

**AMENDED**  
**TEMPORARY AWARD ALLOWING COMPENSATION**  
(Affirming the Award and Decision of Administrative Law Judge  
but Reversing With Respect to Costs)

Injury No.: 09-110930

Employee: Raymond Smuzeski  
Employer: Altec Industries  
Insurer: Self-Insured c/o Avizent  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

On June 19, 2012, we issued a Temporary Award Allowing Compensation that affirmed Administrative Law Judge Boresi's January 27, 2012, award in all respects (including deferring the award of attorneys' fees until the final award) other than her assessment of costs under § 287.560 RSMo. Our award reversed such assessment of costs. Due to an oversight, however, our award contained inconsistent language regarding attorneys' fees. We issue this Amended Temporary Award to delete the inconsistent language.

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, and considered the entire record, the Commission issues this decision affirming in part and reversing in part the award of Administrative Law Judge Karla Ogrodnik Boresi dated January 27, 2012. We find 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, except with respect to the application of costs under § 287.560. Pursuant to § 286.090 RSMo, we issue this award and decision affirming the January 27, 2012, award and decision of the administrative law judge, except that part discussing "Unreasonable Defense" and assessing costs against employer. We reverse that part of the award and decision and deny such costs, as further described below.

Section 287.560 RSMo states, in relevant part: "[I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them."

The state treasury generally bears the costs of workers' compensation proceedings. Only a party who brings, prosecutes, or defends a case "without reasonable grounds" may have costs assessed against it. Even then, the Commission "may" assess such costs, but neither the statutory language nor case law compels such an award. Indeed, our appellate courts have cautioned the Commission to exercise this discretionary

Employee: Raymond Smuzeski

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statutory power "with great caution and only when the case for costs is clear and the offense egregious."

*Nolan v. Degussa Admixtures, Inc.*, 276 S.W.3d 332, 335 (Mo. App. S.D. 2009) (internal citations omitted).

In the case at hand, the best evidence suggests that employee had consistently reported to employer, Dr. Rutz, and then Dr. Mabe that he had gradually become stiff and sore during the July 2, 2009, work day and that it was his work on that day which had caused his new injury. He had consistently reported to each of these sources that he could recall no specific event that occurred. We have no evidence that employee ever reported to employer that a specific event where employee was working on a hydraulic pump had occurred on a job in Ellisville, Missouri, in mid-July 2009.

It was not until employer received Dr. Bailey's report dated September 20, 2010, that employer learned about the alleged second event in Ellisville (that employee told Dr. Bailey he had reported to employer) that occurred in mid-July 2009 after seeing Dr. Rutz and before seeing Dr. Mabe. And it was in that same report that Dr. Bailey stated his reliance on this event of which employer had no knowledge in establishing causation. And it was in this same report that Dr. Bailey made his treatment recommendations. Since Dr. Bailey based his causation finding on this event about which employer had no knowledge and since employer had not previously received a report of any such incident, employer reasonably wanted to investigate this information further.

Its investigation of this matter led to the letter from its attorney to Dr. Bailey. In response, Dr. Bailey's November 19, 2010, report acknowledged a potential inconsistency in what employee had told him and the importance of the inconsistency. Dr. Bailey emphasized the need for credible information. Dr. Bailey's November 19, 2010, report led employer to schedule depositions with employee.

Consequently, we are persuaded that these circumstances gave employer a reasonable basis for further investigation and withholding authorization for the treatment that Dr. Bailey had recommended. Therefore, we hereby reverse that part of the award and decision that assessed costs under § 287.560.

In all other respects, we affirm and adopt the award and decision of the administrative law judge.

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

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued January 27, 2012, is attached and incorporated by this reference, except to the extent it is inconsistent with this award and decision.

Employee: Raymond Smuzeski

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This award and decision is only temporary or partial, is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

Given at Jefferson City, State of Missouri, this 2<sup>nd</sup> day of July 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

## TEMPORARY AWARD

Employee:	Raymond Smuzeski	Injury No.: 09-110930
Dependents:	N/A	Before the
Employer:	Altec Industries	<b>Division of Workers' Compensation</b>
Additional Party	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Self C/O Avizent	Jefferson City, Missouri
Hearing Date:	October 26, 2011	Checked by: KOB

### 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: July 2, 2009
5. State location where accident occurred or occupational disease was contracted: Saint Louis City
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:  
During a busy stretch, Claimant was working long, hard, heavy work, when he felt pain in his lower back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: TBD
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0

Employee: Raymond Smuzeski

Injury No.: 09-110930

- 17. Value necessary medical aid not furnished by employer/insurer? TBD
- 18. Employee's average weekly wages: Not determined
- 19. Weekly compensation rate: \$807.48 / \$422.97
- 20. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	TDB
weeks of temporary total disability (or temporary partial disability):	TBD
weeks of permanent partial disability from Employer:	TBD
The whole cost of the proceeding (fees and expenses):	\$14,264.09

22. Second Injury Fund liability: Open

TOTAL: \$14,264.09

23. Future requirements awarded:

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

**IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.**

The compensation awarded to the claimant shall be subject to a lien in the amount of --- of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Deferred to final award; payment for legal services addressed as costs of proceedings herein.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Raymond Smuzeski	Injury No.: 07-056964
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Altec Industries	Department of Labor and Industrial Relations
Additional Party	N/A	Of Missouri
Insurer:	Self C/O Avizent	Jefferson City, Missouri
Hearing Date:	October 26, 2011	Checked by: KOB

### PRELIMINARIES

The matter of Raymond V. Smuzeski (“Claimant”) proceeded to hearing on a hardship basis. Attorney Jill Bollwerk represented Claimant. Attorney John Fox represented Altec Industries (“Employer”), which is self-insured. The Second Injury Fund, while a party to the underlying claim, did not participate in the hearing because no issues of Second Injury Fund liability were raised.

Two of three<sup>1</sup> pending cases were tried simultaneously: Injury No. 07-056964 with an alleged injury date of June 18, 2007 (the “2007 Case”), and the instant case, Injury No. 09-110930, with an alleged injury date of July 2, 2009 ( the “2009 Case”). With respect to the 2009 Case, the parties agree that on or about July 2, 2009, Claimant was an employee of Employer, earning an average weekly wage that qualified him for rates of compensation of \$807.48 for temporary total disability (“TTD”) benefits and \$422.97 in permanent partial disability (“PPD”) benefits. The parties stipulated venue is proper in the City of St. Louis, and Claimant filed his claim in a timely manner. Claimant seeks medical treatment for his low back, and Employer questions whether Claimant had a compensable injury that is causally related to a work accident or disease.

In the 2009 Case, the issues to be determined are limited to the following: 1) Did Claimant sustain an injury by accident or occupational disease that arose out of and in the course of employment; 2) was a work accident the prevailing factor in causing both the resulting medical condition of the recurrent herniated disc at L5-S1 and any disability resulting therefrom; 3) Is future medical care is necessary to cure and relieve Claimant from the effects of a work accident in July of 2009; 4) Did Claimant provide notice pursuant to § 287.420; and 5) Did Employer defend the July 2009 Case without “reasonable ground” such that the Division may assess the whole costs of the proceedings against Employer pursuant to § 287.560?

The undisputed evidence establishes Claimant has a recurrent herniated disc in his lumbar spine. The dispute is whether such injury is compensable and Employer is liable for benefits.

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<sup>1</sup> Injury No. 10-056013 shall remain on the prehearing docket.

## **FINDINGS OF FACT**

### *Lay Witnesses*

Claimant began working as a mobile service mechanic for Employer, a company that produces digger derricks and aerial equipment for the utility industry, in 2002. He provides on-site repairs for customers' utility equipment. He goes wherever the customer may be in order to fix or repair the equipment, working out of a hub in Wentzville, Missouri. Ameren UE, one of his biggest customers, allows him to keep his truck on location and receive his mail there. He does all of his paperwork at his home in Warrenton, Missouri. The physical demands of his job vary. Some days he lifts repetitively, other days he does not. Mostly, he works alone. His weight-lifting varies, but in general he is required to lift from 40-70 pounds.

On June 18, 2007, the admitted date of injury in the 2007 Case, all day Claimant was working replacing old cables from a truck. As he did so, his back got tighter and tighter. During clean up, he noticed that his back was very stiff and getting worse. He was having stiffness at and below his beltline. At home, he had progressive pain that felt like someone was squeezing his spine very tightly.

When Claimant awoke the next day, he called his supervisor, J.R. Ross, to ask for treatment. Due to the unbearable pain Claimant reported, Mr. Ross authorized him to see Dr. Mabe, his family doctor. Dr. Mabe provided pain medication and an MRI on June 22, 2007 that showed "mild posterior disc bulging at L5-S1 with a likely small central disc herniation to the right of mid-line." It also found "posterior disc bulging with a posterior high intensity zone in keeping with an annular fissure at L4-5, mild posterior disc bulging at L3-4, and minimal diffuse disc bulging at L2-3 with a small left lateral extra foraminal disc protrusion. This may also be confirmed with Axial CT Imaging."

Claimant received physical therapy, which caused him to feel worse. He eventually saw Dr. Andrew Wayne, who performed a series of steroid injections. He then saw Dr. Kevin Rutz, who ordered a repeat MRI. By that time, Claimant had developed cramping in his calf muscle and his foot was falling asleep. Dr. Rutz recommended a lumbar discectomy, which was performed on August 3, 2007. After surgery, Claimant was off work for several weeks, then returned at light duty. When he returned to work at full duty, he was still having aches in his lower back from time to time, and cramping in his calf. He discussed these problems with Dr. Rutz, who released Claimant at maximum medical improvement on December 13, 2007 with no permanent restrictions.

After surgery, Claimant had a lot less pain, but did have low-grade achiness and calf cramping, mostly at night. Dr. Mabe provided a steroid dose pack in March 2008, which helped alleviate his remaining symptoms. From March 2008 to July 2009, Claimant had no treatment or problems. He could modify his schedule as needed, and had good and bad days. He took over the counter pain medication. This is the 2007 Case, for which a separate temporary award is issued.

Then, in July of 2009, something occurred that caused a severe increase in his back pain. At the start of the month, Claimant was putting in extra long hours the week before the

Independence Day holiday, working more than his usual 60 hours per week. During the four-day period ending July 2, 2009, he worked over 70 hours.

On July 2, 2009, Claimant continued to work at the unusual intensity when he started to feel pain. He cannot identify lifting anything in particular, as the pain came on gradually throughout the day, similar to what occurred on June 18, 2007. He finished out the workday and went home. The next day, July 3, was a paid holiday, followed by the weekend. The next regularly scheduled day for work on which Employer would have been open was July 6, 2009. Because he had a few days off, Claimant went home and rested in the hopes that his back pain would get better. However, his back pain remained persistent over the weekend and he merely lay around the holiday weekend taking Advil. Claimant admits on cross exam that he was doing his usual job on July 2, 2009 and cannot recall anything in particular that caused his injury. He just worked a lot of extra hours doing his strenuous job that week.

When he arose on Monday, July 6, Claimant called J.R. Ross, and told him that he believed he hurt himself working on Thursday, July 2. Employer produced an email that J.R. Ross sent to Sandy Travis of Altec indicating "I had a voicemail this morning, July 6, 2009, to call Ray as soon as I got in. He said he had gotten home Thursday night around 8:00 p.m. and his back was sore and stiff. He lay down and fell asleep. He rested Friday, Saturday and Sunday, and woke up this morning and was still stiff. He thought it was coming from the same location as his previous surgery. He doesn't recall any certain thing that might have caused this. He had to move some pole guide weldments."

Claimant and his wife attended an appointment with Dr. Kevin Rutz on July 9, 2009, at which Kathleen Hopkins, the nurse case manager assigned to his case, was present. Apparently, there was some misunderstanding as to the purpose of the visit, and Dr. Rutz was uncharacteristically agitated. When Claimant explained he thought he had a new injury, Dr. Rutz told Claimant that he would be fine, gave him a steroid pack, said it is not work-related, and released him. Dr. Rutz did not do an MRI scan. Based on Dr. Rutz's statements, Claimant was relieved and thought that this was just a flare-up.

After the appointment, he reported Dr. Rutz's opinion to the manager of service, Bob Cobb. Thanks to six days of steroids, Claimant was able to work his regular duties, but when the steroid pack wore off, he began to feel the pain again on a day when he was working with a hydraulic pump on a truck, which was about the same as the pain he had on July 2, 2009. Because he had already been told that this injury was not work related, he went to see his private doctor, Dr. Mabe, on July 17, 2009, and received another Medrol Dose Pack, which was temporarily helpful. Another MRI showed a recurrent herniated disc. Claimant subsequently tried to deal with the pain by modifying his work duties based on how he felt on a particular day.

Claimant has had no further treatment since that appointment with Dr. Mabe on July 17, 2009. He is still in pain. On good days, he just goes about and does his work. On bad days, he takes Aleve and modifies his work.

On June 23, 2010, Claimant was in the car accident that is the subject of Injury No. 10-056013. He received some treatment to the low back, but mostly to his shoulder and neck. The accident had no long-term effect on his back pain.

Counsel for Employer's attempts to impeach Claimant on cross-examination fell short. I find there was no new accident with a hydraulic pump, and to focus on issues surrounding the pump is not helpful.<sup>2</sup> Inconsistencies in the record, if any, do not undermine Claimant's credible testimony that he was injured on July 2.

After he filed a claim, Employer scheduled Claimant for a second opinion with Dr. Alexander Bailey in St. Joseph, MO, which required an overnight stay. Claimant gave a history consistent with the evidence, but thought Dr. Bailey focused on his mention of the pump. Claimant was not sure the doctor understood his job duties. Dr. Bailey ultimately issued three reports over between September 20, 2010 and April 26, 2011, which are more fully discussed later in this award. The follow up reports were issued at the request of Employer's counsel, after providing additional information and assumptions. In the first report, Dr. Bailey found the condition of a recurrent disc to be causally related to a July 2009 accident. It was only after receiving the report that Claimant understood he had a new injury in July 2009, not merely a continuance of the June 2007 Case. The second report contained the same conclusion: that Claimant was in need of additional surgical treatment to cure and relieve a July 2009 work injury. It was only after counsel's third request that Dr. Bailey finally changed his opinion, and opined that the undisputed re-herniated disc that required surgery was NOT due to a work-related accident.

Claimant testified credibly that throughout the relevant times, he has had good and bad days. At hearing, he was having a good day with a lower level of aches and pains. On a bad day, Claimant has pain up to the level of a seven, with radiation and twitching/cramps in the calf. He does exercises and takes Aleve. He wants surgery or other treatment to cure and relieve his low back symptoms. I find Claimant to be consistent in his testimony, even when it does not particularly help his case, and extremely credible.

Sandy Travis, workers' compensation supervisor for Employer, testified on her company's behalf. She acknowledged Claimant had a compensable accident and injury in the 2007 Case, and that Employer should have paid all bills, including the outstanding physical therapy charges.<sup>3</sup> She admitted she received an email on July 6, 2009, which contains the details of Claimant's report of injury on July 2, 2009. She sent Claimant to Dr. Rutz, but closed her 2009 file when he opined the new symptoms were not work related. In response to Claimant's request for a second opinion, Ms. Travis scheduled an appointment with Dr. Bailey, with whom she has a close professional relationship. Despite receiving reports dated September 20, 2010 and November 19, 2010, Ms. Travis did not authorize the treatment recommended by Dr. Bailey. Ms. Travis asserted she reviewed all three Bailey reports and information from other investigations to deny the 2009 Case. She could offer no explanation as to why Employer did not take action on the Bailey recommendations prior to the issuance of his final pro-Employer report of April 26, 2011. It was Ms. Travis' personal opinion that Claimant's symptoms were ongoing from the 2007 Case.

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<sup>2</sup> For this reason, the testimony of Dwane Reeder is not recounted in this award.

<sup>3</sup> Since the parties did not identify past medical as an issue in either the 2007 Case, or the 2009 Case, I cannot order payment of this bill. If the bill is not paid by the final award, the issue will be revisited.

*Expert Testimony*

Dr. David Kennedy testified on behalf of Claimant by deposition on August 3, 2011. (Ex. O). He examined Claimant after Claimant saw Dr. Bailey. Dr. Kennedy took a history consistent with the credible evidence of record. Claimant told him that his work duties were to maintain hydraulic equipment on power trucks, and that his job required a lot of bending, twisting, stooping and heavy lifting. He learned Claimant was originally injured on June 19, 2007 while performing his regular work duties, and ultimately required an L5-S1 discectomy performed by Dr. Rutz. Dr. Rutz removed the disc and Claimant improved, but still had some aching pains and cramps, and that he did have to go to his private physician for some medication on at least one occasion.

Dr. Kennedy further stated that Claimant told him that on July 2, 2009, he was once again doing his normal work activities when he began to have back pain that worsened throughout the day and was quite severe the next day with pain radiating down his right leg. He testified that Claimant's pain was quite a bit worse after July 2.

The physical examination revealed significant loss of range of motion and positive straight leg testing. He reviewed MRI scans from 6/22/07, 7/24/07 and 7/21/09. His diagnosis was the same as Dr. Bailey's diagnosis—recurrent herniated disc at L5-S1. Dr. Kennedy testified that Claimant was not at maximum medical improvement as far as the recurrent herniated disc is concerned, and that he would recommend that Claimant go through a myelogram and thereafter most likely require a fusion at L5-S1. He told Claimant he could continue to work as tolerated but to be very cautious with lifting and to call him if things got worse. It was Dr. Kennedy's opinion that the prevailing factor of Claimant's current diagnosis and the need for treatment is the work injury of July 2, 2009.

Dr. Kennedy did not take a history of any specific lifting incident with a hydraulic pump. He did have many enumerated medical records, the first two reports of Dr. Alexander Bailey, Claimant's deposition, and Dr. Alexander Bailey's deposition. He testified that after reading Dr. Bailey's deposition, his opinions did not change. It was his understanding that on July 2, 2009, there was no single traumatic event that occurred, but rather, that the pain came on gradually throughout the day.

Dr. Kennedy did acknowledge Claimant had pain prior to July 2, 2009 and because of that, it is a possibility that the recurrent herniated disc developed before that date. However, Dr. Kennedy did state that Claimant indicated that his pain was much worse after the work he performed on July 2, 2009. Dr. Kennedy stated that Claimant had not had a flare-up to that degree prior to July 2, 2009.

Dr. Kennedy agreed that a herniated disc can come from any activity, including natural progression, activities of daily living, or work. It can also occur based on a combination of these three things. But, he remains of the opinion that the recurrent herniated disc occurred on July 2, 2009, while performing his work activities, based upon the severity of Claimant's symptoms on that day. He reiterated that the work Claimant was doing on July 2, 2009 was the prevailing factor in causing the need for additional treatment, even if it was not the only factor.

Employer sent Claimant to Dr. Alexander Bailey for a second opinion. Dr. Bailey's office is in Overland Park, Kansas—250 miles from Claimant's home. Dr. Bailey examined Claimant on September 20, 2010 and thereafter issued a lengthy report. (Ex. 8, Deposition Ex. 2).

In his original report, Dr. Bailey indicated as follows:

Based on review of medical records and notes, as well as clinical intake, it appears the patient did sustain injury on 6/19/07 consisting of disc herniation in his lumbar spine. I believe the 6/19/07 ultimate workers' compensation injury is resolved. I believe, based on historical intake and review of the medical records' notes, the patient apparently sustained a secondary injury in July of 2009 that the patient apparently reported. He was working on a truck, replacing a hydraulic pump, and developed a sudden onset of back and leg pain and reported this to his employer. There was an attempt to return the patient to Dr. Rutz, but full evaluation and treatment did not continue. Nothing was offered nor ordered, according to the patient. This led to a primary care physician visit and an MRI with now evidence of recurrent disc herniation at L5-S1, very large in nature. The patient has subsequently sustained a motor vehicle accident in 2010, but no recent MRI scans are now available surrounding that event. Based on the medical record evidence available now, in July of 2009, a report was made to the Employer about working on a hydraulic pump on a truck has actually occurred, been reported and documented, I would indicate the July, 2009 injury is an inciting event that has led to this patient's increasing pain in his back as well as his leg. The and a prevailing factor for this patient's need for medical and/or surgical attention appears to be related to a July of 2009 incident. Documentation is not available in the medical record file to confirm this theory. It remains unknown and unclear whether the 2010 motor vehicle accident has a contributing factor in this overall causation statement. Therefore, the 6/19/07 injury is resolved, and a new injury in July of 2009 with resulting further worsening of an anular tear at L4-5 with development of recurrent disc herniation at L5-S1."

Dr. Bailey gave treatment options of living with the pain at regular duty, living with it at possible work restrictions, the consideration of more physical therapy, injection therapy or the consideration of surgical intervention. Surgical intervention "would be a recurrent disc herniation excision surgery at L5-S1," and "may entail fusion surgery at L4-5 and L5-S1 to treat the full spectrum of the patient's complaint, problems and findings on studies."

Employer did not provide medical treatment as recommended by Dr. Bailey in his report of September 20, 2010. Instead, Employer's representatives called and sent letters asking the doctor to consider additional information. Dr. Bailey submitted a report dated November 19, 2010, wherein he acknowledged that there were some discrepancies between his history and the history given to other doctors, but, "based on medical facts that are available, I currently believe that this is a work-related injury. I certainly could be wrong. Dr. Rutz did not take the steps to order an MRI scan and the patient felt compelled to go to his primary care physician where the MRI scan was ordered, which ultimately found the large herniated nucleus pulposus recurrence." (Ex. 8, Deposition Ex. 3). Dr. Bailey goes on "in actuality, **the patient's complaints appear to have been ignored and sized up, rather than acted upon.** It is based on these factors I once again believe that an on-the-job injury has occurred." (emphasis added). Dr. Bailey still stood by his opinion that the injury was work related.

Employer still refused to provide treatment and, instead, decided to take the deposition of Claimant on January 19, 2011. Counsel for Employer then sent the deposition transcript to Dr. Bailey, along with a three-page letter summarizing alleged inconsistencies regarding a pump and a DOT physical. With this third request, Dr. Bailey changed his opinion. He said “with the available evidence at hand, I feel compelled to alter my findings in the independent medical examination...at the present time, I feel that the patient’s need for medical and/or surgical attention, and the and a prevailing factor for his need for medical and/or surgical attention, appears to be a personal medical condition, a degenerative medical condition, and not specifically and purported on-the-job work injury on or about July of 2009. I believe the failure to report and the failure to identify this in medical visits is the substantiating evidence in this case for my medical opinion.”

Dr. Bailey testified by deposition that he now cannot say that the recurrent herniated disc occurred on the job because, “If I had been aware that this was not a reported event, that this was not a specific day, (sic) specific event reported, I would have found the other way.” Dr. Bailey was asked by Claimant’s counsel to assume that Claimant was doing his regular work and then felt the pain. Dr. Bailey answered that if the patient comes in with that type of history, “a lot more credence in that situation would be put into truly his recovery from his previous surgery.”

It is important to note that Dr. Bailey received inaccurate information from Employer’s representatives regarding notice and the DOT exam. Further, Dr. Bailey has a close and longstanding relationship with Employer.

### **RULINGS OF LAW**

#### **1. Injury by Accident/Occupational Disease.**

The Workers' Compensation Law sets forth two categories of compensable injuries: (1) injuries by accident; and (2) injuries by occupational disease. Claimant consistently and credibly testified that he was injured on July 2, 2009, while performing the physical tasks required of a mobile service mechanic. He asserts his injury, an undisputed herniated disc, is the result of heavy, repetitive motion on a single shift, which constitutes either an accident or an occupational disease.

The language of § 287.020.2 RSMo defines “accident” as “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.”

There is credible evidence to support a finding of accident. The facts establish Claimant was working heavy, intense work for several days leading up to July 2, 2009, but on the 2<sup>nd</sup>, while performing repetitive heavy work, he experienced a level of pain that was unprecedented, at least since his last herniated disc in 2007. The event was unexpected and traumatic: Claimant’s disc herniated. The event is identifiable by time and place: employee established the time and place of the incident with his testimony that he had the onset of pain while working on July 2, 2009. The event produced, at the time, objective symptoms of an injury: Claimant felt muscle tightness, discomfort and pain.

The weak link in finding accident is the requirement that the symptoms of injury are caused by a *specific event*. According to Merriam-Webster, “event” is defined as “something that happens : occurrence.” One could argue that a hard day at work is an occurrence that qualifies as a specific event. However, when the legislature revised the Workers’ Compensation Act in 2005, the definition of accident was narrowed. The pre–2005 definition included the phrase “a series of events,”...whereas the post–2005 definition is plainly limited to a single, discrete, identifiable event or strain occurring during a single work shift. *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 23 (Mo.App. W.D.,2011). With a clear intent to narrow the definition of accident, and given the plain meaning of the phrase “specific event,” I find Claimant does not meet his burden of proving he sustained an accident.

However, occupational diseases due to repetitive actions are compensable. An "occupational disease" is defined to mean, .... an identifiable disease arising with or without human fault out of and in the course of the employment. 287.067. 1. RSMo. An injury “arises out of” the employment if the injury is “a natural and reasonable incident of the employment, and there must be a causal connection between the nature of the duties or conditions under which employee is required to perform and the resulting injury.” *Simmons v. Bob Mears Wholesale Florist*, 167 S.W.3d 222, 225 (Mo.App S.D. 2005). An injury arises “‘in the course of employment’ when it occurs within the period of employment at a location where employee would reasonably be while engaged in fulfilling the duties of employment or something incidental thereto.” *Id.*

Claimant was injured by occupational disease on or about July 2, 2009. He suffered an identified disease on that day, a herniated disc, while performing his heavy and physical work. The injured disk was a natural and reasonable incident of the employment, and, as discussed below, there is a causal connection between the nature of the duties or conditions under which Claimant was required to perform and the resulting injury. Claimant sustained an injury by occupational disease.

## 2. Medical Causation.

I find Claimant has met his burden on the issue of medical causation. Section 287.067.2 provides for the compensability of occupational disease claims generally:

An injury by occupational disease due is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067.3 provides, “An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter.”

Dr. Kennedy testified that the work-related activity employee was performing on July 2, 2009 was the prevailing factor in Claimant’s current diagnosis and the need for medical treatment. It was not the only factor, but it was the prevailing factor. I find Dr. Kennedy the

most credible expert for several reasons. First, he considered the most accurate and complete history of the accident, including facts most consistent with the facts found herein. Claimant told Dr. Kennedy that he does a lot of bending, twisting, stooping and heavy lifting, “so it’s a pretty demanding job physically by his description.” He knew Claimant experienced the gradual onset of pain throughout the day, without an identifiable single event. His understanding of the injury required no clarification or supplementation. Second, Dr. Kennedy has a greater degree of independence, as compared to Dr. Bailey, who had occasional interaction with Sandy Travis, toured Employer’s facilities, and succumbed to Employer’s multiple requests to reconsider his opinion on causation. Dr. Kennedy is more credible than Dr. Bailey, and therefore his opinion is controlling.

Dr. Kennedy’s credible testimony establishes, and I find, that the work activity performed by Claimant caused him to become disabled on July 2, 2009, and is the prevailing factor in his current diagnosis and need for medical treatment.

### 3. Medical Treatment.

Claimant seeks medical treatment. The right to medical aid is a component of the compensation due an injured worker. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996). ) Section 287.140.1 “entitles the worker to medical treatment as may reasonably be required to cure and relieve from the effects of the injury.” *Id.*

There is little or no dispute over the diagnosis or treatment options. Dr. David Kennedy and Dr. Alexander Bailey agree on the diagnosis of Claimant’s current condition and the treatment plan necessary to cure and relieve Claimant of the effects of his injury. Dr. Kennedy recommends a myelogram, followed by a discogram, and thereafter a fusion at L5-S1. Dr. Bailey said Claimant could live with it, he could try physical therapy and injections, or he could consider surgical intervention in the form of either a removal of the disc at L5-S1 or fusion.

Because I find that a work-related and compensable injury has occurred, I therefore order Employer to provide the treatment as recommended by both of the experts who have testified in this case.

### 4. Notice.

Section 287.420 states that “No proceedings for compensation for any occupational disease or repetitive trauma 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 diagnosis of the condition *unless the employee can prove the employer was not prejudiced by failure to receive the notice.*” §287.420 RSMo. There was no evidence that employee gave actual written notice as required by Section 287.420. However, “(s)trict statutory construction demonstrates that section 287.420 contains an exception to the written notice requirement—when the employer is not prejudiced by the failure to receive written notice—and the application of case law related to the evidentiary basis for supporting the factual existence of that exception provides that actual notice to a supervisory employee is imputed to the employer.” *Sell v. Ozarks Medical Center*, 333 S.W.3d 498, 510 (Mo.App. S.D., 2011).

There is no prejudice due to the failure to give written notice. Claimant gave actual, not written, notice to his supervisor when he left a voice mail message. The supervisor transcribed the content of the voice message and sent it by email to Sandy Travis, who manages the worker's compensation cases for Employer. She arranged for the medical exam, closed the file she had opened in the 2009 Case after receiving Dr. Rutz's July 9, 2009 report, which contains an accurate description of the injury. Dr. Rutz addressed his report to Kathleen Hopkins, the medical case manager for Employer's insurance administrator. Sandy Travis acknowledged there are no medical bills that can be attributed to the failure to report.

There can be no prejudice when Employer has actual notice, receives written descriptions of the alleged injury, opens a file, and directs and pays a doctor to evaluate and treat. There statutory exception to the written notice requirement has been satisfied.

##### 5. Unreasonable Defense.

Claimant seeks to recoup the costs of prosecuting the matter because he views Employer's denial of the 2009 Case to be without reasonable ground. If the finder of fact in a Missouri workers' compensation case determines that "any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them." § 287.560. The [factfinder] should only exercise its discretion to order the cost of proceedings under section 287.560 where the issue is clear and the offense egregious. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003).

The Supreme Court addressed the question of what amounts to unreasonable grounds in *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. 2003). In that case, the court found similar facts to the facts in the case at hand as grounds for assessing costs due to unreasonable defense. In *Landman*, the employer ICS refused to pay for treatment of the claimant's shoulder even after the employer's chosen doctor concluded that the shoulder injury was a work injury. This forced claimant to prepare for a hardship hearing. The court said, "there certainly were no grounds for refusing treatment once [the employer's doctor] concluded that the injury was work-related. This conduct is especially unreasonable because [employer] agreed to be bound by [the doctor's] conclusions, and it was on the basis of these promises that [claimant] did not immediately seek a hearing." *Id.* at 250.

Employer's failure to follow its own expert's opinion constitutes substantial evidence Employer defended the claim for treatment without reasonable grounds. On September 20, 2010, Dr. Bailey<sup>4</sup> authored a letter to Employer's counsel indicating the prevailing factor for Claimant's need for surgical attention appears to be related to the July 2009 incident. Employer did not authorize treatment. On November 20, 2010, a follow up report indicated Claimant had a new work related injury to his lumbar spine in July 2009, and that it appears Employer ignored and sized up, rather than acted upon, his complaints. Employer did not authorize treatment, and a five-month delay followed, during which time Employer took Claimant's deposition on January 19, 2011. It was not until April 20 that Employer's counsel authored a factually inaccurate, argumentative three-page letter asking Dr. Bailey if the "new" information would change his

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<sup>4</sup> Employer required Claimant to travel overnight, nearly 250 miles away, to attend the exam by Dr. Bailey.

opinion. One week later, and 7 months after his first report finding causation, Dr. Bailey issued a report changing his causation opinion on which Employer could legitimately deny treatment.

I find the Employer acted unreasonably in denying treatment. While the Missouri Workers' Compensation Act provides employers with the right to direct medical care, there is a corresponding obligation to do so reasonably. Employer took the extraordinary step of requiring Claimant to travel to the other side of the state, staying overnight, in order to be examined by the doctor of their choosing, only to ignore the opinion of the doctor that the injury was work related. Dr. Bailey made causation in not one, but two reports, yet Employer refused to authorize treatment. Sandy Travis had the opportunity, but could not offer a reasonable explanation of why she refused to authorize treatment. All she could offer is that she personally felt the injury was part of the 2007 case (there is no credible evidence to suggest so).

I find the refusal to follow its own expert's treatment recommendation, the delay in following up with requests for clarification, and the aggressive and argumentative manner in which supplemental reports were procured all constitute evidence of unreasonable behavior on the part of Employer with respect to the issue of treatment.

Claimant's attorney submitted Exhibit N, which contains documentation of Claimant's attorney's "Out-of-Pocket Expenses for Preparation of Hardship Hearing" in the instant case. Exhibit M constitutes "Attorney Time of Jull S. Bollwerk for Purposes of 287.560 Costs" in the instant case. The evidence in Exhibits M and N is unrebutted and unimpeached, and includes expenses and time associated with traveling across state to depose Employer's doctor. I hereby assess the whole cost of the hardship proceeding upon Employer, who defended the hardship matter unreasonably.

The "whole cost of the proceeding" includes the out-of-pocket expenses of the law firm Bollwerk, Ryan and Tatlow, LLC, totaling \$4,870.34. The cost of the proceeding also includes reasonable compensation for the time Claimant's attorney spent prosecuting the hardship matter. Exhibit M documents 75.15 total hours of attorney time expended on the hardship issue. I find a reasonable, but conservative, hourly rate for the St. Louis legal market is \$125.00 per hour in this case. Employer shall pay \$9,393.75 for Claimant's attorney's time. Employer shall pay \$14,264.09 as the whole cost of the proceeding.

**CONCLUSION**

Claimant's work for Employer on and about July 2, 2009 is the prevailing factor in causing an occupational disease of the spine and resulting in a herniated disk injury. Medical treatment is reasonably necessary to cure and relieve the effects of the injury. Employer shall provide the treatment, and all associated workers' compensation benefits, immediately. Because Employer acted unreasonably as discussed above, Employer shall pay \$14,264.09 as the whole cost of the proceeding.

**IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD.**

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

KARLA OGRODNIK BORESI  
*Administrative Law Judge*  
*Division of Workers' Compensation*