

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 06-074603

Employee: Eli Sell
Employer: Ozarks Medical Center
Insurer: Self Insured c/o Cannon Cochran Management Services

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, read the briefs, heard the parties' arguments, 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 August 31, 2009, as supplemented herein.

Introduction

The findings of fact and stipulations of the parties were accurately recounted in the award of the administrative law judge and are adopted by the Commission.

The administrative law judge concluded that employee suffered a work-related back injury on May 29, 2006, which resulted in employee's permanent partial disability and the need for future medical treatment. The administrative law judge found employer to be liable for future medical treatment, temporary total disability benefits from May 30, 2006 through February 19, 2008, and permanent partial disability benefits reflecting a permanent disability of 20% of the body as a whole. We agree with the result reached by the administrative law judge. We offer this supplemental opinion to address an issue raised by employer in employer's brief and at oral argument.

Discussion

Employer argues that the administrative law judge improperly concluded that employee provided notice of his work injury to the 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). By

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operation of the foregoing section, the employee is required to provide written notice to the employer within 30 days of the accident, or show that the employer was not prejudiced by the employee's failure to provide timely notice.

Here, employer argues that the administrative law judge erred in disregarding the testimony of employer's witnesses on the issue of notice. Specifically, employer argues that there is nothing in the record, other than employee's testimony, to indicate that either written or oral notice was provided to the employer within the thirty day period as required under § 287.420 RSMo. Employer identifies a number of factors in an attempt to diminish the credibility of claimant's testimony that he provided notice to the employer. Finally, employer argues that because employee failed to provide timely notice, employer was not allowed the opportunity to properly investigate the incident on May 29, 2006, and thus employee did not meet his burden of proving that employer was not prejudiced by employee's failure to provide timely notice.

In the award, the administrative law judge addressed the issue of notice as follows:

Claimant testified that after the accident, he telephoned an unnamed person whom he told that he was leaving and going home. Claimant testified that he told the person he had been hurt and that he was going home. Claimant and Claimant's spouse testified about receiving a piece of paper from Dr. Preston to take Claimant off work. They testified that they went by the Employer and gave the off-work slip to Cal Hutchins. Cal Hutchins recalled speaking with Claimant about his low back pain but did not remember any specific conversation about Claimant's accident of May 29, 2006. ... After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Employer had actual knowledge that an accident occurred on May 29, 2006, and that Employer was aware of the May 29, 2006, accident within 30 days of the date of the accident.

It is undisputed that employee did not provide a formal, written notice to employer within 30 days of the accident, as required under a strict construction of § 287.420 RSMo. Thus, the question is whether employee demonstrated that employer was not prejudiced by his failure to provide written notice. In order to answer this question, we first examine the record to determine whether employee has provided substantial evidence that employer had actual knowledge of the accident.

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. If the employer does not admit actual knowledge, the issue becomes one of fact. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer.

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However, when the claimant does not show either written notice or actual knowledge, the burden rests on claimant to supply evidence and obtain the Commission's finding that no prejudice to the employer resulted. If no such evidence is adduced, we presume that the employer was prejudiced by the lack of notice because it was not able to make a timely investigation.

Soos, 19 S.W.3d at 686 (citations omitted).

The record contains conflicting testimony as to when and how employer acquired actual knowledge of employee's work injury on May 29, 2006.

Employee provided his testimony as to the events following the work accident on May 29, 2006. Employee testified that after hurting his back, he attempted to continue working, but his back hurt too much, so he put his work tools away and called the maintenance shop. Employee explained that his normal supervisor, Cal Hutchings, was not on duty that day because it was a holiday. Employee could not remember whether Steve Tackitt or Cliff Webb was on duty in the maintenance shop that day, but employee informed one of these individuals that he hurt his back while working, and that he was going home. Employee testified that the next day, he visited his own doctor, who provided him with a note excusing him from work. Employee's wife then drove employee over to employer's premises, where she stopped the car at the maintenance shed, went inside, "told Cal," and provided the doctor's note.

Employee testified that he had been injured on the job previously. Employee's course of action in connection with those injuries was to simply tell his boss, who filled out the necessary paperwork and provided it to employee to sign. Employee has a sixth grade education level, attended special education classes while in school, and is unable to read or write at a functional level. Employee explained that he didn't do anything different in regard to the injury on May 29, 2006, than he did for any of his previous work-related injuries.

Employee's wife, Samantha Sell, provided her testimony as to what transpired when she delivered the doctor's note to Cal Hutchings on May 30, 2006. Ms. Sell testified that she informed Mr. Hutchings that employee had been hurt on the job the day before, and that if Mr. Hutchings needed more information, he needed to contact employee. Mr. Hutchings did not ask Ms. Sell any questions about the circumstances of the accident.

Employer presented the testimony of Stephen Tackitt. Mr. Tackitt testified that employee called him in the maintenance shop on May 29, 2006, to state that he was going home. Mr. Tackitt testified that employee did not say anything about his back or hurting himself.

Employer presented the testimony of Cal Hutchings. Mr. Hutchings testified that Ms. Sell did provide him with a doctor's note, although he didn't think it was on May 30, 2006. Mr. Hutchings did not remember Ms. Sell telling him that employee had

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been hurt at work. Mr. Hutchings acknowledged that he did not inquire into the nature of employee's reason for missing work. Mr. Hutchings admitted that he learned that employee was injured at work from another groundskeeper, but could not identify when that was, although Mr. Hutchings believed it was "way later on." Mr. Hutchings also admitted that he was aware of employee's difficulties with reading and writing, and that if someone did not fill out an injury report for employee, it probably would not get done.

We resolve the conflicting testimony of the parties as follows. We find the testimony of employee to be more credible than that of Mr. Tackitt. We find that employee notified the maintenance worker on duty in the shop on May 29, 2006, that he had been injured while working that day. We find the testimony of employee's wife to be more credible than that of Mr. Hutchings. We find that employee's wife informed Mr. Hutchings on May 30, 2006, that employee had been hurt at work, and that Mr. Hutchings should contact employee if he had questions. 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 employee's supervisor, Mr. Hutchings, on May 30, 2006, we conclude that employee has presented substantial evidence that employer had actual knowledge of employee's work injury.

Because employee has provided substantial evidence that 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, we find no evidence that employer was prejudiced by employee's failure to provide written notice. Employer's witnesses testified as to when and how they became aware that employee sustained a work injury on May 29, 2006, but there is no testimony, nor can we find any other form of evidence in the record, sufficient to demonstrate that employer was hampered in its ability to investigate the incident, or that employer was denied an opportunity to minimize employee's injuries. Absent such evidence, we are unable to find that employer has met its burden of demonstrating that it was prejudiced by employee's failure to provide written notice.

We acknowledge that employee treated with his own doctor initially, but the evidence is uncontested that employee began treating with employer's doctors as early as July 20, 2006. Moreover, Mr. Hutchings had the opportunity to inquire further into the circumstances of employee's injury after May 30, 2006, but according to his own testimony, Mr. Hutchings never asked employee to elaborate on the circumstances of his back injury, even when he sat down with employee to fill out FMLA papers.

Accordingly, we conclude that employer was not prejudiced by employee's failure to provide written notice.

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Decision

Based upon the foregoing, we conclude that employer was not prejudiced by employee's failure to provide written notice. Thus, employee's claim for compensation for his injuries resulting from the work accident of May 29, 2006, is not barred by the notice requirement of § 287.420 RSMo.

The award and decision of Administrative Law Judge David L. Zerrer, issued August 31, 2009, is attached and incorporated to the extent it is not inconsistent with this supplemental opinion.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 7th day of April 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Eli Sell

CONCURRING 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 agree with the reasoning and conclusions of the administrative law judge and I would affirm the award and decision of the administrative law judge without supplementation.

John J. Hickey, Member