19. Weekly compensation rate: \$231.41 for all purposes.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$0.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None.

No attorney fees are awarded in this case.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On September 9, 2013, the employee, JB Pounds, appeared in person and with his attorney, Mark A. Cordes for a hearing for a final award. At the request of the parties the record was reopened and finally closed on October 7, 2013. The employer-insurer, Gilster-Mary Lee Corporation (“Gilster”) was represented at the hearing by their attorney, David M. Remley. Jason Comstock appeared and represented Brain and NeuroSpine Clinic, L.L.C /Regional Brain & Spine (“Brain and NeuroSpine Clinic”). At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Gilster was operating under and subject to the provisions of the Missouri Workers’ Compensation Act, and was duly qualified as a self insured employer.
2. On January 15, 2010, JB Pounds was an employee of Gilster and was working under the Workers’ Compensation Act.
3. The employee’s claim was filed within the time allowed by law.
4. The employee’s average weekly wage is \$347.12, resulting in a compensation rate of \$231.41 for all purposes.
5. The employer-insurer paid \$0 in medical aid.
6. The employer-insurer paid \$0 in temporary disability benefits.
7. The employee has no claim for mileage.
8. The employee has no claim for future medical care.
9. The employee has no claim for permanent total disability.

ISSUES:

1. Accident.
2. Notice.
3. Medical Causation.
4. Past Medical Bills.
5. Direct Medical Fee Dispute.
6. Medical Lien.
7. Temporary Total Disability.
8. Permanent Partial Disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee Exhibits:

- A. Medical report and Curriculum Vitae of Dwight I. Woiteshek, M.D.
- B. Medical records from Southeast Missouri Hospital.

- C. Medical records of Kevin A. Vaught, M.D.
- D. Medical records of Terry L. Cleaver, M.D.
- E. Records from St. Francis Medical Center.
- F. Medical records of Richard J. Tipton, D.O.
- G. Billing records of Brain and NeuroSpine Clinic.
- H. Claim forms of Brain and NeuroSpine Clinic.
- I. Medical bills of Terry L. Cleaver, M.D.
- J. Medical bills from St. Francis Medical Center.
- K. Medical bills from Southeast Missouri Hospital Physicians.
- L. Medicaid lien.

Employer-Insurer Exhibits:

- 1. Brain and Neurospine Clinic patient questionnaire dated February 8, 2010.
- 2. Brain and NeuroSpine Clinic Neurologic Evaluation dated February 9, 2010.
- 3. Curriculum Vitae of Kevin A. Vaught, M.D.
- 4. Deposition of Kevin A. Vaught, M.D.
- 5. Medical record from Southeast Missouri Hospital ER.
- 6. IME intake questionnaire of Dwight I. Woiteshek, M.D.
- 7. Deposition of Dwight I. Woiteshek, M.D. taken April 24, 2013.

Brain and NeuroSpine Clinic Exhibits:

- I. Medical bills.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

The employee, JB Pounds, Charles Martin, Jerry Scott and Tara Morgan all personally testified at trial. All other evidence was received in the form of written records, medical records or deposition testimony.

Mr. Pounds is sixty years old and completed the eleventh grade. He indicated that he cannot read and write very well. He testified that he is now presently working and is drawing social security disability.

Mr. Pounds testified that he had worked in the box plant for Gilster. He indicated that he worked there for about one year before the alleged accident. Mr. Pound's primary job duties in the box plant involved keeping materials flowing to the various machines in the plant. He used a forklift daily to perform those tasks.

Mr. Pounds testified that on January 15, 2010, he was on duty working in the box plant. He stated that he had picked up some boxes that had fallen. He indicated that he was in the process of getting back on his forklift when he was injured. He indicated that as he was getting on the forklift he fell backwards hitting his buttocks and head on the floor. In so doing, he testified that

he had his left foot in a step on the side of the forklift and was stepping up about twelve inches. He grabbed a handle attached to the forklift with his left hand. At trial he testified that when he grabbed the handle his hand slipped and that is what caused his fall. **On cross examination Mr. Pounds testified that he is sure of this information and never told anyone any different information.**

He testified that when he fell, he felt immediate pain in his low back. He indicated that he lay on the floor for five to six minutes before he got up. He said that another employee witnessed the fall, smiled at him but did not provide any assistance. No co-employee was called to verify this information. Mr. Pounds said that he got up to go to the bathroom and saw Charlie Martin who is his lead man. Mr. Pounds testified that he told Mr. Martin that he fell and Mr. Martin smiled and said that, "shit happens-everyone falls". Mr. Pounds testified that Mr. Martin did not offer to give any assistance, did not offer to send him to the doctor or fill out any reports. The evidence is that Mr. Pounds did not ask to be sent to a doctor. Mr. Pounds testified that he finished working his shift and went home. Mr. Pounds testified that when he went home he could hardly drive as his left leg and back were hurting so badly. He indicated that he took Tylenol and "ironed" his left leg using a cloth.

The employee returned to work the following day and worked his entire shift. He testified that on that second day he reported the accident to his shift supervisor, Jerry Scott. Mr. Scott is a superior to Mr. Martin. Mr. Pounds testified that he told Mr. Scott that he fell and that when he told Mr. Scott of his fall, Mr. Scott just smiled and gestured. He testified that once again no action was taken. Mr. Scott did not offer to send Mr. Pounds to the doctor nor fill out any forms. Mr. Pounds testified that he worked his full shifts for several days but did not finish out his shifts that week. He said that he thought "it would go away". He said that he took two weeks off thinking he would get better.

Finally, on February 2, 2010, Mr. Pounds went to the ER at Southeast Missouri Hospital. From there he was referred to Dr. Vaught of Brain and NeuroSpine Clinic. Mr. Pounds indicated that he was given a shot and pain pills at the hospital. He received an MRI evaluation. Dr. Vaught diagnosed a herniated disc at L5-S1. Dr. Vaught performed surgery to remove the disc fragment on February 12, 2010.

On cross examination, Mr. Pounds was presented with several exhibits that addressed discrepancies between his testimony and the information contained in the records. While there were challenges by Mr. Pounds as to the accuracy and source of some of the information contained in the medical records/histories, all of the records were admitted into evidence without objection.

Regarding Employer-Insurer Exhibit 1 - February 8, 2010 report of Brain and NeuroSpine Clinic Information contained in this exhibit indicates that:

- The employee does not have a Work Comp Claim.
- The injury occurred on February ?, 2009.
- The injury was described as occurring due to "bending and lifting boxes repetitively over eight hours".

Regarding Employer-Insurer Exhibit 2 - February 9, 2010 report of Brain and NeuroSpine Clinic Information contained in this exhibit indicates that:

- The employee has had low back and left leg pain for approximately one year.
- The employee said the symptoms began while lifting boxes.
- The patient and his daughter understand the recommendations.

Regarding Employer-Insurer Exhibit 5 - February 2, 2010 Southeast Missouri Hospital Complete ER Medical Record

Information contained in this exhibit indicates that:

- Complaint occurred by no apparent mechanism of injury.
- The onset of symptoms was gradual.
- Patient accompanied by a friend.

Regarding Employer-Insurer Exhibit 6 - April 4, 2011 Questionnaire given by Dr. Woiteshek's office

Information contained in this exhibit indicates that:

- The employee reported that he fell off the forklift as a piece of metal grabbed his pants leg causing him to fall.

Mr. Pounds testified that he hurt himself on January 15, 2010. Yet in two different medical histories contained in Employer-Insurer Exhibits 1 and 2, both given to Dr. Vaught or his assistants, report that he stated that he had his low back problems for about a year, dating it from February of 2009. The intake questionnaire at the emergency room on February 2, reports that the employee stated that his pain was present for about a week, or a full week after the date to which he testified at the hearing. Employer-Insurer Exhibit 5.

At trial the employee testified that his pain was immediate upon his hitting the floor at work. However, in the medical history he gave to intake personnel at the Emergency Room on February 2, Mr. Pounds stated that his pain came on gradually. Employer-Insurer Exhibit 5.

Mr. Pounds's testimony as to the mechanism of injury is inconsistent and contradictory. At hearing he testified that he fell from his forklift when his hand slipped off a handle. In his deposition testimony he indicated that he fell when a handle broke off the forklift as he was using it to get onto the forklift. However, at the ER, when he was asked to identify the mechanism of injury, he was not able to identify the mechanism of injury. Employer-Insurer Exhibit 5. At Dr. Vaught's office he twice identified the mechanism of injury as lifting boxes. Employer-Insurer Exhibits 1 and 2.

Dr. Woiteshek performed an IME and testified by deposition on April 24, 2013. Employer-Insurer Exhibit 7. Dr. Woiteshek identified the mechanism as a fall from a forklift when a projecting piece of metal snagged the employee's pant leg when getting off the forklift. Employer-Insurer Exhibit 6. In his IME report, Dr. Woiteshek reported that the employee hurt his back while lifting boxes

At trial the employee insisted that his testimony at hearing was the truth and that the various personnel who recorded the contradictory information just got it wrong. He specifically stated that the medical people got it wrong.

As to his injuries, Mr. Pounds testified that he had considerable pain in the low back with leg numbness even after the surgery. He was treated with pain medications, physical therapy and injections intended to relieve his pain. These treatments were only partially effective in relieving his pain.

Dr. Woiteshek examined the employee and his report was admitted into evidence. Based upon the medical history he collected from the employee and his review of medical treatment records, Dr. Woiteshek opined that Mr. Pounds's herniated disc was work related and that as the result of that injury, the surgical intervention by Dr. Vaught was medically necessary and that Mr. Pounds had a permanent partial disability of 50% of the body as a whole.

In cross examination, Dr. Woiteshek admitted that the medical history contained in his IME narrative report indicated that Mr. Pounds was injured while lifting boxes. He agreed this was in stark contradiction to the History Questionnaire filled out by or for Mr. Pounds for that IME. In that questionnaire Mr. Pounds reported that he had fallen from the cab of the forklift when a piece of metal snagged his pants leg. When confronted by this obvious difference in history, Dr. Woiteshek admitted that he had lifted the medical history from Dr. Vaught's office notes. He did concede that because of the differences in the history prepared by Mr. Pounds and the history recorded by Dr. Vaught, the ". . .mechanism of injury is still kind of unclear." However, Dr. Woiteshek refused to accept as true other information in Dr. Vaught's records to the effect that Mr. Pounds had had low back pain for a year before the alleged accident. In response, Dr. Woiteshek stated that Dr. Vaught had more wrong than he, and that so far as he could tell, the rest of his own IME report was "pretty mistake free".

After a running recitation of the discrepancies in Mr. Pound's testimony and various recorded histories, including date of onset, speed of development of symptoms and mechanism of injury, like Mr. Pounds himself, Dr. Woiteshek attributed the differences to poor "recordkeeping".

Gilster's evidence consisted of the direct testimony of Charles Martin and Jerry Scott. They specifically refuted Mr. Pound's testimony regarding his report of his injury to Gilster supervisors.

Dr. Kevin Vaught testified by deposition. Employer-Insurer Exhibit 4.

Specific attention was paid to Employer-Insurer Exhibits 1 and 2 and to how those documents were prepared and recorded. Dr. Vaught testified that when a patient initially comes into his office, the patient questionnaire is given to the patient to fill out. If needed, a member of his staff is made available to assist the patient. In this particular instance, Dr. Vaught agreed that the handwriting on Exhibit 1 appeared to be female and it was possible that a member of his staff assisted the employee in filling out the form.

Dr. Vaught confirmed three important points about Employer-Insurer Exhibit 1.

Firstly, his personnel go to some lengths to determine whether an incoming patient's injury is work related. He stated that they know that if an injury is work related, it is essential to secure the employer's authorization to provide treatment or there is significant risk that the treatment will not be paid for. Further, his office needs to know if an injury is work related because it is important that they code their treatment billings correctly lest they violate federal law regarding Medicaid and Medicare. For these reasons, Dr. Vaught was very confident that his personnel determined right up front whether treatment was work related.

In this case, the form filled out by or for the employee clearly indicates that the injury and the need for treatment is not work related. The form states that the employee does not have an open workers' compensation claim.

Secondly, because the mechanism of injury is important to understand the condition for which treatment is rendered, Dr. Vaught stated that his intake form seeks to find out how the patient was injured.

In this case, it appears that the employee was asked how he was injured and he responded that he was hurt lifting boxes. This information is directly contradictory to the employee's testimony that he fell off of a forklift landing on his back and buttocks.

Thirdly, because the age of the injury is important to understanding whether treatment might be effective, Dr. Vaught's form asked patients for how long they have been in pain or have been injured.

In this case, the employee provided information to the effect that the injury to his back occurred in February of 2009, eleven months before the date provided in his testimony.

Dr. Vaught also provided extensive testimony about the office note prepared by his physician's assistant, Mr. Bagley. Dr. Vaught testified that as a part of the first conversation between the patient and the physician's assistant, all critical components of the medical history are re-visited and confirmed. An office note recording that medical history is then prepared using voice recognition software and dictation which was to be completed before the physician's assistant meets with another patient.

In this case, Mr. Bagley's note confirms two significant facts contained in the initial screening questionnaire, those being that the employee said that his low back pain has been present for almost a full year before the date of the interview and that the injury was sustained while lifting boxes. Both of these statements are directly contradictory to the employee's hearing testimony.

Further, like Employer-Insurer Exhibit 1, Employer-Insurer Exhibit 2 contains no history of the injury having been sustained in any work related activity.

As to the injury, Dr. Vaught testified regarding the diagnosis and the treatment he rendered. Specifically, Dr. Vaught testified that diagnostic imaging showed the presence of a fairly large disc herniation at L5-S1. Dr. Vaught performed surgery on this condition just a few days after the first evaluation to remove the disc fragment. Dr. Vaught further testified that the medical treatment was reasonable and necessary and that his billings for his services were reasonable. Dr. Vaught also testified that modern medical technology did not permit medical professionals to assign a date or date range for when a herniated disc occurred. In addition, he testified that when the employee presented in his office, he already had degenerative changes in his low back.

Mr. Martin testified that he has worked in the Gilster box plant for fifteen years. He indicated that he is a lead man. In that capacity he runs the shift, makes sure production gets out, makes sure workers are happy and repairs and adjust machines. He stated that he did not work on forklifts.

Mr. Martin testified that he knows the employee from work as the employee drives a forklift.

He directly refuted Mr. Pounds' testimony and stated that Mr. Pounds never told him anything about being injured on the job. In fact, when asked whether he had heard anything about a back injury, Mr. Martin testified that he recalled Mr. Pounds saying that he had hurt his back while moving a refrigerator.

Mr. Martin testified directly about the January 15, 2010 accident stating:

- He has no knowledge of the event at all.
- The employee never told him he fell as a handle broke off forklift.
- The employee never told him he fell for any reason.
- The employee never told him that he hurt himself lifting boxes.
- The employee never told him that while he was on job he was lifting boxes and hurt back and leg.
- The employee did tell him that he was moving a refrigerator for someone and hurt his back. Mr. Martin could not pinpoint when the employee told him this information.
- He did not know that employee had back surgery.
- The employee never asked for assistance in filling out an accident report.
- The employee never told him about taking vacation and asking for help with this. Mr. Martin testified that he is not the person to do this.
- The employee never told him about falling and that a doctor is going to fix it.
- The employee never, at any time, said he hurt himself on the job.
- The employee never asked for help getting medical care for an on the job accident. If this had happened he indicated that he would have directed the employee to go to Mr. Scott or the plant superintendent.
- Mr. Fudge is the plant superintendent. In January 2010 that plant superintendent was Mr. Gremmels, however he died and Mr. Fudge took over.

During cross examination, Mr. Martin testified that he is not Mr. Pounds' direct supervisor. Mr. Scott is his supervisor. He indicated that he is above the employee in the pecking order. He indicated that if there was an injury, the employee could report it to me. He said that if this

happened, the employee would be directed to Mr. Scott and then the superintendent. If those people were not available then he would fill out paperwork and then contact the superintendent, even in the middle of night.

He remembered that the refrigerator incident was when Mr. Pounds was a forklift operator. He said that nothing was written down and he does not remember if he told anyone else. He indicated that he became aware that the employee was claiming a work injury about three weeks ago and he did not know when Mr. Pounds had surgery.

Mr. Martin confirmed that he remembers no conversation about medical care with the employee in 2010. He also confirmed that the employee never reported a work injury to him.

When questioned by counsel for Brain and NeuroSpine Clinic, the attorneys agreed that none of them checked Gilster's files for any records. Mr. Martin testified that whether a person is sent for medical care depends on how the person feels.

Mr. Scott testified that he has worked for Gilster for twenty-one years. He is a production supervisor/shift supervisor. He indicated that he works in the box plant both days and evenings and Mr. Gremmels was his supervisor in 2010. He indicated that part of his job responsibility is to take role. He further testified that in the box plant he is the primary person to manage on-the-job injuries and to fill out accident reports.

Mr. Scott also contradicted the employee's testimony about giving notice.

He testified that he remembers Mr. Pounds and is aware that the employee filed a workers' compensation claim for January 15, 2010. He indicated that he became aware of the claim about two weeks ago when Steve Landholt called him. He testified that he was a shift supervisor on January 15, 2010, when the employee was working. He testified that at no time did the employee tell him that he had a work related injury. He testified that the employee never told him that he fell off forklift, or that a handle broke off of a forklift. He also testified that the employee never told him that the employee had an injury from repeatedly lifting boxes for eight hours. He testified that the employee never reported any work injury at all.

In addition, he testified that the employee never asked him to help in filling out an accident report and cannot recall any conversation about vacation time. He also testified that he does not recall any reports of a workers' compensation claim. He also testified that he fills out the information about such claims and there was no such paperwork about the employee around January 15, 2010.

During cross examination by employer-insurer's counsel, Mr. Scott indicated that he was not aware in 2010 that the employee had back surgery and cannot recall anything about him missing time from work. He indicated that he first learned of his back surgery two weeks ago.

He testified that he was not asked to bring his file and assumes that the employee was terminated due to absenteeism. He said after the employee's termination he had no talks with him about

missing time from work. He also testified that a report is made even if an employee reports an injury but does not request medical care.

He indicated that he did not check his own records to see if he was working on January 15, 2010.

At the conclusion of the employer-insurer's case, counsel for Brain and NeuroSpine Clinic called Tara Morgan to testify. She is the business office manager of Brain and NeuroSpine Clinic which is Dr. Vaught's medical group. Ms. Morgan testified regarding the account opening and billing practices of the office. She indicated that she is responsible for everything in the office related to billing.

Ms. Morgan testified that she is aware of the employee's account. She indicated that in July of 2010 she was aware of a large balance that was not paid by Health Link as payment was denied for services. She testified that they had a copy of the employee's insurance card. She indicated that a majority of the bill was for the surgery that was performed by Dr. Vaught on February 12, 2010.

Specifically, Ms. Morgan testified that the outstanding bill for Dr. Vaught's medical treatment rendered to Mr. Pounds stood at \$18,857.74. However, in pre-hearing conference, counsel for Brain and NeuroSpine Clinic indicated that they would have accepted the sum of \$10,950.39 had the employee's group health insurance carrier paid the bill. Ms. Morgan went on to testify that the charges for Dr. Vaught's treatment were fair and reasonable.

Upon questioning by the Court, Ms. Morgan testified that no one from Gilster authorized care for the employee.

Upon questioning by counsel for the employee, Ms. Morgan testified that the surgery was pre-certified by Health Link which is a group health care provider for Gilster. She also indicated that coverage was denied by Health Link as they were asking for accident information. She testified that the employee has been contacted many times about the bill, but they have been denied when they asked for payment.

Upon questioning by counsel for Gilster, Ms. Morgan testified that Health Link denied the claim on the basis of accident. She said that in the treatment records in this case there is no documentation regarding workers' compensation information. She indicated that in a workers' compensation case we have a workers' compensation coordinator which is to get authorization. She further testified that in this case at no point in the treatment is there documentation regarding workers' compensation information.

Ms. Morgan indicated that when the employee first came to Brain and NeuroSpine Clinic, he provided his group health insurance card for payment. In fact, she indicated that the group health carrier had been contacted and had specifically authorized the treatment. She went on to agree that she had not been in contact with Gilster or its TPA for authorization under the rules of Workers Compensation.

Finally, Ms. Morgan repeated Dr. Vaught's testimony regarding Brain and NeuroSpine Clinic's efforts to determine whether a new patient was covered by workers compensation. She agreed that securing treatment authorization from an employer or its insurance carrier was important in securing payment and that such confirmation was important to remain out of trouble with the state and federal governments.

Ms. Morgan was also questioned about Employer-Insurer Exhibit 1. She testified that if a person cannot write a staff person helps them fill out the forms. She testified that on the form there is a question, "Do you have an open Work Comp Claim?" and the response was marked "no" with an X.

RULINGS OF LAW:

Issue 1. Accident and Issue 2. Notice.

Based upon the totality of the evidence, the Court makes the following findings.

On the date of the alleged injury, January 15, 2010, Gilster-Mary Lee Corporation was a covered employer under the Missouri Workers Compensation Act.

On January 15, 2010, the employee was an employee of Gilster-Mary Lee Corporation.

The employee has failed to carry his burden of proof with regard to whether an accident happened on January 15, 2010. This finding is specifically based upon the employee's poor credibility. As noted above, the employee has provided multiple versions of how and when this accident allegedly occurred and the progress of his symptoms.

As to how it happened, the employee has said that:

- He did not know the mechanism of his injury.
- He was injured from falling when a handle broke while he was getting in a forklift.
- He was injured when his hand slipped off of the handle when he was getting in a forklift.
- He was injured from falling when a projecting piece of metal snagged his pants leg.
- He was injured from the repetitive lifting of boxes over an eight hour period.
- There was even testimony from Mr. Martin quoting the employee as saying that he hurt his back when moving a refrigerator.

As to when he received his injury, the employee has said that:

1. He received his injury on the date stated in the Claim for Compensation, January 15, 2010.
2. He has also said that he had had this back pain for 11 months before January 15, 2010.
3. He had had back pain beginning about one week before his first medical treatment on February 2, 2010.

As to the progress of his condition, the employee testified at trial that the onset of pain was immediate after the fall. However, he told ER personnel that his symptoms came on gradually.

Simply put, the employee's numerous different statements regarding the circumstances and timing of his injury make him unbelievable.

As per §287.020.2, "[t]he work "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 any injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."

§287.808 tells us that ". . . The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true."

Broken down, in order to be successful in establishing his entitlement to compensation, the employee has the burden of proving by a preponderance of the evidence that:

1. he sustained unexpected traumatic event or unusual strain;
2. identifiable by time and place of occurrence; and,
3. which produced at the time objective symptoms of any injury caused by a specific event during a single work shift.

The employee has failed to carry his burden of proof. His testimony was sharply contradicted by other multiple pieces of evidence that were credible.

On the issue of whether the employee's injury occurred on the job, the Court cannot conclude that it did.

Firstly, the employee was the only witness who gave any testimony regarding whether the accident was work related. The Court has already commented on the employee's significant credibility problems.

Secondly, there is no other credible evidence supporting the claim that the accident happened at work. None of the treatment records associated with the employee's low back problems make mention of the occurrence happening at work. The emergency room record created just two weeks after the fall says nothing about an employment event. Further, Dr. Vaught's intake questionnaire, Mr. Bagley's office note, Dr. Vaught's own testimony and the testimony of Ms. Morgan clearly establish that there was an effort by Brain and NeuroSpine Clinic to determine if the employee had a work accident, but were unable to do so.

Besides the employee's own testimony, the only other source of evidence which might have provided support for the claim that the accident happened at work for Gilster comes from the intake history taken by Dr. Woiteshek many months after the event in connection with an independent medical examination commissioned by the employee's attorneys. That medical history was that the employee pants leg was caught on a piece of metal and that he fell from the forklift while getting down from it. This story matches no other story in any way other than the

possible involvement of a forklift. In fact, this story does not even match the medical history contained in Dr. Woiteshek's IME report which he copied from Dr. Vaught's medical history.

Given the significant differences in the various stories regarding the mechanism, Dr. Woiteshek testified that the ". . .mechanism of injury is still kind of unclear." The various reports document the fact that the mechanism of injury is unclear. Thus, the only sources of evidence from which one might expect support for the factual proposition that the causal event occurred at work are not trustworthy sources.

Because the mechanism of injury is not clear, it cannot be said that the employee sustained his burden of proof.

§287.420 states in pertinent part:

"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 30 days after the accident, unless the employer was not prejudiced by failure to receive the notice."

Section 287.420 requires that an employee who suffers a compensable injury give written notice to the employer as soon as practicable, but no later than thirty days after the occurrence. Lack of timely written notice may be excused when there is actual notice to the employer. **Smith v. Plaster**, 518 S.W.2d 692, 697 (Mo.App.1975). Claimant has the burden of proof of showing that the employer was not prejudiced. **Pattengill v. General Motors Corporation**, 820 S.W.2d 112, 113 (Mo.App.1991). A prima facie showing of no prejudice is made if claimant can show the employer had actual notice. **Willis v. Jewish Hospital**, 854 S.W.2d 82, 85 (Mo.App.E.D.1993).

In this case, the employee has not established that he gave the required written notice. There was no testimony or evidence of any sort from the employee regarding written notice. Any oral notice that the employee claims to have provided to his supervisors has been disputed by credible evidence.

The testimony from the employee was that he gave verbal notice first to Charles Martin, his lead man, and then to Jerry Scott, his shift supervisor.

Both Mr. Martin and Mr. Scott denied those conversations. Further, they both testified that at no time did the employee ask for assistance in filling out an accident report. Both testified that any request to complete an accident report would be directed to Mr. Scott and that Mr. Pounds made no such request. There was no impeachment of these witnesses' testimony. The Court found their testimony to be consistent and credible.

Absent evidence that a timely written report was given, or in lieu thereof credible evidence to establish that actual notice was given by a verbal report to an appropriate supervisory person, the Court cannot find that notice was given as required by statute.

The Court further finds that the employee failed to carry his burden of proving that he gave the employer proper notice of his alleged injury. While he testified that he had mentioned his fall to both his lead man and his shift supervisor, they both directly denied any such conversations. Combining this information with the other credibility problems that exist in the employee's case, he cannot be believed on the issue of giving notice. The Court specifically finds that the testimony of Mr. Martin and Mr. Scott is more credible than the testimony of the employee.

Issue 3. Medical Causation

Issue 4. Past Medical Bills

Issue 6. Medical Lien

Issue 7. Temporary Disability

Issue 8. Permanent Partial Disability

The Court has denied the employee's case on the issues of accident and notice. Issues 3, 4, 6, 7, and 8 are therefore moot and are not addressed by the Court.

Issue 5.

Finally, there is the issue of whether Brain and NeuroSpine Clinic was authorized by Gilster to treat the employee. This determination is critical to the resolution of two issues in this case: 1) whether the employer-insurer is required to pay for past medical treatment obtained by the employee, and 2) whether Brain and NeuroSpine Clinic is entitled to receive from Gilster payment for the medical services it provided to the employee.

The central question to be resolved in this situation is whether Gilster authorized Dr. Vaught and his staff to undertake treatment. The evidence is clear on this issue. Even the employee agreed that he never asked for medical care from Gilster.

The employee testified that he tried to inform both Charles Martin and Jerry Scott that he was receiving treatment for the work related fall he claims. However, as mentioned above, the employee is not a credible witness. Further, Mr. Martin and Mr. Scott directly refuted that testimony.

The testimony of Ms. Morgan is also illuminating on this issue. The Court has already recounted her and Dr. Vaught's testimony regarding their unsuccessful efforts to determine directly from the employee whether his need for treatment was work related. Not only did he not tell them he had a workers' compensation claim, but he also gave them his group health insurance information. Upon calling that carrier, the treatment was authorized by the carrier. Ms. Morgan agreed that she never had direct contact with Gilster or its TPA to secure authorization, and thus, had no authorization to provide treatment under the auspices of the workers compensation system.

Based on a consideration of all of the evidence in the case, the Court finds that under the workers' compensation umbrella, Gilster did not authorize Brain and NeuroSpine Clinic to undertake workers' compensation care for the surgical treatment Dr. Vaught and his staff

provided. The evidence is clear that Brain and NeuroSpine Clinic received authorization to provide medical treatment to the employee from Health Link which is a group health carrier for Gilster. Under the workers' compensation umbrella, Gilster has no responsibility to pay for the employee's medical care.

The Court finds that Dr. Vaught's medical treatment and the other care rendered by Brain and NeuroSpine Clinic was not authorized as required by statute. Therefore, the Court finds this issue against Brain and NeuroSpine Clinic. Gilster is not obligated to pay any part of the bill for medical services due to a workers' compensation injury.

ATTORNEY'S FEE:

No attorney fees are ordered in this case.

INTEREST:

There will be no interest in this case.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation