

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

Injury No.: 04-133552

Employee: Rita Schroeder Hall

Employer: Highlandville Packing Company

Insurer: Missouri Employers Mutual Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 29, 2011, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued July 29, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12th day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Rita Schroeder Hall

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be reversed and a temporary or partial award should be issued directing employer to provide needed medical treatment to cure and relieve the effects of employee's February 27, 2004, work injury.

The ALJ found that employee failed to satisfy the notice provisions located in § 287.420 RSMo. Section 287.420 RSMo 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....

The ALJ concluded that employee could not recall whether she specifically advised employer that her back injury occurred at work and, therefore, found that "[e]mployer did not know of the work accident." Further, the ALJ concluded that employee failed to prove that employer was not prejudiced by employee's failure to provide notice.

Based upon my review of the evidence, I disagree with the ALJ's conclusions and find that employer was provided actual notice of employee's injury within thirty days of the accident, and was not prejudiced by the fact that the notice was not in writing.

Employee testified that on Friday, February 27, 2004, she attempted to open the heavy meat locker door with the full weight and force of her arms and back. As she did so, employee felt intense pain in her low back. Employee was never able to open the door by herself that morning because it had frozen shut.

Employee stated that she had occasionally experienced back pain that was brought on by the nature of her work; however, her discomfort would usually resolve with rest. The February 27, 2004, injury occurred on the last day of her work week so she assumed that bed rest and over the counter medications would resolve the problem by the start of the next work week. Employee testified that she took over the counter medications and rested the entire weekend, but her back pain did not subside.

On the following Monday, March 1, 2004, employee testified that she discussed the injury and her back condition with one of the owners, Roger Smith. Specifically, employee testified that she was bent over and could not straighten up and Mr. Smith told her that she needed to go to the doctor. Employee stated that she told him about the February 27, 2004, injury at that time. Mr. Smith then directed employee to a local chiropractor, Dr. Schiffner. Dr. Schiffner's records indicate that employee's condition

Employee: Rita Schroeder Hall

- 2 -

originated on February 27, 2004, when she was “pulling on freezer door and felt snap in low back.”

Based upon employee’s uncontradicted testimony and Dr. Schiffner’s supporting records, I find that employer was given actual notice of employee’s work injury on March 1, 2004. I further find that in light of employer’s immediate direction of employee’s medical treatment that employer was not prejudiced by the fact that its notice was not in writing.

The statute excuses the requirement of written notice where the employer is not prejudiced by the failure to receive such notice. *Pattengill v. General Motors Corp.*, 820 S.W.2d 112, 113 (Mo.App. 1991). The purpose of the notice requirement is (1) to enable the employer to minimize the injury by providing medical diagnosis and treatment, and (2) to facilitate a timely investigation of the facts surrounding the injury. *Lawson v. Vendo Company*, 353 S.W.2d 113, 119 (Mo.App. 1961). The burden of proving the employer was not prejudiced lies with the claimant. *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498, 504 (Mo.App. 1968). However, if a claimant makes a prima facie showing of no prejudice, the burden shifts to the employer to show prejudice. *Ford v. Bi-State Development Agency*, 677 S.W.2d 899, 902 (Mo.App. 1984).

Hannick v. Kelly Temporary Services, 855 S.W.2d 497, 499 (Mo. App. 1993).

In light of this prima facie showing by employee of no prejudice, the burden shifts to the employer to demonstrate that it was prejudiced. Employer failed to produce any evidence showing that it was prejudiced by employee’s failure to provide written notice of the injury. Due to the fact that employer immediately directed employee’s medical treatment on March 1, 2004, employer cannot allege that it was unable to minimize the injury by providing medical diagnosis and treatment or was unable to timely investigate the facts surrounding the injury. Employer had actual notice of the injury and began directing treatment just three days after the accident.

For the foregoing reasons, I disagree with the ALJ’s finding that employee failed to satisfy the notice requirements of § 287.420 RSMo. I find that employer was provided actual notice on March 1, 2004, and was not prejudiced by the fact that the notice was not in writing.

In addition to the aforementioned, I also disagree with the ALJ’s finding that there is no causal connection between employee’s herniated L4-L5 lumbar disc and the work-related injury on February 27, 2004.

Employee sought medical treatment for the work injury just three days after its occurrence. While employee may have initially treated conservatively for this injury, an MRI eventually revealed the herniated disc at the L4-L5 level in her lumbar spine.

There was no evidence or medical records adduced at the hearing indicating employee had any low back condition prior to February 27, 2004. There was also no evidence

Employee: Rita Schroeder Hall

- 3 -

presented that employee had sustained any type of intervening event or injury between February 27, 2004, and the MRI that was performed on November 17, 2004.

Dr. Bennoch completed a medical records review and physical examination and opined that the February 27, 2004, injury was the prevailing factor causing the herniated disc at L4-L5 in employee's lumbar spine. Dr. Bennoch also recommended that employee return to neurosurgeon, Dr. Lee, for further neurological evaluation and, in all probability, low back surgery.

In sum, I find that employee satisfied the notice requirements of § 287.420 RSMo and is in need of further medical treatment to cure and relieve the effects of the February 27, 2004, work injury. For the foregoing reasons, a temporary or partial award should be issued directing employer to provide said medical treatment.

I respectfully dissent from the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member

AWARD

Employee: Rita Schroeder Hall

Injury No. 04-133552

Dependents: N/A

Employer: Highlandville Packing Company

Before the
DIVISION OF WORKERS'
COMPENSATION
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: Missouri Employers Mutual Insurance Company

Medical Fee Dispute: St. John's Clinic MFD# 401488

Hearing Date: May 3, 2011; Record Closed June 1, 2011

Checked by: VRM/ps

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: February 27, 2004.
5. State location where accident occurred or occupational disease was contracted: Highlandville, Christian 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 was contracted: Claimant injured back while opening freezer door.
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: Low back.

14. Nature and extent of any permanent disability: None awarded.
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: \$290.00.
19. Weekly compensation rate: \$193.33.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.

TOTAL: NONE.

23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rita Schroeder Hall

Injury No. 04-133552

Dependents: N/A

Employer: Highlandville Packing Company

Additional Party: N/A

Insurer: Missouri Employers Mutual Insurance Company

Medical Fee Dispute: St. John's Clinic MFD# 401488

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Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: VRM/ps

INTRODUCTION

On May 3, 2011, the undersigned Administrative Law Judge conducted a final hearing in this case involving Rita Schroeder Hall (Claimant), who appears with her attorney Paul Reichert. Karen Johnson represented Highlandville Packing Company (Employer) and Missouri Employers Mutual Insurance Company (Insurer). No one appeared on behalf of Missouri Healthnet or St. John's Clinic which had filed a Medical Fee Dispute. Upon motion of Employer/Insurer, the record remained open for 30 days for the receipt of a deposition transcript. The transcript was received timely and the record closed on June 1, 2011. Claimant seeks a Temporary/Partial Award directing the provision of medical care for an alleged work-related back injury. Employer seeks a Final Award, having denied all liability.

STIPULATIONS

The parties stipulated to the following facts:

1. On February 27, 2004, Rita Schroeder Hall was an employee of Highlandville Packing Company, an entity fully insured by Missouri Employers Mutual Insurance Company.
2. On the date of the alleged accident Claimant was covered by and Employer was subject to the Missouri Workers' Compensation Law.
3. The claim for compensation was filed within the time prescribed by law.
4. The accident is alleged to have occurred in Christian County. Venue is appropriate in Springfield, Greene County, Missouri. Jurisdiction is appropriate.
5. Employee's average weekly wage was \$290.00, yielding a temporary total disability and permanent partial disability rate of \$193.33.
6. Employer/Insurer paid no benefits.

ISSUES

The parties agree that the following are the issues for resolution as a result of this hearing:

1. Did Employee sustain an accident?
2. Did the alleged accident arise out of and within the course of employment?
3. Was notice of the alleged accident provided as required by law?
4. Is the alleged injury medically and causally related to the alleged work accident?
5. Is Employer responsible for payment of treatment provided through Mo. Healthnet, which has filed a lien?
6. Is Employer liable for past and future medical care?
7. Is the Healthcare Provider entitled to direct payment?
8. Is Employer liable for future temporary total disability?

EXHIBITS

The following exhibits were offered and received into evidence without objection:

- A. Notice of Complete Medical Report
- B. Medical Records
- C. Notice of Amended Lien – Mo. Healthnet
 1. Chiropractic Records
 2. Deposition – Claimant April 22, 2011
 3. Deposition – Claimant October 5, 2007
 4. Deposition – Dr. Lennard

The Administrative Law Judge also prepared a Legal File consisting of the Claim, Answer, Report of Injury, and Employer's request to leave open the record.

FINDINGS OF FACT

On Friday February 27, 2004, Claimant was trying to retrieve an order of meat from a commercial freezer at work. The door was stuck. As she pulled, she felt pain in her back. A coworker then assisted her in opening the freezer. Claimant described the pain as being across her lower right back like a rubber band that had stretched and snapped. She completed her work shift, rested over the weekend, and returned to work the following Monday.

On Monday, when she returned to work, Claimant was bent over and could not straighten her back. She told Roger Smith, one of the owner/ supervisors, that she had hurt her back. She could not recall whether she told Mr. Smith or anyone else that she hurt her back at work. Given the intervening weekend, Employer would not necessarily have known that Claimant hurt herself

at work on the preceding Friday unless Claimant had told her Employer what had occurred. I find that Claimant's Employer did not know of the work accident or the alleged causal connection.

Claimant had seen a chiropractor in the past, but he had died. Knowing only that Claimant was hurting, Roger Smith suggested that Claimant see his chiropractor, Dr. Schiffner. This was not an authorization for treatment since Employer did not know the injury was related to work. Rather, Mr. Smith was merely suggesting a place where Claimant might obtain some relief for her discomfort.

Claimant presented to Dr. Schiffner on March 1, 2004. The consultation history for that date recites a low back complaint with an onset of "LST THURS. – INSIDIOUS. (HAPPENS 1-2x/YEAR." (Exhibit 1). This history record is inconsistent with an occurrence of a work related injury occurring the prior Friday. But also contained in Dr. Schiffner's medical records is an "Attending Physician's Statement" dated March 2, 2004. In it, Dr. Schiffner states that Claimant's condition originated on February 27, 2004, when she was "Pulling on freezer door and felt snap in low back." (Exhibit 1). Thus, this medical record substantiates that Claimant sustained some type of injury with a freezer door on February 27, 2004. Dr. Schiffner provided treatment with spinal manipulation and electrical muscle stimulation the first few days of March 2004. Claimant attempted to testify that Dr. Schiffner performed an x-ray when he saw her and diagnosed a herniation. As noted below, however, Dr. Lennard testified it is not possible to diagnose a herniated disc with an x-ray. Such diagnosis is made through an MRI or a CT myelogram. Dr. Schiffner's records do not indicate the results of any x-rays. No MRI or CT scan was performed by Dr. Schiffner.

Following treatment at Schiffner Chiropractic, there is no evidence of any medical treatment until nearly six months later on August 18, 2004, when Claimant was seen at the Cox Emergency Room. At that time, she was seen for chest pain and "shooting anterior leg pain on and off for the past 2 months." (Exhibit B). The history given at this time is inconsistent with an injury occurring in February 2004, especially an injury resulting in a herniated disc. On physical examination, straight leg raises were negative and Claimant exhibited only "minimal tenderness" in the paraspinal lumbar musculature of L4 and L5 (Exhibit B). The records indicate that Claimant's pain resolved without treatment. The clinical impression was noncardiac chest pain, reflux esophagitis, and recurrent back and leg pain. Claimant continued to work for Employer through September 2004. She had no further treatment for the back until November 3, 2004, when she went to the Cox emergency department with right sided back pain going down her right leg. She was diagnosed with acute low back pain and given Toradol and an injection of morphine.

Dr. Miller, Claimant's personal physician, order a lumbar MRI that was performed on November 11, 2004. It revealed a mild L4-5 bulge with a prominent right paracentral and subarticular disc protrusion with expected mass effect on the traversing right L5 nerve root. Prior to this MRI, Claimant saw Dr. Miller, beginning in September 2004, for a multitude of ailments, but there is no mention of any low back pain until October 22, 2004, and no mention of a work injury.

On January 28, 2005, Claimant reported low back and left knee pain existing since February 2004. On April 25, 2005, when Dr. Sunghoon Lee, a surgeon, evaluated Claimant, she

reported being injured one year prior while carrying trays of meat; not from opening a freezer door. Dr. Lee reviewed the MRI and noted a large disc herniation eccentric to the right side at the L4-5 interspace. He suggested conservative therapy, and if not improved, he believed surgery could be an option. Claimant subsequently had epidural steroid injections. She has not had surgery.

Expert Opinions

Dr. Shane Bennoch examined Claimant on September 29, 2010. He found that Claimant was unable to put her full weight on her right leg. He found positive straight leg raises on the right. He found no paraspinal muscle spasm on palpation and complaints of pain. He found traumatic injury to the low back secondary to a work-related pulling injury on February 27, 2004. He diagnosed L4-5 right sided disc disease with right radiculopathy involving the L5 nerve root. He did not believe Claimant had reached maximum medical improvement. He recommended that Claimant be seen by a neurosurgeon and refrain from full time work.

Dr. Ted Lennard examined Claimant on April 11, 2011. He testified by deposition (Exhibit 4). He said there was no question that Claimant suffered from a herniated disc at L4-5 on April 25, 2005, when she was evaluated by Dr. Lee. But he said if Claimant had ruptured her disc in February of 2004, she would have continued to experience symptoms that most likely would have taken her to the emergency room or to the doctor. But in this case, Claimant did not go to the emergency room until August 2004, and at that time gave a history of pain of only two months duration. While she did seek treatment at Schiffner Chiropractic in early March 2004, Dr. Lennard believed Claimant “could have certainly strained her back at that time and went to see him for treatment.” (Exhibit 4, p. 22). Even if Dr. Schiffner had performed an x-ray at that time, Dr. Lennard indicated that there was no way for a simple x-ray to diagnosis a herniated disc.

Dr. Lennard agreed that pulling on a freezer door in the manner described by Claimant has “a potential mechanism” to cause a ruptured disc at L4-5. But he refused to say that such event caused the rupture in this case within a reasonable degree of medical certainty. As Dr. Lennard explained, “I just feel like if she – for patients that I see that rupture a disc acutely, it’s a little unusual to wait five months to go in and have something more done.” (Exhibit 4, p. 35). While Dr. Lennard agreed there was objective evidence of a herniation, he believed Claimant was now exaggerating her symptoms. He observed the presence of several positive Waddell’s criteria. Dr. Lennard did not believe Claimant needed any additional treatment for the event that may have occurred in February 2004, but he agreed that it would not be unreasonable for Claimant to be reevaluated by an orthopedic or neurosurgeon.

I find Dr. Lennard’s opinion more persuasive on the issue of medical causation.

CONCLUSIONS OF LAW

Claimant bears the burden of proving a direct causal relationship between the conditions of her employment and an alleged occupational disease. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo. App. W.D. 1999), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In meeting that burden of proof, Claimant must have expert testimony establishing that the claimed occupational disease was caused by

conditions in the workplace. *Smith v. Donco Const.*, 182 S.W.3d 693, 699 (Mo. App. S.D. 2006); *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 48-49 (Mo. App. E.D. 1999). Expert evidence must establish the causal connection by a reasonable probability. *Cook v. Sunnen Products Corp.*, 937 S.W.2d 221, 223 (Mo. App. E.D. 1996), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Where there are conflicting medical expert opinions, as in the instant case, the fact-finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. S.D. 1984). The Administrative Law Judge may reject all or part of one party's expert testimony and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo. App. E.D.1993).

ACCIDENT/COURSE & SCOPE

I do not believe Claimant is lying about the incident on February 27, 2004. If she were dishonest, she could just have easily lied about whether she specifically informed her Employer how she was hurt. That she would admit that she could not recall whether she gave notice to her Employer, indicates that she is a forthright individual. The chiropractic records are equivocal, but provide some support that Claimant suffered an injury by pulling a freezer door. I find and conclude that Claimant suffered an accident within the course and scope of her work at Highlandville Packing.

NOTICE

Claimant could not recall whether she specifically advised Employer that her back injury occurred at work. I have found that Employer did not know of the work accident. Section 287.420, RSMo 2000, which was in effect at the time of the work injury, reads in applicable part 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.

The purpose of this section is to give an employer a timely opportunity to investigate the facts of the accident and to promptly furnish medical attention to the employee to minimize the injury. *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498, 503-04 (Mo. App. E.D. 1968). Written notice under the 2000 version of this statute is not an absolute, unconditional prerequisite for Claimant's recovery of compensation. If Claimant possessed "good cause" for not providing written notice within 30 days, or Employer was not "prejudiced" by the lack thereof, the failure to give the required notice within 30 days has been held excusable. Section 287.420 RSMo, places the burden of proof upon Claimant to produce competent and substantial evidence that the written notice was given or to establish the excuse for failing to do so.

In this case, Claimant provided no evidence of a written notice within 30 days. One common method for an employee to establish lack of prejudice is to show that the employer had

actual knowledge of the accident when it occurred. *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d at 503. Here, Claimant failed to establish that Employer had actual knowledge that her back injury occurred at work. While there was a coworker working the day of Claimant's injury, that coworker did not testify. There is no evidence that the coworker had any supervisory duties over Claimant. If no evidence of actual knowledge is adduced, the Court will presume that the employer was prejudiced by the lack of notice because it was not able to make a timely investigation. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo. App. E.D. 2000), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

As noted in *Soos v. Mallinckrodt Chem. Co.*, appellate courts have found good cause for the failure to report the injury within the required time period when an employee experienced a very trivial incident that triggers a very serious condition which did not manifest itself until after the notification period. 19 S.W.2d at 687. But, as in *Soos*, where the employee is well aware of the mechanism of injury and immediately suffers pain, the employee's failure to advise her employer of the accident for more than 30 days results in prejudice to that employer. This case is similar to *Soos*, and I conclude that absent any evidence of either written or actual notice, Claimant is not entitled to benefits. Claimant failed to demonstrate good cause or a lack of prejudice.

MEDICAL CAUSATION

Even if Claimant had proven that she gave notice to Employer, I conclude Claimant's current medical condition is not medically and causally related to the work accident on February 27, 2004. As noted by Dr. Lennard, there is no question that Claimant had a herniated disc at L4-5, as shown by objective testing in April 2005. There is no objective evidence, however, that the herniated disc was present in March 2004, or that the work accident on February 27, 2004, caused the herniation.

Although Claimant contended at the hearing that Dr. Schiffner diagnosed the herniation through an x-ray, I believe Claimant is simply mistaken in this regard. She did not have the appropriate diagnostic tests to confirm such abnormality. Dr. Schiffner's records do not even include the x-ray results. Moreover, it makes no sense that Claimant would wait nearly six months to seek additional treatment if she truly believed, and had been diagnosed with, a herniated disc.

Following the chiropractic treatment in March 2004, the first evidence of any additional medical care was at Cox Emergency Room on August 18, 2004, at which time Claimant gave a history of chest pain and anterior leg pain for the past two months. This history is inconsistent with a work injury in February 2004. Further, on physical exam, straight leg raises were negative and Claimant displayed only minimal tenderness. Other than the chiropractic care in early March 2004, the first history given to any provider of a *work-related* injury occurring in *February 2004* was that from St. John's Spine Center dated January 28, 2005, 11 months after the work accident. There is absolutely no reference to a work injury when Claimant saw her personal physician in the fall of 2004 for a myriad of other ailments. There also is a lack of evidence demonstrating that Claimant was missing work due to back pain between early March 2004 (after the chiropractic treatment) and the emergency room visit in August 2004.

As opined by Dr. Lennard, the evidence suggests that Claimant suffered a back strain on February 27, 2004. I find and conclude that Claimant's current condition, a herniated disc, is not the result of the work accident on February 27, 2004. As there is no evidence of any permanency from the back strain, I award none. As Dr. Lennard indicated that Claimant needs no additional medical treatment for the back strain, I award no additional treatment.

Having denied Claimant's claim for compensation for the herniated disc on the basis of causation and notice, all remaining issues are moot.

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation