

**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

Employee: Eli Sell

- 2 -

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.

Employee: Eli Sell

- 3 -

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

Employee: Eli Sell

- 4 -

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.

Employee: Eli Sell

- 5 -

**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 7<sup>th</sup> day of April 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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CONCURRING OPINION FILED  
John J. Hickey, Member

Attest:

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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.

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John J. Hickey, Member

## AWARD

Employee: Eli Sell Injury No. 06-074603  
Dependents:  
Employer: Ozarks Medical Center Before the  
Additional Party: **DIVISION OF WORKERS'**  
**COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Insurer: Cannon Cochrane Management Services Jefferson City, Missouri  
Hearing Date: May 21, 2009 Checked by: DLZ

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
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: May 29, 2006
5. State location where accident occurred or occupational disease was contracted: West Plains, Howell 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? Yes
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 felt pain in back when he lifted lawn mower
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: Body as a whole
14. Nature and extent of any permanent disability:
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Eli Sell

Injury No. 06-074603

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$436.17
- 19. Weekly compensation rate: \$290.79
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses: None

90 weeks of temporary total disability (or temporary partial disability) \$26,171.10

80 weeks of permanent partial disability from Employer 23,263.20

N/a weeks of disfigurement from Employer

- 22. Second Injury Fund liability: Yes No  Open

TOTAL: \$49,434.30

- 23. Future requirements awarded: As set out in this award

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: Justin Nelson

Employee: Eli Sell

Injury No. 06-074603

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Eli Sell

Injury No: 06-074603

Dependents:

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Ozarks Medical Center

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

Additional Party

Insurer: Cannon Cochrane Management Services

Checked by: DLZ

On the 21<sup>st</sup> day of May, 2009, the parties appeared before the undersigned Administrative Law Judge for final hearing. The Claimant appeared in person and by his attorney, Justin Nelson. The Employer appeared by its attorney, Christine Kiefer. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is not a party to this claim.

The parties have entered into a stipulation as to certain facts which are not at issue in this claim as follows, to wit: On or about the 29<sup>th</sup> day of May 2006, Ozarks Medical Center was an employer operating subject to the Missouri Workers' Compensation law; the Employer's liability was fully insured by Cannon Cochrane Management Services; on the alleged injury date of May 29, 2006, Eli Sell was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation law; the employment occurred in Howell County, Missouri, and the parties agree that Howell County, Missouri, is the proper venue for this hearing; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed accident, Claimant's average weekly wage was \$436.17, sufficient to allow a compensation rate of \$290.79 for temporary total disability and permanent partial disability; no temporary disability benefits have been paid prior to the date of this hearing; the Employer has paid no medical benefits prior to the date of this hearing; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award.

Employee: Eli Sell

Injury No. 06-074603

## ISSUES

Whether the Claimant sustained an accident.

Whether the Claimant gave the Employer proper notice.

Whether the accident arose out of the course of and scope of employment.

Whether the accident caused the injuries and disabilities for which benefits are now being claimed.

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries.

Whether temporary total benefits are owed to the Claimant.

The nature and extent of any permanent disabilities.

## DISCUSSION

A legal file was adopted which consisted of the following documents: Report of Injury, Claim for Compensation, and Answer to Claim for Compensation. The record was ordered to remain open until June 4, 2009.

Eli Sell, claimant herein, testified on his own behalf. Claimant testified that he was age 40 at the date of the hearing, married with two teenage children. Claimant testified that he attended school through the sixth grade in a special education program. Claimant cannot read and write except to a limited amount.

Claimant worked for Employer for 12 years prior to the incident of May 29, 2006. His job tasks consisted of grounds keeping, including mowing, trash removal, landscaping, snow removal, working on equipment, and occasionally some roofing. Claimant was assigned to the

Employee: Eli Sell

Injury No. 06-074603

maintenance department as a general laborer. Prior to this employment, Claimant worked as a laborer for a landscape nursery.

Claimant testified that on May 29, 2006, the Memorial Day holiday, he was assigned and did report for work at 7:00 a.m. Claimant picked up trash and emptied trash barrels, then took a break. After break Claimant backed the ATV, which was equipped with a dump bed on the back, toward the equipment storage shed to place a push type lawnmower into the dump bed of the ATV. Claimant testified that he bent down to pick up the lawn mower to place it into the ATV when his feet slipped from under him causing him to slip while he still had the lawnmower in his hands. Claimant partially fell against the back of the dump bed to catch himself and the lawnmower went to the concrete floor. Claimant further testified that when he slipped and fell, he twisted his back and body causing him to lose his balance.

Claimant testified that he felt an immediate pain when he twisted his back and was slipping. Claimant caught himself on the back of the ATV to prevent himself from falling to the ground after he dropped the lawnmower. Claimant further testified that he picked himself up and shoved the mower into the shop; he locked the shop and called someone at the maintenance shop. Claimant testified that the usual management employees, including Cal Hutchins, were not at work that day because it was a holiday. Claimant testified that following the incident he called an unknown person after the lawnmower was secured to report that he was going home. There is a discrepancy in the testimony adduced at the hearing as to whether Claimant reported to anyone on the day of the accident that he had suffered an accident on the job.

Claimant testified that on May 30, the day following the accident, he went on his own to see his personal physician, Dr. Preston. Dr. Preston removed Claimant from work and Claimant testified that he and his wife went over to Employer to deliver the off-work slip to Cal Hutchings. Claimant further testified that he remained off work until June 6, 2006, when he

Employee: Eli Sell

Injury No. 06-074603

returned to work. Claimant was instructed by Cal Hutchins to, "do what you can." Claimant further testified that he worked for part of the day but Claimant could not stand the pain in his back and decided to leave before the workday was completed.

Claimant testified that Employer sent him to see Dr. Cooper concerning his pain complaints since Claimant's fall on May 29, 2006. Claimant testified that he had no back problems prior to the incident at work of May 29, 2006.

Claimant testified that he cannot read the reporting forms or most other forms but that he did not do anything much different for this injury than injuries he had sustained in the past.

On cross-examination, Claimant admitted that he tried to mow part of the Medical Center's lawn but that his back hurt too much so he took the lawnmower back to the shop. Claimant testified that while he was at the shop he telephoned the Maintenance department and told a person, whom Claimant does not remember, that he was hurt and he was going home.

Claimant admitted that he saw Dr. Preston, who is Claimant's primary care physician, on May 30, 2006. Claimant further admitted that he told Dr. Preston that he was loading a lawnmower into the ATV when he felt a sharp pain in his back like a knife sticking him. Claimant admitted that Dr. Preston gave Claimant an off-work slip on May 30, 2006 which was from June 3, 2006 through June 5, 2006.

Claimant admitted that he came into work on June 5, 2006, and talked with Cal Hutchins about his incident with his back and the fact that Claimant was still in pain from the incident of May 29, 2006. Claimant admitted that Cal Hutchins told Claimant to "take it easy" but that Claimant could really be used on the grounds crew on that day. Claimant further admitted that he called Cal Hutchins the next day and told him that he was going back to the doctor because Claimant's back hurt worse after trying to work on June 5, 2006.

Employee: Eli Sell

Injury No. 06-074603

Claimant admitted that he returned to Dr. Preston, his personal physician, on June 6, 2006, and received another off-work slip from June 6, 2006 through June 13, 2006. Claimant admitted that he gave the off-work slip to Cal Hutchins. Claimant admitted that after that, Cal Hutchins set Claimant up with Dr. Cooper, the Employer physician. Claimant admitted that Dr. Cooper also took him off work. Claimant started physical therapy but stopped attending because the pain in his back was worse from the physical therapy than before he started.

Claimant admitted that he had been injured in the past while employed by this Employer. Claimant further admitted that Cal Hutchins would send Claimant to see Dr. Cooper in the past and that he also sent Claimant to see Dr. Cooper after this injury.

Claimant admitted that he had several conversations with Cal Hutchins after the May 29, 2006, accident but Claimant did not remember any specifics of conversations other than talking about going on short term disability and perhaps terminating Claimant from employment to disability.

Claimant admitted that his physicians have discussed the possibility of surgery from time to time.

On re-direct examination, Claimant testified that the doctors have recommended surgery but that they may not have a good result. Claimant further testified that he takes pain medication, muscle relaxants, cholesterol medication, and high blood pressure medication.

Samantha Sell testified on behalf of Claimant. Ms. Sell testified that she is the spouse of Claimant and that they have been married fifteen years.

Ms. Sell testified that Claimant had no real back problems prior to May 29, 2006, and that she had to drive Claimant to Dr. Preston's office on May 30, 2006.

Ms. Sell testified that Dr. Preston put Claimant off work and gave them a paper about not working that she gave to Cal Hutchins. Ms. Sell testified that she told Cal Hutchins on May 30,

Employee: Eli Sell

Injury No. 06-074603

2006, that Claimant had been hurt at work the day before. She further testified that Cal Hutchins did not ask her any questions and that she did not believe Cal Hutchins spoke to the Claimant on that day.

There was no cross-examination of Ms. Sell.

Dr. David Volarich testified on behalf of the Claimant by deposition. Dr. Volarich testified that he issued a report of independent medical evaluation dated February 8, 2008, pursuant to an examination of the Claimant. Dr. Volarich's report indicates the medical records reviewed as part of the evaluation and also sets out the results of the tests and examination of the Claimant. Dr. Volarich testified that the findings of the medical records and his examination correlated with the symptoms related to him by Claimant in a history taken as part of the evaluation.

Dr. Volarich testified that it was his opinion that the incident of May 29, 2006, which took place while Claimant was attempting to lift a lawnmower, was the prevailing factor in the need for treatment and the prevailing factor in causing any disability which the Claimant suffered as a result of the May 29, 2006, incident. Dr. Volarich further testified that the test results which he reviewed showed degenerative disc disease, but Dr. Volarich opined that the prevailing factor for Claimant's condition was the accident of May 29, 2006, and not the pre-existing disc disease, based on the history from the Claimant and the lack of symptomatic treatment prior to May 2006.

Dr. Volarich's report indicated that Claimant was not at maximum medical improvement at the time of the evaluation and that Claimant could perhaps benefit from further conservative treatment or a surgical consult. If Claimant was not to receive any further treatment, then Claimant's permanent disability rating would be 50% of the body as a whole, in the opinion of Dr. Volarich.

Employee: Eli Sell

Injury No. 06-074603

Dr. Volarich further testified that if Claimant did not receive further treatment, he would place restrictions on the Claimant of avoiding bending, twisting, lifting, pushing, pulling, carrying, climbing, and other similar tasks. In addition, Claimant should not handle weight of more than 15 pounds and only on an occasional basis; no handling of weight overhead or away from the body or carrying any weight over a long distance or uneven terrain. Dr. Volarich also recommended the use of a cane as an assistive device.

In addition, Claimant was not to remain in a fixed position for more than 15 minutes at one time and to change positions frequently and to rest as needed, including recumbent rest.

On cross-examination, Dr. Volarich admitted that the history notes from Dr. Green's office, indicate that Claimant's pain started on May 29, 2006, while working at Employer, but does not give any precipitating event to identify how the pain began.

Dr. Volarich admitted that there are other factors that can contribute to cause degenerative disc disease and that the doctor's definition of disability is a medically measurable loss from a condition and then how it impacts that person's ability to perform activities of daily living, leisure activities, and work activities.

Employer admitted into evidence treatment records from Dr. Preston, Dr. Green, Dr. Cooper, and Ozark Medical Center. The medical records, for the most part, support the testimony of the Claimant with regard to treatment administered; however, the history of the incident of May 29, 2006, does not report exactly the same in each of the records.

## **FINDINGS OF FACT AND RULINGS OF LAW**

**Whether the Claimant sustained accident.**

**Whether the accident arose out of the course of and scope of employment.**

Employee: Eli Sell

Injury No. 06-074603

**Whether the accident caused the injuries and disabilities for which benefits are now being claimed.**

Claimant testified as to the events of May 29, 2006. Employer did not offer any evidence to contradict Claimant's recitation of the facts of his incident, other than to question Claimant about his activities of the weekend prior to the date of the incident. Claimant denied, under oath, that he injured his back doing any of the activities of the previous weekend. If the facts of Claimant's incident are taken as true, Claimant was performing a job task at the time of the incident which is directly related to his job duties for the Employer. There is no credible evidence adduced at the hearing to prove that Claimant's incident of May 29, 2006, was not work related or that his need for treatment on the following day was not caused by the incident of lifting a lawnmower into the bed of an ATV.

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 there is substantial and competent evidence to establish that the incident described by Claimant of lifting a lawnmower into the bed of an ATV at a time when his footing slipped on damp concrete pavement, constitutes an accident under the definition set out in Chapter 287. I further find that Claimant was performing tasks in the ordinary course of his job with the Employer in preparing to mow grass on the Employer's premises and therefore the accident occurred within the course of and scope of Claimant's employment with the Employer.

Claimant testified that the accident resulted in immediate pain in his low back, and the Claimant further testified that he was unable to continue his job tasks after the accident and the Claimant left work and went home and he performed self-administered conservative treatment until the following day when Claimant presented to his private physician for additional treatment. I find that there is substantial and competent evidence that Claimant's accident of

Employee: Eli Sell

Injury No. 06-074603

May 29, 2006, is the prevailing factor in the Claimant's need for treatment and the resulting permanent disability suffered by Claimant.

The Claimant's accident of May 29, 2006, is compensable and Employer is hereby ordered to provide appropriate benefits pursuant to Chapter 287 and as set out in this award.

I find these issues in favor of Claimant.

**Whether the Claimant gave the Employer proper notice.**

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 that 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 testified that he did not recall Claimant giving him an off-work slip but that Claimant was off work from May 30, 2006, through June 5, 2006, when Claimant returned to work. 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. Claimant testified that Cal Hutchins told Claimant on June 5, 2006, to do what he could but that they needed Claimant's help at the Employer.

Claimant testified that he tried to work but the pain was too great and that he went back to Dr. Preston who took Claimant off work again and Claimant delivered another off-work slip to Employer. Thereafter, Employer arranged for Claimant to see Dr. Cooper, the Employer's physician, whom the Claimant saw about 7 weeks after the accident occurred. Dr. Cooper's treatment notes reported that Claimant did not follow proper protocol for the Employer in obtaining treatment and that the Claimant's medical condition was caused by arthritis rather than any event which occurred at work, for which proper protocol was not followed.

Employee: Eli Sell

Injury No. 06-074603

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 accident. I further find there is substantial and competent evidence that Claimant sufficiently informed the Employer of the accident which occurred on May 29, 2006, notwithstanding the fact that Claimant chose to be treated by his private physician.

I find this issue in favor of the Claimant.

**Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries.**

Claimant testified that his treating physicians have recommended surgery to help relieve his pain symptoms. Dr. Volarich opined that Claimant may well be a candidate for surgery to relieve his low back conditions. Dr. Volarich recommended several modalities of treatment which may be helpful to Claimant. Employer's physician indicated that Claimant may need additional treatment; however, Employer's physician opined that Claimant's condition was not work-related.

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 there is substantial and competent evidence that Claimant is in need of medical treatment in the future in order to cure and relieve the Claimant of the effects of the injury.

I further find that Claimant voluntarily exercised his right of second opinion by choosing his own treating physicians prior to the date of final hearing, consequently, I find that Employer has not abandoned its right to direct medical treatment because Employer was never given the opportunity to direct medical treatment, and therefore has not abandoned its right to direct medical care.

Employee: Eli Sell

Injury No. 06-074603

Employer is hereby ordered to provide such medical care as may be recommended from time to time by the physician or physicians selected by Employer to treat Claimant for the injuries sustained on May 29, 2006. This order to provide treatment shall be for an indeterminate period of time.

I find this issue in favor of Claimant.

**Whether temporary total benefits are owed to the Claimant.**

The medical records admitted into evidence contain off-work slips from May 30, 2006, through July 20, 2006. Dr. Cooper's Employer Report of July 20, 2006, took Claimant off work, but indicated that no determination was made as to whether the reason for off-work status was work related or not work related. Dr. Cooper's record does not give an end date for the off-work status. At a later date, Dr. Cooper opined that the need to be off work was not work related. Dr. Volarich opined that Claimant was temporarily totally disabled from May 29, 2006, through February 19, 2008, the date of Dr. Volarich's evaluation, unless the Claimant received additional treatment.

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 there is substantial and competent evidence that Claimant is entitled to temporary total disability benefits from May 30, 2006, through February 19, 2008, a period of 90 weeks. The parties stipulated that the Claimant's compensation rate is \$290.79. Employer is hereby ordered to pay to Claimant the sum of \$26,171.10 as and for temporary total disability benefits (90 x \$290.79 = \$26,171.10).

I find this issue in favor of Claimant.

**The nature and extent of any permanent disability.**

Employee: Eli Sell

Injury No. 06-074603

The only rating admitted into evidence at the hearing is that of Dr. Volarich who opined that if the Claimant did not have additional treatment, the permanent disability would be 50% of the body as a whole.

Claimant testified that he has not worked since June 2006. However, Dr. Volarich did state in his report that there were some positions that Claimant might be able to perform if he was retrained. Claimant has a 6<sup>th</sup> grade education and admittedly can barely read and write.

Claimant has not had surgery and there is no evidence, other than the speculation contained in Dr. Volarich's report, that surgery would actually have a substantial effect on Claimant's condition. The Claimant has not sought an order for additional treatment at this hearing.

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 Claimant has suffered a permanent partial disability of 20% of the body as a whole. Claimant's stipulated rate of compensation for permanent partial disability is \$290.79. Employer is hereby ordered to pay to Claimant the sum of \$23,263.20, as and for permanent partial disability ( $400 \times 20\% = 80 \times \$290.79 = \$23,263.20$ ).

I find this issue in favor of Claimant.

Claimant's attorney requested approval of an attorney fee of 25% of the amount of any award. Claimant's attorney's fee request is approved. Claimant's attorney is hereby awarded a fee of 25% of the amount of this award. Claimant's attorney is granted a lien on the proceeds of this award unless and until this award shall have been paid in full.

Employee: Eli Sell

Injury No. 06-074603

Date: August 31, 2009

Made by: /s/ David L. Zerrer  
David L. Zerrer  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Naomi Pearson  
Naomi Pearson  
*Division of Workers' Compensation*