

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

Injury No.: 05-086767

Employee: Matthew Ryan
Employer: TBR Enterprises, Inc.
d/b/a Schulze Tool Company
Insurer: Westport Insurance Corporation

Date of Accident: November 18, 2004

Place and County of Accident: Independence, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 May 26, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Emily S. Fowler, issued May 26, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this ____8th__ day of November 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Matthew Ryan

Injury No. 05-086767

Dependants: N/A

Employer: TBR Enterprises, Inc., d/b/a
Schulze Tool Company

Insurer: Westport Insurance Corporation

Hearing Date: April 10, 2006

Checked by: ESF/bi

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? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: November 18, 2004.
5. State location where accident occurred or occupational disease was contracted: Independence, Jackson 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? 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:
While in the course and scope of his employment, Employee was on a truck which began to move, he jumped off landing flat on his feet causing the injuries to his right hip.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right hip.
14. Nature and extent of any permanent disability: Undetermined at this time.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$705.20
19. Weekly compensation rate: \$470.13/\$354.05
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

N/A weeks of temporary total disability

N/A weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

22. Second Injury Fund liability: N/A
23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Matthew Ryan Injury No. 05-086767

Dependants: N/A

Employer: TBR Enterprises, Inc., d/b/a
Schulze Tool Company

Insurer: Westport Insurance Corporation

Additional Party: N/A

On April 10, 2006 a hearing for a temporary award was held in the above captioned case. The Employee, Mathew Ryan appeared in person and was represented by Robert Schnieders. The Employer and Insurer were represented by Michelle Haskins. This Court has jurisdiction to hear this case pursuant to §287.020.

STIPULATED FACTS

The parties stipulated that:

1. That on or about November 18, 2004, Schulze Tool Company was an employer operating subject to Missouri Workers' Compensation Law and that its liability under said law was fully insured by Westport Insurance Corporation;
2. That on or about November 18, 2004, Matthew Ryan was an employee of Schulze Tool Company working under the provisions of the Missouri Workers' Compensation Law;
3. That Employee's contract of employment was made in Missouri;
4. That Employee's claim was filed within the time allowed by law;
5. That the Employee's average weekly wage was \$705.20 resulting in a compensation rate of \$470.13 for temporary total disability and \$354.05 for permanent partial disability compensation;

6. That the Employer has paid no temporary total disability or medical care to date, that Employee does seek additional temporary total disability benefits beginning July 22, 2005 to the present date; and
7. That Employee was working subject to the law in Independence, Jackson County, Missouri.

ISSUES

The parties requested the Division to determine:

1. Whether the Employee notified the Employer of the injury as required by law;
2. Whether the Employee sustained an accident or occupational disease arising out of and in the course of his employment;
3. Whether the Employee is entitled to temporary total disability benefits from July 22nd through the date of this hearing and ongoing; and
4. Whether the Employer must provide the Employee with additional medical care.

The Employee's evidence consisted of the live testimony of Matthew Ryan as well as his wife, Roneita Ray Ryan, and the following exhibits, which were admitted into evidence without objection:

Exhibit A – medical records of Matthew Ryan
Exhibit B – deposition of Aaron Todd Stegmaier

Employer and Insurer did not have any live witnesses, but offered the following exhibits into evidence, which were received without objection:

Exhibit No. 1 – claim for compensation
Exhibit No. 2 - deposition of Carole Austin Felix

FINDINGS AND RULINGS

Matthew Ryan, hereinafter referred to as Employee, was working for Schulze Tool Company on November 18, 2004 when he was injured while in the course and scope of his employment. Employee testified that although the original filing date of injury was in January of 2005, after reviewing records, he determined that his actual date of injury was November 18, 2004.

Employee explained that he was injured when he was helping coworkers get a fork truck unstuck from the side of another truck. Apparently, the fork truck had lifted a load and spun its tires because the break was still on; however, this caused the fork truck to become wedged, and in order to release the two vehicles, Employee had to climb up onto the truck and unhook a tarp from the top, which was creating a bind keeping the fork truck from being able to move out. Once the bind was released, the truck driver moved forward and Employee was forced to jump off of the truck, clipping his right hip and landing on his feet. Employee stated he caught himself before he landed on the ground, but he did land feet first. He stated that Leon and a Richard Bell were present at the time and that his supervisor, Doug Keifer and Eric Stegmaier were also in the area.

After landing on his feet he stood up and his hip hurt him "real bad." He stated that Leon had his head turned and Richard was up by the cab drinking coffee with his back to him, and therefore, neither of them actually saw him come off the truck. Employee states he went into the office and told Mr. Stegmaier what had happened. Mr. Stegmaier was asked if he was going to be all right and Employee told him he thought he would be okay. He did tell him it hurt all over his body, but there was no instruction to fill out a report or to report it to workers' compensation. Employee stated that Doug Keifer knew that it happened because Employee heard that when someone named Aaron walked into the office, Richard was being chewed out by Doug Keifer for what had happened.

When Employee returned to his home that evening, he realized that he had broken a shoe insert, which he had been wearing as a result of a previous accident. He states it was almost torn in half. He stated he suffered from stiffness in his neck and back and his hip popped and crunched quite a bit. His foot was bothering him a

great deal. He finally ended up taping the shoe insert. He had no problems with his left hip, but his right hip was hurting. He waited until after Christmas to get his shoe insert fixed. When the shoe insert was replaced, the symptoms in his foot went away but not in the hip, although they did get somewhat better. He stated that he could hear popping in his hip socket, crunching and popping noises from the hip, pain when he would lean on the leg, but he continued to work. He continued to see Dr. Fleishman, who is his doctor with regard to his shoe insert who eventually referred him to Dr. Dugan. Dr. Dugan ordered an MRI sometime in February of 2005. Dr. Dugan stated that he felt the hip socket was deeply bruised and that eventually his symptoms would resolve on their own.

Employee stated he told Doug Keifer in the parking lot about the results of the MRI. He said that Mr. Keifer asked him about what had happened and he told him that he injured himself when he jumped off the truck. He stated that Mr. Keifer's response was simply to say, "Huh" and threw a cigarette down and walked back to the office. Employee never requested to file a report of injury. He stated he did not feel comfortable doing so. He stated that over time symptoms got worse as he became more active in the spring. He stated that since he quit working the pain has subsided. He saw his family doctor in July of 2005, who examined him and did a rotation movement with his leg and he said there was no rotation in the right leg at all. He said that after the exam he was returned to work on July 25. He finally couldn't take it anymore and he left work telling Doug that his hip hurt too bad. He states his family doctor told him to stay off of it for six weeks and referred him to a specialist. When he told the Employer that he wouldn't be coming back for six weeks, he stated there was no discussion but that Mr. Keifer said, "that's fine." When he spoke with Bruce Goin, the owner, he was told to file a claim and to call Carole Felix, the secretary, to report the injury. He told Ms. Felix that he was injured on the job. He was told by Carole that he could not do that.

Other physicians he saw for care were Dr. Cook and Dr. Mark Maguire. Dr. Cook wanted to do an arthrogram, which has not been done because Employee did not have the money. Dr. Maguire examined him and said he would send him to a surgeon. Since he saw Dr. Maguire he has only seen his family doctor who continues to treat him. He is reluctant regarding surgery. He has remained off of work. His condition has not changed. He feels he is permanently disabled in his hip. He stated since the date of November 18, 2004 through July 25, 2005 when he quit working he has had no other accidents. He has not been able to return to work since that time.

On cross-examination he stated that when he originally filed his Claim for Compensation the date of accident was noted as January 2, 2005, but he stated that was not the correct date. In his deposition he stated that he was not certain of the date of accident, but now he knows the right date. He admitted on cross-examination that he never requested of his supervisor need for treatment and didn't ask to file a report. When he saw Dr. Dugan he stated in the information that his pain was of gradual onset and not sure where it started. That in the portion of the intake where asked how and when his injury occurred he left that blank. He admitted that there were no restrictions from Dr. Dugan and that Dr. Maguire said he could return to work on November 4, 2005. He also admitted that he did not know when he talked to Ms. Felix whether or not he should apply for short-term disability or for workers' compensation. He admitted he had no cane or walker on the day of hearing. He had a previous injury to his hips and legs in 2002.

Employee's wife, Roneita Ray Ryan also testified at hearing. She stated she knew that he was injured as of the date of injury as he told her about it. It takes his breath away, sometimes it gives out, he has loss of mobility, he cannot lift over 10 pounds, he is unable to do the yard work or carry out the trash and he cannot sit for a very long time. He is unsteady on his feet and putting on jeans is difficult. The stairs are difficult for him and he cannot go on long walks.

Employee's other evidence consisted of medical records beginning with Dr. Sheldon Fleishman, who is a podiatrist. It appears that on January 3, 2005, the chief complaint was regarding an evaluation of Employee's orthosis. Dr. Fleishman noted, "the patient has been utilizing orthosis for approximately 18 months. The patient has been treated for tenosynovitis second, third and fourth metatarsal heads plantarly right foot. Patient underwent orthotic management with forefoot offloading to the right, second, third and fourth metatarsal heads. His symptomatology has completely resolved. He presented this time, due to excessive wear of the forefoot extensions of the right orthosis."

It is noted under the examination that under Musculoskeletal there is no joint pain, swelling, stiffness or weakness. Also under the physical examination under Orthopedic, "Examination reveals range of motion normal

ankle, subtalar and first metatarsal phalangeal, negative crepitus, negative subluxations, no tenderness upon palpation, no gross musculoskeletal deformities seen.”

In the assessment Dr. Fleishman states, “The orthotic and shoe wear are within normal limits. However, the forefoot extension of the right orthosis has undergone excessive wear and the right orthosis should be sent to the laboratory for refurbishing. The patient has returned to work and recreational activities on a full-time basis. The patient’s past medical history to include familial, social, as well as review of systems is unchanged from January 3, 2005. The patient’s vascular, neurological and dermatological findings are unchanged from January 3, 2005. The biomechanical findings are unchanged from June 24, 2003.”

The patient was again seen by Dr. Fleishman on January 19, 2005, again, under Musculoskeletal, it is noted there is no pain, swelling, stiffness or weakness. Under Orthopedic, it is also noted that examination reveals range of motion normal, ankle subtalar, and first metatarsal phalangeal, negative crepitus, negative subluxations, no tenderness upon palpation, no gross musculoskeletal deformities seen. Dr. Fleishman noted that, “The patient ambulated satisfactorily in the office with orthosis. The patient’s past medical history to include familial, social, as well as review of systems is unchanged from January 3, 2005. The patient’s vascular, neurological and orthopedic and dermatological findings are also essentially unchanged from January 3, 2005. The patient was referred to orthopedics for evaluation of his right hip. The patient relates that while wearing his orthosis the symptoms in the right hip has decreased, however, he was urged to undergo evaluation for underlying hip pathology.”

Dr. Dugan’s medical records of February 18, 2005 note that he was referred by Dr. Fleishman due to his chief complaint of hips. The history of the present illness was noted as starting gradually and he was not sure where the injury occurred. He noted that it had been three months of more intense pain and that his pain was daily and that the pain sometimes causes him to limp and it keeps him from doing the things he enjoys, hurting mostly throughout the day. Occasionally keeping him awake at night, and is aggravated by sudden moment and feels better when he stays off of it.

In Dr. Dugan’s notes, he states, “This is a 36-year-old male who developed discomfort about the right hip about three months ago. Apparently he jumped off a semi at work, came down and had a popping sensation and the immediate onset of discomfort. Over the course of the past three months he feels he is actually getting worse. Any activity, particularly with hip flexion and rotation, causes a sharp pain in the groin area. This goes down into the anterior thigh. He has had no back pain, no gluteal pain. He has had no change in bowel or bladder control and although he has had radiating pains down the anterior thigh, is has not gone below his knee. He has tried some different forms of shoe inserts, which seem to effect his pain. The most recent inserts seem to help. He has been on no medication on a regular basis.”

Dr. Dugan noted that upon examination the right hip shows that Employee had definite pain with internal rotation limited to approximately 15 degrees. He had no pain with abduction or adduction, and had minimal pain with forward flexion. The tenderness was about the anterior superior iliac spine and just inferior to this area in the groin area. He had a negative straight leg test, neutral alignment to the lower extremities and his compartments are all soft. No obvious quad or calf atrophy or edema. He was able to heel and toe walk with no obvious leg length discrepancy. X-rays of his pelvis obtained in the office failed to show any specific degeneration or other acute changes about the hips. The two views of the right ankle obtained in the office showed some posttraumatic changes about the distal tibia and fibula which appeared to be a distal tib-fib fracture which had healed in an acceptable position. The ankle itself fails to show any significant acute or chronic changes. The recommendation was that since he was three months down the road and not getting any better, in fact, worse an MRI would be obtained.

An MRI was obtained on February 18, 2005. The impressions were: “abnormal signal noted in the medial anterior right hip joint with subchondral bone changes noted, greater in the anterior column of the acetabulum. I don’t know if this represents posttraumatic change or degenerative disease. No changes are noted to suggest avascular necrosis of the weight-bearing portion of the joint. Incidental finding was noted in the left femoral neck where there is abnormal signal seen anteriorly. This may represent bone contusion; however, the patient is asymptomatic on the left.”

The medical records of Dr. Gialde of Oak Grove Medical Clinic begin with an exam date of July 22, 2005 wherein subjective complaints were noted that six months ago the employee jumped off a semi truck and hit a fork

truck on the way down. He tore his orthopedic insert during the accident and was without inserts for two weeks. He had right hip pain. An MRI showed a bone bruise and his pain had been increasing. In the records it is noted there is a disability certificate from July 22, 2005 to August 18, 2005. Again, on August 12, 2005, Employee was seen by Dr. Gialde regarding a follow-up on a hip strain. It is noted he was to continue on disability for six weeks. Again, on September 23rd he was, again seen by Dr. Gialde who continued restrictions of activity and suggested he apply for disability. Another disability certificate is seen for September 23, 2005 through November 4, 2005. On November 2nd as well as November 16th and December 22nd, Employee was seen again with regard to hip pain and extension of his disability. Another disability certificate of December 22nd is seen running from December 28th to February 8, 2006. On January 30, 2006 he was seen by Dr. Gialde for follow-up on the right hip labial tear with no changes. On January 13th he said he bent over to pickup a phone, popped a muscle on the right and the left hip has been painful for three days. He is to be continued on disability indefinitely. On March 24, 2006 it was recommended he get total disability.

The records from Dr. Scott Cook of Orthopedic and Sports Medicine note that, "Employee presented to the clinic with the chief complaint of right hip pain on August 4, 2005. Employee stated he had pain for approximately seven months and originated from an injury that occurred at work when he leapt off a semi-truck landing on his right side stiff legged. He states that following this he had dull pain in his right hip; however, it was not significant at that time. He did not feel a pop. He states now he has a significant popping in his right hip when getting in and out of the car. He stated that sometimes it will pop when walking and turning in a certain direction. The pain when it pops is in the groin. Employee felt as though the right hip would lock occasionally." On physical exam Dr. Cook noted that Employee was able to ambulate. He did have a coccyalgic gait favoring his right hip. Stinchfield testing caused mild pain in the right groin. He was able to flex Employee to 90 degrees, internally rotate 10 degrees, and externally rotate 50 degrees. He noted that Employee did not have pain with flexion, axial loading, and external rotation. The assessment was that Employee had a right hip pain secondary to labral injury. At the time Dr. Cook noted that the treatment plan could be a recommendation of an MR arthrogram of the left hip. He also noted the MRI Employee had encompassed both hips and Dr. Cook could not definitely make out a labral tear or any other pathology.

Finally, in Employee's medical records are the records of Dr. Mark Maguire who saw Employee on April 10th. Employee stated to Dr. Maguire that he had a work injury in January of 2005 and was forced to jump off the bed of a truck at work. He developed some pain all over but particularly pain in the right hip, deep achy sort of pain and mechanical popping and catching. On physical examination, Dr. Maguire noted there was a shortening of the right lower extremity of an inch or so. There was no swelling or trouble at the knee. The hip could flex and extend well, but Employee had pain with rotation. He noted that Employee stated that sometimes he has fairly audible popping sound when it is rotated and the pain tends to be deep in the groin. Employee does get some night pain with it, but it is worse when he tries to rotate it.

Dr. Maguire obtained x-rays and noted that there was a little bit of irregularity on the femoral head shape, particularly on the lateral view. There was a bit of sclerosis and osteophyte changes consistent with some degenerative changes within the hip. Dr. Maguire's treatment plan included a discussion with Employee and his wife that when Employee was actually describing, it sounded more like symptoms that related to labral tear and some mechanical symptoms related to his osteoarthritis. He felt he needed to be worked up a bit further for a labral tear and that an MRI arthrogram is more likely to show something than a regular MRI. He would recommend he be seen by someone who could do a hip arthroscopy and let them make the decision whether there was need for an additional study. The ultimate fix would be a hip replacement.

Claimant's Exhibit B was the deposition of Aaron Todd Stegmaier. Mr. Stegmaier noted that he has known Matt Ryan and continues to know him even after leaving the company. Mr. Stegmaier was a supervisor only when Doug Keifer was not present on the premises, either on vacation or out. Mr. Stegmaier noted that he was present the day Employee allegedly injured himself, as well as was Doug Keifer. He did not see Employee injure himself. Employee came in and told him that he had to jump off the truck and that he was very angry at Richard the truck driver, but did not tell him about his leg hurting. He asked him if he had told Doug and Employee told him that he had. Mr. Stegmaier spoke to Doug Keifer some days later, and Doug had related to him something about Richard, but didn't mention anything regarding Employee having been injured in the incident. He had never spoken to Richard about the incident itself. He stated that as a lead man when Doug was away. It would be his

responsibility to take action when somebody gets hurt, but only if Doug was not there. And on the date in question, Doug was present so he did not have any responsibility that day. He noted that a few days or weeks later Employee did tell him that his hip was sore. He did know that Employee was going to the doctor, but couldn't exactly tell when and he didn't know that it was related to the incident. He knew it had something to do with foot inserts. On cross-examination, Mr. Stegmaier testified that he did not actually see the incident occur. That on the initial discussion Employee did not tell him that he was hurt. That it was a week or two later that he mentioned his hip was sore, but it was more of a generalized comment and not related to the incident. Employee never came to him in his capacity as supervisor at the company to ask for medical treatment or direction. He was aware of the policy if someone was injured at a workplace and that it needed to be reported to Doug and that a report of injury needed to be made. It would then go to Carole for processing after that.

Employer's evidence included Employee's initial claim for compensation noting a date of accident or occupational disease of January 2, 2005, as well as the deposition of Carole Austin Felix. In the deposition Ms. Felix stated that she is the office manager. The protocol for making a report of injury would be that an injured employee would have to go to Doug. If Doug was not there, then they come to her. They can also go to Bruce who is the owner or they can go to their lead man. After they have discussed the incident with one of these individuals, then they had to come to her if it was a legitimate accident and they were injured. She is the one who determines if it was a legitimate accident. She first learned that Employee was claiming he had been injured in July of 2005. She was visiting in her boss's office and noticed the absentee list had an excuse from a doctor concerning Employee, that he would be off for a few days. She asked Bruce at the time was Employee ill and Bruce said no, that he hurt his ankle. She did not file an accident report with Division of Work Comp because she was not told it was an accident. She first learned that it was a possible work-related accident later in July of 2005 when he called in and talked about his short-term disability, and she asked if he was ill and he said, no that he hurt his ankle, but he didn't know whether it was work comp or disability. She explained he couldn't do both and that she asked him whether he did it at work or someplace else, and he told her he didn't know. He hung up at that point and she received an angry call from his wife and eventually she called back and got the number for the short-term disability carrier to put in an application over the phone. She never filed notice of injury or anything with the Division because she was not made aware it was work comp. At that point all she knew was they were making a request for short-term disability. She found out he was filing for work comp some time after the July date. She stated that she had spoken to Doug regarding whether Employee talked to Doug about being injured and he did remember that Employee came in and talked to him about it but could not remember the date. She noted that when asked how come Doug didn't come in to talk to her about it, she said it was because Employee had told him he wasn't hurt. Employee never came to her at anytime and said he needed to be seen for medical treatment or that he had been injured and request a copy of the report of injury to be completed.

The main issue to be determined regarding this case is whether Employee notified the Employer of his injury as required by law. There is some rather hazy information as to exactly what happened on the date that Employee was injured. He stated that he jumped off of a truck while it was moving and felt immediate pain in his hip. He later spoke to Mr. Stegmaier telling him that he was very angry about Richard having moved the truck, but apparently, according to Mr. Stegmaier never made mention to him that he was injured. There is some discussion as to whether or not Employee may have told Doug Keifer, his supervisor, that day but it is not clear what he said or exactly when. There is hearsay testimony that he overheard someone saying that Doug was very angry that Richard had moved the truck. But no testimony that he specifically went to his supervisor and told him of the injury or that he was injured and needed medical care. Employee's coworker and friend, Mr. Stegmaier testified that although Employee did tell him of the incident, he did not express to him that he was injured but mostly that he was angry that the incident had occurred. It wasn't until a couple of weeks later that he even knew Employee was having problems with his hip and he testified that, in fact, there was no indication that it was related to the incident. There was no evidence that the employer even had implied notice that this injury had occurred as a result of a work related incident.

The evidence from Ms. Felix showed that she was not aware of any incident until more than six months later when Employee contacted her regarding possible disability for an ankle injury and it wasn't until sometime in August when she was told by the owner, Bruce Goin, that in fact Employee was requesting a work comp claim.

§287.420 RSMo requires the employee to give the employer written notice of the time, place and nature of the injury and the name and address of the person injured. This is to be given to the employer as soon as

practicable after the happening thereof but not later than 30 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 such notice.

Employee's testimony was confusing at best. He knew who he was to go to if he was injured in an accident. When the incident occurred he had immediate pain in his hip, according to him but failed to tell anyone about it. Although he testified he told his supervisor Doug Keifer about the results of his MRI, which was taken some three months after the incident, he never testified that he told Mr. Keifer at or around the time of the incident. Further on the date of the alleged incident Employee testified that he mentioned the incident to Mr. Stegmaier, but he mainly told him because he was angry that it happened and made no attempt to ask for medical care then or even a few weeks later and never related to Mr. Stegmaier that it was due to the incident. Mr. Stegmaier stated that although he was made aware that an incident had occurred, there were no complaints of pain and there was no request by Employee to file a report of injury. Carole Felix also testified that she was not made aware of any problems including any incident of physical injury to Employee until some six or seven months after the incident itself. At that time it was her understanding that he was complaining about his ankle and that it was a disability claim.

This Court finds that Employee failed to give timely notice to his employer within the 30 days after the accident as required by law. The next matter for this Court to determine is whether there was good cause for failure to give the notice or that the employer was not prejudiced by failure to receive the notice.

This Court does not find that there is any good cause for failure to give the notice. Employee had access to his supervisors who were all present that day and certainly within the few days afterwards he could have easily gone in, requested medical care describing the incident that had occurred. He failed to do this. Therefore, this Court does not find good cause for Employee's failure to report this incident on the day it happened considering Employee realized he was hurt that day yet failed to file a proper claim. Even within the few days and weeks following within the 30-day requirement, Employee although his pain became worse, again failed to give notice to anybody of this injury. Employee has also not proven that Employer has not been prejudiced by the failure to receive such notice. The main reason for the requirement to give immediate notice is to allow the employer to direct the medical care. Some seven to eight months went by since his injury, Employee went to his own doctors who initially told him that it would get better on its own and eventually suggested additional medical care including an MR arthrogram. Because Employee had no funds to obtain this testing more time went by without a differential diagnosis regarding his injury. Had Employee reported this immediately after the incident the Employer would have had the opportunity to send him to their own doctors who they would have paid for and who could have more specifically determined what was wrong with his hip and given him immediate medical care. By not doing this and waiting, stating that he had no money to pay for such testing, Employee may have caused additional harm to himself. His failure to give the required notice to his employer deprived the employer of its right to direct Employee's medical care.

The burden is on the employee to show that the employer was not prejudiced by his failure to give notice. Employee has failed to carry his burden. This Court, therefore, finds that Employee failed to give proper notice to his Employer of the alleged injury on November 18, 2004.

It appears based upon the evidence that Employee may well have sustained an accident arising out of and in the course of his employment. He described an incident wherein he had to jump off a truck as it started to move and landed hard on his feet, causing the damage to his foot insert. He felt immediate pain. Other employees were aware that an incident had occurred, although no one actually witnessed it. However, because Employee failed to notify the employer as required by law the issues of whether Employee sustained an accident or injury or whether employer owes Employee temporary total disability or medical care, are moot. Therefore, this Court finds that Employer is not liable to Employee for his injury or for any care or payment of benefits herein.

Date: _____

Made by: _____

Emily S. Fowler

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation