

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

Injury No.: 08-043656

Employee: Gregory Robertson
Employer: Behnen Management Inc.
Insurer: Travelers Commercial Casualty
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-captioned workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have read the briefs of the parties and heard the parties' arguments. After 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John A. Tackes, issued May 10, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Gregory Robertson

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 am convinced the decision of the administrative law judge should be reversed.

Employee worked for employer as a thrower on a garbage truck from January 23, 2007, until July 31, 2008. Employee's duties involved riding on the garbage truck and jumping off to collect and dump garbage bins and containers. On April 1, 2008, employee was paired with a coworker named Marty Long. Mr. Long was driving the garbage truck and employee was throwing garbage. Mr. Long slowed the speed of the truck at each collection site to allow employee to jump off. At one point, employee felt the truck slowing down and prepared to jump off. The truck suddenly lunged forward, causing employee to lose his balance and fall off the truck. Employee landed on his left side and experienced immediate pain in his back and left knee.

Mr. Long testified via deposition. Mr. Long remembered seeing employee lose his balance and fall off the garbage truck on April 1, 2008. Mr. Long witnessed the fall in the rearview mirror. Mr. Long remembered stopping the truck and walking around to the back of the truck to help employee off the ground.

After the accident of April 1, 2008, employee worked through his pain and finished the shift. Employee was unable to report the incident to a supervisor after his shift because everybody had already gone home by the time employee and Mr. Long returned to employer's offices.

The next morning, employee found that his pain had worsened overnight. When employee arrived at work, he reported to a supervisory employee, Tommy Norman, that he had fallen from the truck the day before and that he hurt himself and needed to go to the doctor. Mr. Norman told employee, "You got to do what you got to do," and declined to send employee for treatment. Employee scheduled several doctor's appointments for himself during April 2008 to seek treatment for his left knee and back complaints. Mr. Norman refused to allow employee time off from work to see the doctor. Employee was eventually required to take vacation time in order to see a doctor for his work injuries.

Tommy Norman testified for the employer at the hearing. Mr. Norman testified that he was a salesman for employer and denied that he was a supervisor. On cross-examination, however, he admitted that he had a dual employment role and that he was responsible for some supervisory duties, such as relaying information between the company owners and labor personnel. I find Mr. Norman lacking in credibility to the extent he testified that he is not a supervisor. I find that Mr. Norman performed supervisory duties, such as relaying information between laborers and management.

Employee saw Dr. Mehra on April 28, 2008. Employee told Dr. Mehra that he was injured at work while jumping on and off a garbage truck. Dr. Mehra provided

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conservative care but would not authorize an MRI for the knee or back, apparently because the doctor believed this was a workers' compensation case. Dr. Mehra released employee for light duty and provided a return to work note which advised that employee was in need of further treatment. Employee gave the note to Stephanie Endress, employer's office manager and Mr. Norman. Employer again failed to send employee for medical treatment.

Dr. David Volarich performed an independent medical evaluation of employee on August 11, 2009. Dr. Volarich diagnosed lumbar left leg radicular syndrome most consistent with L4-5 herniation and left knee patellofemoral syndrome. Dr. Volarich opined that the prevailing factor causing employee's injuries and medical condition was the fall from the garbage truck on April 1, 2008. Dr. Volarich opined that employee is not at maximum medical improvement, but is in need of future medical treatment as a result of the work injury. Dr. Volarich recommended an EMG nerve study, MRI scans of the left knee and low back, and injections. Since the fall, employee has been unable to work without restrictions. He has only limited ability to sit, stand, kneel, and bend, and has difficulty lifting heavy objects. Employee is unable to do yard work without breaks and even simple household chores take employee twice as long to accomplish.

The parties stipulated that, given the foregoing facts, employee sustained an injury by accident arising out of and in the course of employment. The administrative law judge denied employee's claim, however, on a finding that employee failed to provide proper notice of his injury to employer as required under § 287.420 RSMo. That section provides, in pertinent part, as follows:

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

The purpose of the foregoing 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. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo. App. 2000), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003). Because employee did not provide the written notice required by the statute, the question becomes whether employer was prejudiced by failure to receive the notice. I conclude that employer was not prejudiced.

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. *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498, 503 (Mo. App. 1968). If the employer does not admit actual knowledge, the issue becomes one of fact. *Id.* If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice

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which shifts the burden of showing prejudice to the employer. *Id.* at 503-04. See also *Gander*, 933 S.W.2d at 892.

Soos, 19 S.W.3d at 686.

Employee notified a supervisory employee, Tommy Norman, on April 2, 2008, that he was injured when he fell off the garbage truck. It is well settled that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652, 654-55 (Mo. App. 1994). Because notice was provided to a supervisory employee on April 2, 2008, I find that employer had actual knowledge of employee's work injury.

Because employer had actual knowledge of employee's work injury, the burden shifts to employer to demonstrate that it was prejudiced by employee's failure to provide written notice of employee's work injury. After a thorough review of the record, I am convinced that employer failed to meet that burden. Employer had an opportunity to direct employee's medical treatment as early as April 2, 2008, when employee told Mr. Norman that he was hurt and needed to see a doctor. Instead, employee was told it was his own problem. Employer's office manager, Ms. Stephanie Endress, admitted that employer was able to investigate this matter, and that the owners of the company were aware that employee was seeking medical treatment for a potential work injury. Employer was able to interview and depose Marty Long. I conclude that employer has not met its burden of demonstrating that it was hampered in its ability to investigate the incident, or that it was denied an opportunity to minimize employee's injuries. I conclude that employer was not prejudiced by employee's failure to provide written notice under § 287.420.

I proceed to the issue of medical causation. Employer did not present any medical expert testimony; Dr. Volarich is the only doctor to testify in this case. I find Dr. Volarich's opinion credible. I find that the prevailing factor causing employee's low back problems, left leg radicular syndrome, and left knee patellofemoral syndrome, was the work injury of April 1, 2008, when employee fell off the garbage truck. I find that employee is in need of immediate medical treatment in connection with that work injury.

The administrative law judge made findings on the medical causation issue, even though it was technically moot after the administrative law judge determined that the claim was barred by § 287.420. Although the administrative law judge's comments are gratuitous, I note that they are erroneous in several important ways. First, the administrative law judge summarized Dr. Volarich's testimony without making any express determination as to the doctor's credibility. As a result, the administrative law judge failed to make unequivocal, affirmative findings as to pertinent facts. See *Stegman v. Grand River Reg'l Ambulance Dist.*, 274 S.W.3d 529 (Mo. App. 2008) (reversing a decision of the Commission that failed to make affirmative, unequivocal findings, but instead merely summarized the testimony of witnesses, and then reached a conclusion without indicating what weight or credibility were given to any of the evidence).

The administrative law judge then concluded that the accident of April 1, 2008, was not the prevailing factor causing the work injury, noting that a coworker had seen employee

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limping previous to April 1, 2008. The administrative law judge implies that employee's left leg problems predated the date of injury, without any medical evidence to support such a determination. Clearly, the administrative law judge disregarded uncontradicted expert medical evidence and adopted instead a lay opinion on the issue of medical causation. This is error as a matter of law:

The commission may not arbitrarily disregard or ignore competent, substantial and undisputed evidence of witnesses who have not been impeached. In addition, the commission may not base its finding upon conjecture or its own opinion unsupported by sufficient evidence.

Highley v. Von Weise Gear, 247 S.W.3d 52, 57 (Mo. App. 2008) (citation omitted).

The majority has joined in the foregoing legal errors by affirming the award of the administrative law judge.

In sum, I am convinced that employee met his burden of establishing that employer was not prejudiced by his failure to provide timely notice. Additionally, I would find that employee met his burden of establishing he sustained a compensable injury on April 1, 2008, given the credible testimony of employee and Marty Long, and the uncontradicted and unimpeached opinions of Dr. Volarich. Accordingly, I would reverse the award of the administrative law judge and award the compensation to which employee is entitled under the law.

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

John J. Hickey, Member

FINAL AWARD

Employee:	Gregory Robertson	Injury No.:	08-043656
Dependents:	N/A		Before the
Employer:	Behnen Management Inc.		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	Travelers Commercial Casualty		
Hearing Date:	May 4, 2010 ¹	Checked by:	JAT

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? Yes
4. Date of accident or onset of occupational disease: April 1, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant fell off the back of a truck.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back/Left knee (alleged)
14. Compensation paid to-date for temporary disability: \$0.00
15. Value necessary medical aid paid to date by employer/insurer? \$0.00

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- 16. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 17. Employee's average weekly wages: \$625.00
- 18. Weekly compensation rate: \$416.62 TTD/\$389.04 PPD
- 19. Method wages computation: Stipulated

COMPENSATION PAYABLE

- 20. Amount of compensation payable: NONE
- 21. Second Injury Fund liability: NONE
- TOTAL: \$0.00
- 22. Future requirements awarded: NONE

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Michelle Rine.²

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Gregory Robertson	Injury No.:	08-043656
Dependents:	N/A	Before the	
Employer:	Behnen Management	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Travelers Commercial Casualty	Department of Labor and Industrial	
Hearing Date:	May 4, 2010	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JAT

PRELIMINARIES

A hearing was held on the above captioned matter in St. Louis, Missouri before the Division of Workers' Compensation before Administrative Law Judge John Tackes on October 22, 2009. A Temporary or Partial Award was issued January 21, 2010. The parties now request a Final Award be made in this matter. The hearing proceeded to trial for a Final Award on May 4, 2010. Attorney Robert Frayne represented the Employer and its Insurer. Attorney Michelle Rine Hughes represented the Claimant. The Second Injury Fund did not appear but is a party in this matter.

At trial on May 4, 2010, Employer offered the transcript of the Temporary Award hearing which was entered without objection. This transcript contains all exhibits from the October 22, 2009 hearing.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated that on or about April 1, 2008:

1. Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. Claimant was an employee of Employer;
3. At all relevant times, Employer was fully insured for Missouri Workers' Compensation purposes by Travelers Commercial Casualty;
4. Claimant sustained an injury by accident arising out of and in the course of employment; and
5. Venue is proper in St. Louis

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Notice
2. Medical Causation
3. Attorney fees/costs (penalties)
4. Future medical treatment
5. TTD
6. Past Medical Bills

FINDINGS OF FACT

Based on the competent and substantial evidence and my observations of Claimant at trial, I find:

Claimant worked approximately two years as a laborer for Employer's trash hauling business in Valley Park, Missouri. As of the date of the hearing, Claimant was 45 years old and lives in Mapaville, Missouri. He currently works full time for Edge Manufacturing as a machine operator. As an employee of Behnen Management, the employer, Claimant picked up trash containers, threw the trash in the truck and then rode the truck to the next stop. He preferred standing on the passenger side at the rear of the truck. His hours of work were 6:00 a.m. until the job ended for the day, usually around 3:00 p.m. or 4:00 p.m.

Claimant believes he was injured when falling off one of the employer's trucks in the course of his duties. On April 1, 2008, while in a subdivision performing his "throw and go" activities, Claimant alleges he was injured when thrown from the truck he was riding. He incorrectly believed the truck was making a stop because it slowed momentarily before accelerating. There were two other workers on the truck. One of the workers, the driver of the truck, says he saw the Claimant fall off, the other did not. Claimant alleges he fell on his left leg and hurt his back, and that his pain grew worse with each hour he continued working. He continued to work three hours that day until the work was finished and made no report of the incident to the employer. Claimant's testimony that he did inform the employer of the incident is self serving and not credible.

When he and the crew returned to the main office, Claimant did not make a report because he believed no one was present at work. Instead he clocked out and left around 5:00 p.m. Claimant returned to work the next day around 6:00 a.m. He spoke with a salesman named Tommy Norman who he believed was an acting supervisor. Claimant mentioned the fall to Mr. Norman but no report was made.

Claimant had no prior injury with the company and denies any knowledge of a policy requiring him to immediately report the injury. Claimant had received a copy of the company handbook which includes a section on when to report an injury. Claimant's assertion that he made a doctor's appointment for April 4, 2008 because of this incident but did not go because his employer denied him time off is not credible. There is no competent or credible evidence of such an appointment having been made or of the employer denying the Claimant time off. A witness for the Employer who testified at the hearing is aware of workers' compensation law and the necessity of reporting injuries and notifying its insurer when accidents occur. Claimant's allegation that the Employer was aware the Claimant made a claim of injury at work and was denied access to a doctor because work was too busy is not credible.

Claimant was off work from April 30, 2008 to May 5, 2008 for vacation. He did not work for the employer after May 5, 2008. On April 28, 2008 he was seen by his primary care physician where he complained of low back pain and left knee instability. His doctor recommended an MRI, physical therapy, and possibly surgery. After his appointment, Dale Behnen, one of the owners of the company and a supervisor, informed the Claimant that he could not return to working on the back of a truck until released by a doctor. No light duty work was available.

Testimony of Stephanie Endres

Stephanie Endres is employed by Behnen Management as a bookkeeper. She has been employed 11 years and handles the employer's accounting matters, HR issues, workers' compensation insurance claims, and accounts payable and receivable. She is familiar with the employer's procedures when a report of injury is made. Standard procedure after notice of an injury is received is to follow up on the report, contact the insurer, request a recorded statement, conduct an investigation, and send the injured worker for medical treatment. Employer was unable to do any of this because no actual report was made. Even when the employer offered to make a report of injury and open a file in May, 2008, Claimant refused.

Claimant never requested treatment from Ms. Endres or the employer. As of April 1, 2008, the company supervisors included George and Dale Behnen, owners, and Mark Reilly, operations manager. Tom Norman, who Claimant believed was a supervisor, was not a supervisor. He had been a driver but was transitioning to sales for less pay and better hours.

Ms. Endres was not aware of an alleged workplace accident until she received notice from Claimant's attorney dated May 13, 2008. On May 16, 2008, Claimant appeared at the employer's office for a paycheck. At this time he was asked whether or not he was hurt and wanted to file a workers' compensation claim. He said no.

Employer has had a handbook for eleven years during which time it has undergone several revisions. According to the policy in effect on April 1, 2008, a report of injury is required to be made immediately to an owner or supervisor.

Testimony of Thomas Norman

Thomas R. Norman has been an employee of Employer for three years. On April 1, 2008 he was a dispatcher/salesman. He had been a driver for the company but was not a supervisor and had no supervisory authority. Mr. Norman could not hire, fire, demote, or otherwise supervise employees. He was present in the office on May 16, 2008 when Claimant appeared and announced he had been injured nearly six weeks earlier on April 1, 2008. Mr. Norman has known Claimant for more than fifteen (15) years. He has seen Claimant walking with a limp even before April 1, 2008.

Testimony of Marty Robert Long (by deposition)

Marty Long is a resident of Jefferson County, Missouri and was employed by Employer as a waste hauler as of as of December 11, 2008 when his deposition was taken. He testified that

Mark Reilly was a supervisor but was uncertain if Tommy Norman was or not. He believes Mr. Norman was in sales and that Mark Reilly was a supervisor. At the time of the incident on April 1, 2008, there were two throwers and a driver. Mr. Long was the driver and the throwers were Claimant and Larry Babb. Mr. Long believes he saw in the passenger side mirror, Claimant's fall from the truck. Mr. Long stopped the truck, got out and asked Claimant how he was but could not remember the Claimant's answer. No medical treatment was requested or provided. The men continued their duties and worked another three hours until the work was finished.

Medical Records of S.K. Mehra, M.D.

Claimant was seen as a new patient on April 28, 2008. In his records, the doctor notes that Claimant reported falling while bowling about two weeks before the visit, and had a motor vehicle accident sometime in 2008 (other than the fall from the Throw and Go truck).

David T. Volarich, D.O. (IME dated August 11, 2009)

Claimant saw Dr. David Volarich for purposes of an Independent Medical Evaluation (IME) only and not for treatment. The evaluation was based on a medical examination and medical records.

After reviewing the medical records, Dr. Volarich noted that in April, 2008, a physician indicated that Claimant had fallen while bowling and had a motor vehicle accident in "either January 2008 or April 2008". Claimant however denied these accidents occurred. Dr. Volarich noted the degenerative bilateral joint disease in both knees. The records showed that Claimant reported improvement in his knees up to May 11, 2008 when he fell after his left knee gave out. Claimant however said that he had not fallen. Dr. Volarich noted tenderness of the left knee and the left low back. Claimant continued to report low back pain and bilateral knee pain from May, 2008 through the IME in August, 2009. He was taking Vicodin and Flexeril for pain.

Claimant told Dr. Volarich that the April 1, 2008 incident caused him to be unable to get on and off a truck. Claimant complains of daily back pain which wakes him up at night and sometimes radiates to his left foot. He cannot squat or kneel because of his knee pain. He is able to bathe and dress but can no longer run for exercise. Leading up to and continuing beyond April 1, 2008, Claimant continued to work without physician imposed restrictions and missed no days of work or seek medical treatment with the employer.

Dr. Volarich diagnosed lumbar left leg radicular syndrome most consistent with L4-5 disc herniation and left knee patellofemoral syndrome. He opined the April 1, 2008 accident is the substantial contributing factor, as well as the prevailing or primary factor causing his lumbar left leg radicular syndrome suspicious for an L4-5 disc herniation, as well as left knee patellofemoral syndrome. He does not place Claimant at maximum medical improvement and offered no disability rating because he opined Claimant needs additional care for the injury. He recommended an MRI scan of the lumbar spine, a full set of lumbar spine films, an EMG nerve conduction study of the left lower extremity, an MRI of the left knee, Pain management for lumbar radicular syndrome and left knee pain, a cortisone injection to the left knee, and an epidural steroid injection for the lumbar syndrome.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

Notice

The Workers' Compensation Law requires that written notice must be given no later than thirty days after the accident for compensation proceedings to be maintained.

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice. RSMo. 287.420.

Claimant's claim for compensation will be barred by his failure to comply with the notice requirement unless the employer was not prejudiced by failure to receive the notice. There was no written notice within thirty days provided to Employer by Claimant of the accident. Even when specifically asked by Employer on May 16, 2008 if he wanted to report an injury or file a claim, he refused. As of this date Claimant had already seen his primary care physician. The thirty day notice period applies unless it can be shown that Employer was not prejudiced by the failure to give notice.

Claimant demonstrates lack of prejudice where evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact-finder. *Pursifull v. Braun Plastering & Drywall*, 233 S.W.3d 219 (Mo. App. W.D. 2007). In this case, evidence of actual notice was not uncontradicted, not admitted by the employer, and not accepted as true by the fact-finder. If the employee cannot show either written notice or actual knowledge, the employee bears the burden to show and obtain the finding that no prejudice to the employer resulted. Where the employee fails to adduce evidence of lack of prejudice, the court will presume that the employer was prejudiced by the lack of notice because it was not able to make a timely investigation. In order to determine whether an employer is prejudiced by failure to provide any notice of an accident, the Commission must hear evidence on the issue and the employee bears the burden of proof of lack of prejudice. *Id.*

There is no evidence of actual notice in this case. There was clearly no written notice, and the only other suggestion that Employer had actual knowledge was the request for time to go to the doctor which was not made to a supervisor and not made in connection with the incident on April 1, 2008. There was never even a suggestion that Employer had any notice or actual knowledge regarding a work related accident until May 16, 2008. Claimant has failed to adduce evidence of lack of prejudice, and I therefore must assume that the employer was prejudiced by the lack of notice because Employer was not able to make a timely investigation.

Medical Causation

The burden is on the Claimant to establish a causal connection between the accident and the claimed injury. An accident is only compensable if it was the prevailing factor in causing both the resulting medical condition and disability. §287.020.3(1) Claimant must prove by competent and substantial evidence, his entitlement to compensation by asserting that the claim is more likely to be true than not. §287.808 According to medical records from Dr. Mehra dated April 28, 2008, Claimant had pain in his left knee and low back for two months and trouble with his knees prior to April 1, 2008. At least one coworker who has known Claimant for more than fifteen years has noted a limp long before April, 2008.

I do not find it more likely to be true than not that his left knee pain and low back pain arose out of an incident at work on April 1, 2008. The question is not whether or not a person could injury their left knee and back falling from a truck. It is whether or not Claimant injured his left knee and his back when he fell or was otherwise thrown or jumped off a truck on April 1, 2008. His conclusion that it did does not match the facts. He made no complaint at the time of the incident to the driver or other employee. He did not report it to the employer any time prior to seeing his primary care physician four weeks after April 1, 2008. No medical causation exists to prove that his left knee and low back injuries were caused by the accident on April 1, 2008. I therefore do not find the accident is compensable because the accident was not the prevailing factor in causing both the resulting medical condition and disability.

Past/Future Medical Treatment and TTD

In light of the findings that Claimant failed to provide statutory notice and lack of medical causation, the issues of past medical treatment (bills), future medical treatment, and temporary total disability (TTD) are moot.

Attorney fees/costs (penalties)

If it is determined that any proceeding have been brought, prosecuted or defended without reasonable ground, the Division or any administrative law judge, or the commission, may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. §287.560. RSMo. There is no finding in this matter that Employer has defended the proceedings without reasonable grounds. The defense has been based on lack of notice and lack of medical causation. There is merit to the employer's position on each.

CONCLUSION

Claimant failed to provide statutory notice and Employer was prejudiced thereby. Medical causation has not been demonstrated by competent and substantial evidence showing a causal connection between the accident and Claimant's injuries to his left knee and low back. Having thus ruled on notice and causation, all other issues raised in this temporary award are moot. The Second Injury Fund is denied.

Date: _____

John A. Tackes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

Naomi Pearson
Division of Workers' Compensation

¹ Hearing on Temporary Award held October 22, 2009. Parties are now requesting a Final Award.

² Michelle Rine is now Michelle Hughes.