

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

Injury Nos.: 03-108375 & 03-147759

Employee: Michael Pursifull  
Employer: Braun Plastering Company Inc.  
Insurer: Builders Association Self Insurance  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Dates of Accidents: September 1, 2003 (03-108375) and  
September 21, 2003 (03-147759)

Places and Counties of Accidents: Mexico, Missouri (03-108375)  
Columbia, Missouri (03-147759)

The above-entitled workers' compensation cases are submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 19, 2005, as supplemented herein, and awards no compensation in the above-captioned cases.

#### I. Preliminary Matters

On October 31, 2003, employee filed a claim for compensation alleging a date of injury on or about September 1, 2003. Injury No. 03-108375 was assigned to this accident.

At the hearing before the administrative law judge on June 8, 2005, the transcript reflects the following statement by the administrative law judge:

It's my understanding that the claim is going to be verbally amended today to reflect two occurrences in September of 2003. It's also my understanding that both claims are being denied but that both claims are the subject of today's hearing.

(Tr. 4).

Subsequent to the hearing, the administrative law judge issued an award July 19, 2005, denying workers' compensation benefits. A timely Application for Review was filed with the Commission alleging that the administrative law judge erred in denying workers' compensation benefits to the employee for both accidents occurring in September 2003.

The Commission, by order dated January 27, 2006, directed the parties to do the following: employee was directed to immediately file with the Commission a Claim for Compensation in conformity with the additional verbal claim asserted at the hearing, and the employer/insurer was directed to file with the Commission an Answer to the Claim for Compensation to be filed in conformity with its verbal answer at the hearing.

Both of the parties complied and there was an additional file established by the Division of Workers' Compensation/Commission with a date of accident of September 21, 2003, and assigned injury number 03-

147759. All evidence pertaining to both accidents and injuries was heard and adduced at the trial setting before the administrative law judge on June 8, 2005, and there is one consolidated transcript on appeal before the Commission.

## II. Issues

The stipulated issues for both accidents, September 1, 2003 and September 21, 2003, were identical and were as follows: injury due to an accident arising out of and in the course of employment; notice of injury, section 287.420 RSMo; medical causation between the accident and the injury; liability for past and future medical care and treatment; and liability for past and future temporary total disability benefits.

As to both alleged injuries, the administrative law judge denied workers' compensation benefits on the following grounds: (1) employee failed to sustain his burden of proof that he complied with the notice provisions prescribed by section 287.420 RSMo; and (2) employee failed to establish a causal connection between each accident and each injury by failing to adduce evidence that the conditions complained of by the employee were caused by the related accident.

The Commission affirms the administrative law judge's denial of workers' compensation benefits in both cases.

## III. General Principles of Law

Section 287.420 RSMo sets forth the notice requirement. The relevant portion of section 287.420 provides:

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

The purpose of this section is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. *Gander v. Shelby County*, 933 S.W.2d 892 (Mo. App. E.D. 1996). However, the failure to give timely written notice may be excused if the Commission finds either that there was good cause for the failure or that the failure did not prejudice the employer. *Willis v. Jewish Hospital*, 854 S.W.2d 82 (Mo. App. E.D. 1993). The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. *Soos v. Mallinckrodt Chemical Company*, 19 S.W.3d 683 (Mo. App. E.D. 2000). However, when the claimant does not show either written notice or actual knowledge, the burden rests on the employee to supply evidence and obtain the Commission's finding that no prejudice to the employer resulted. *Id.* If no such evidence is adduced, we presume that the employer was prejudiced by the lack of notice because it was not able to make a timely investigation. *Id.*

The relevant case law pertaining to the issue of establishing medical causation can be gleaned from reviewing the appellate court cases of *Griggs v. A. B. Chance Company*, 503 S.W.2d 697 (Mo. App. W.D. 1973), and *Goleman v. MCI Transporters*, 844 S.W.2d 463 (Mo. App. W.D. 1992). The *Griggs* case, contains the following guiding principles:

“A party who claims benefits under the workman's compensation law has the burden to prove that an accident occurred and that it resulted in injury.”

(Page 703)

“A claimant must show not only causation between the accident and the injury but also that a disability resulted and the extent of such disability.”

(Page 703)

“Whatever may be the quantum of proof the law imposes on a given issue in a compensation case, however, such proof is made only by competent substantial evidence and may not rest on surmise or speculation.”

(Pg. 703)

“The rule is that the burden of proof rests on the claimant in a workmen’s compensation proceeding, and it is not sufficient for recovery to show only that the injury complained of resulted either from one or the other of two causes, for one of which, but not the other, the employer would be liable. The claimant must produce evidence from which it reasonably may be found that such injury resulted from the cause for which the employer would be liable.”

(Pg. 704)

“Where the condition presented is an acute aggravation of a pre-existing degenerative back condition with nerve root irritation, or any other sophisticated injury, which requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor—in the absence of expert opinion—is the finding of causation within the competency of the administrative tribunal.”

(Pg. 704-705)

The *Goleman* case, *supra*, follows the principles enunciated in the *Griggs* case, *supra*, and, like the two instant claims, involves two successive accidents with the same employer. The employee, in one of his points on appeal to the appellate court, contended that since the same employer was allegedly liable for the two injuries, it did not make any difference to separate the two injuries, because the employer was liable for both injuries. The appellate court rejected this contention because this argument “ignores that there were two separate claims pending and the claimant was only entitled to one recovery for the claim at issue”. (Pg. 466). The court emphasized that each claim was the subject of a separate pending action and the compensability of each independent of the other.

#### IV. Date of Accident September 1, 2003, Injury No. 03-108375

The summary of facts was accurately recounted in the award of the administrative law judge, and will not be repeated by the Commission unless special emphasis necessitates.

As mentioned above, the administrative law judge denied employee workers' compensation benefits due to the fact that employee failed to: (1) satisfy the notice requirements imposed by section 287.420 RSMo; and (2) failed to establish a medical causal connection between this accident and the alleged injury. Either of these two conclusions by themselves is dispositive of the claim, and as the administrative law judge correctly noted, all remaining issues are moot. The Commission supplements the decision of the administrative law judge as to the medical causation issue.

Employee attempted to establish a medical causal relationship between his condition complained of and the accident, through the testimony of Dr. Trecha. When Dr. Trecha initially saw employee, on November 17, 2003, both accidents and injuries had allegedly occurred. The testimony of Dr. Trecha, at best, was that if the history given him by employee were assumed to be true, both injuries were causative of the need for treatment Dr. Trecha subsequently rendered, and all sequelae. There was not an attempt by Dr. Trecha to separate the two injuries and determine which of the two actually caused the alleged back condition and subsequent treatment rendered. There is no evidence in this record differentiating between the two injuries, as one being the cause of the ultimate back problem that Dr. Trecha treated subsequent to November 17, 2003.

As noted in the *Goleman* case, *supra*, the fact that the two successive injuries were with the same employer does not relieve the burden of employee to separate, distinguish and differentiate the cause of the condition. The Commission finds this principle of law to be especially applicable concerning the two instant cases, since there are viable issues concerning compensability of the two accidents, and whether or not proceedings for compensation

can be maintained due to the issue of notice. In fact, as an aside, as to the second alleged accident and injury occurring September 21, 2003, employee has admitted that notice was never given the employer as to any injury.

As clearly stated in *Griggs, supra*, the employee has the burden of proof to show that an accident occurred and that it resulted in an injury. It is not sufficient for recovery to show only that the injury complained of resulted either from one or the other of two causes, and the employee must produce evidence from which it reasonably may be found that such injury resulted from the cause for which the employer would be liable.

Employee ultimately underwent surgery under the auspices of Dr. Trecha who surgically repaired a herniated disc at L5-S1. A herniated disc, requiring surgical intervention, is a sophisticated injury, and the proof of causation of a herniated disc is not within the realm of lay understanding nor, in the absence of expert medical opinion, is the finding of causation within the Commission's competency.

The burden was on employee to prove the injury sustained was attributable to a work related accident for which the employer would be liable. The Commission would be guessing or speculating as to whether or not employee's complained of medical condition was caused by the accident occurring as alleged on September 1, 2003. Accordingly, employee has failed in his burden of proof and the denial of compensation benefits is affirmed.

V. Date of Accident September 21, 2003, Injury No. 03-147759

Employee has failed to satisfy by competent and substantial evidence that his medical condition complained of and for which he received treatment, was medically causally related to the accident occurring September 21, 2003.

Employee attempted to establish medical causation through the testimony of Dr. Trecha, and as discussed above, the evidence does not meet the burden of proof legally required. The employee must produce evidence from which it reasonably may be found that such injury resulted from the cause for which the employer would be liable. The Commission cannot base a finding on guesswork and speculation. A finding that employee's complained of condition was related to the accident occurring September 21, 2003, based on the testimony of Dr. Trecha, would be based on speculation and guesswork, thus, employee has failed to meet his burden of proof.

As to the issue of notice, the claim also fails. Employee admittedly never gave notice; no evidence was adduced to base a finding of good cause; and no evidence was adduced to base a finding that employee's failure to give notice did not prejudice the employee.

VI. Conclusion

As to date of accident occurring September 1, 2003, the Commission affirms the finding and conclusion of the administrative law judge that employee failed to comply with the statutory notice provisions of section 287.420 RSMo, which prevents employee from maintaining this proceeding for workers' compensation benefits and also, employee failed to meet his burden of proof by establishing a medical causal connection between the accident and the alleged injury.

As to date of accident occurring September 21, 2003, the Commission affirms the finding and conclusion of the administrative law judge that employee failed to comply with the statutory notice provisions of section 287.420 RSMo, which prevents employee from maintaining this proceeding for workers' compensation benefits and also, employee failed to meet his burden of proof by establishing a medical causal connection between the accident and the alleged injury.

The award and decision of Administrative Law Judge Hannelore Fischer, issued July 19, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this \_\_\_7<sup>th</sup>\_\_\_ day of April 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## TEMPORARY OR PARTIAL AWARD

Employee: Michael Pursifull

Injury No. 03-108375

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents:

Employer: Braun Plastering

Additional Party:

Insurer: Builders Association Self-Insurers Fund

Hearing Date: June 8, 2005

Checked by: HDF/cs

### 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?
4. Date of accident or onset of occupational disease: September 2003.
5. State location where accident occurred or occupational disease contracted: Mexico, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?  
Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment?
9. Was claim for compensation filed within time required by Law?
10. Was employer insured by above insurer?
11. Describe work employee was doing and how accident happened or occupational disease contracted:

12. Did accident or occupational disease cause death? N/a. Date of death? N/a.
13. Parts of body injured by accident or occupational disease: Back.
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 furnished by employer/insurer? N/a.

Employee: Michael Pursifull

Injury No. 03-108375

17. Employee's average weekly wages: \$761.20
18. Weekly compensation rate: \$507.72 ttd.
19. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

20. Amount of compensation payable: (None.)

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael Pursifull

Injury No: 03-108375

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents:

Employer: Braun Plastering

Additional Party

Insurer: Builders Association Self-Insurers Fund

Checked by: HDF/cs

The above-referenced workers' compensation claims were heard before the undersigned administrative law judge on June 8, 2005. Memoranda and any additional agreements were submitted by July 15, 2005.

The parties stipulated that during September of 2003 the claimant was in the employment of Braun Plastering; an injury arose out of employment; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was insured by Builders Association Self Insurers Fund; a claim for compensation was filed within the time prescribed by law; the claimant's average weekly wage was \$761.20; the rate of compensation on the date of accident was \$507.72 per week for temporary total disability benefits; no temporary disability benefits have been paid to the claimant to date; no medical aid has been provided.

The issues to be resolved by hearing include 1) the occurrence of an accident, 2) the causation of the injuries alleged, 3) whether appropriate notice was given, 4) the liability of the employer/insurer for past and further medical treatment, and 5) the liability of the employer/insurer for past and further temporary total disability benefits.

The parties agreed that the above-referenced Claim is amended to reflect two alleged accidents in September of 2003 and that the Answer is amended to reflect a denial of both alleged accidents.

The parties further agreed that in the event of a finding favorable to the claimant on the issues of accident, causation and notice, the employer/insurer is liable for \$30,307.90 in past medical benefits. An additional \$4,962.50 in past medical benefits is claimed.

Additionally, the parties agreed that in the event of a finding favorable to the claimant on the issues of accident, causation and notice, the employer/insurer is liable for temporary total disability benefits for the periods of October 20, 2003, through October 26, 2003, and November 19, 2003, through and including February 11, 2004. Temporary total disability benefits from July 23, 2004, are claimed.

### FINDINGS OF FACT

The claimant, Michael Pursifull, was 43 years old as of the date of the hearing and had been a union carpenter for the past 16 or 17 years. From May through September of 2003, Mr. Pursifull was employed by Braun Plastering Co., Inc. (Braun Plastering).

Mr. Pursifull recounted two episodes in which he injured his back in September of 2003. The first incident occurred when Mr. Pursifull was working at Commerce Bank in Mexico, Missouri. Mr. Pursifull was in a lift approximately 15 to 20 feet above ground and was holding on to an 8-inch, 18- to 20-foot long, 100-pound metal stud when his co-worker who was holding the lower end of the stud at ground level let the stud slip causing Mr. Pursifull to hold the entire stud himself. Mr. Pursifull felt a sharp pain which then went away. It was about two weeks later that Mr. Pursifull felt a tightening of the muscles in the belt line area of his back.

The second incident occurred while Mr. Pursifull was working at the Life Sciences Center of the University of Missouri in Columbia, Missouri. Mr. Pursifull was attempting to lift a 125-pound, two-foot wide, 12-foot long, one-inch thick shaft wall to the next floor up when he felt pain in his low back going into his left buttock. When Mr. Pursifull released the shaft wall, his pain subsided.

Mr. Pursifull did not report either incident contemporaneously with the incident, thinking he had only

pulled a muscle. Mr. Pursifull knew of the importance of reporting injuries to his supervisor.

Mr. Pursifull saw Dr. Ivins for his shoulders on September 22, 2003, and did not mention back pain, although he had allegedly already injured his low back at the bank job by that date. On October 11, 2003, Mr. Pursifull sought medical treatment for his low back at the emergency room at Callaway Hospital. At that time, Mr. Pursifull reported years of low back pain with gradual worsening for years and "pain worsen (sic) last month." On October 18, 2003, Mr. Pursifull saw Dr. Ivins and gave a history of "one-week history of low back pain without specific trauma or overuse."

Apparently Mr. Pursifull discussed with Dr. Ivins whether the alleged accidents at Braun Plastering could have caused his back problems. Subsequently, Mr. Pursifull contacted Debbie Forck at Braun Plastering to tell her that he had a herniated disk as a result of the injury to his back at the bank in Mexico. Ms. Forck responded by telling Mr. Pursifull that he should have reported his injury within 48 hours.

In late September of 2003, Mr. Pursifull quit working for Braun Plastering and went to work for Brook Drywall. Mr. Pursifull's work for Brook Drywall was as a foreman and was not physically demanding. After his back surgery in December of 2003, which was performed by Dr. Trecha, Mr. Pursifull returned to his job at Brook Drywall where he remained until July of 2004. Mr. Pursifull quit his work for Brook Drywall on July 23, 2004, due to the recurrence of his back pain.

Debbie Forck, part owner of Braun Plastering as well as corporate secretary and office manager, testified regarding Braun Plastering's requirements that employees promptly report injuries. Ms. Forck was only made aware of Mr. Pursifull's injury at the bank in Mexico and was not notified of the alleged accident at the Life Sciences Center. Ms. Forck said that had Mr. Pursifull notified her earlier of his initial accident, she would have sent him out for appropriate treatment, adding that she had sent employees to both the Callaway Community Hospital and to Dr. Trecha for treatment. Ms. Forck stated that if she had known Mr. Pursifull had a herniated disk, she would not have allowed him to lift the 100- to 125-pound wallboard.

Dr. Randall R. Trecha, board certified orthopedic surgeon, testified by deposition that he initially saw Mr. Pursifull in November of 2003. Dr. Trecha stated that, when he first saw Mr. Pursifull, Mr. Pursifull told him of two episodes which he related to his back pain. Dr. Trecha diagnosed a symptomatic herniated disk at L5-S1 and opined that the disk pathology was caused by the two work events which Mr. Pursifull described to him. While Dr. Trecha referred to Mr. Pursifull's work as the precipitating or triggering event in his disk failure, he also specifically confirmed that Mr. Pursifull's work was the substantial factor in causing his disk failure.

Dr. Trecha's treatment of Mr. Pursifull included conservative care such as exercise, back care precautions and medications and more aggressive treatment in the form of epidural steroid injections, followed by surgery and then followed by another round of epidural steroid injections.

Dr. Trecha recommended a discogram to determine if a disk is generating Mr. Pursifull's ongoing complaints of back pain. If it is determined that a disk is the source of pain, a discectomy or fusion are possible treatment options.

#### APPLICABLE LAW

Section 287.420 provides as follows:

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

See, also, Messersmith v. University of Missouri - Columbia, 43 S.W. 3d 829 (Mo. banc 2001) where claimant's failure to give timely notice of a latent injury was held to be for good cause and sufficient to excuse the claimant from the requirement of timely notice, and Soos v. Mallinckrodt Chemical Co., 19 S.W. 3d 683 (Mo. App. 2000) where the claimant's failure to give timely notice of an injury until he knew it was a disk injury was held not to meet the good cause standard where the claimant knew he was injured and took time off from work and sought medical treatment shortly after the injury.

#### AWARD

The claimant, Michael Pursifull, has failed to sustain his burden of proof that he notified his employer of both of the September back injuries he allegedly sustained in 2003. While Mr. Pursifull stated that, although outside of the 30-day period since the accident, he told his employer, through Debbie Forck, part owner of Braun Plastering, as well as corporate secretary and office manager, of his accident in early September while working at a bank in Medico, Missouri, he admitted that he never reported his second accident later in the month while working at the Life Sciences Center. Ms. Forck testified similarly that she received late notice of the first accident and no notice of the second. While the failure to give timely notice of the first accident might very well have been overcome, given Mr. Pursifull's showing of good cause for failure to report his back injury and his showing of lack of prejudice to the employer/insurer, there is no evidence of notice, much less of good cause for failure to give notice or a showing of lack of prejudice to the employer/insurer with regard to the second accident.

Dr. Trecha, although identifying Mr. Pursifull's work for Braun Plastering as the culprit in his need for further treatment, failed to identify which of the two injuries caused the need for the recommended treatment or the need to have lost time from work.

Thus, the workers' compensation benefits sought for two September 2003 back injuries allegedly sustained at Braun Plastering are denied. All other issues raised for resolution are hereby rendered moot.

Date: July 19, 2005

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

A true copy: Attest:

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