

**TEMPORARY OR PARTIAL AWARD**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 11-109231

Employee: Melvin Thomas  
Employer: Express Scripts  
Insurer: Travelers Property Casualty Co. of America  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated June 18, 2013.

This award 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.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued June 18, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3<sup>rd</sup> day of October 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## TEMPORARY OR PARTIAL AWARD

Employee: Melvin Thomas

Injury No.: 11-109231

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Express Scripts

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

Additional Party: none

Insurer: Travelers

Hearing Date: March 25, 2013

Checked by: KMH

### 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: on or about September 23, 2011
5. State location where accident occurred or occupational disease contracted: St. Louis
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 happened or occupational disease contracted:  
Claimant injured his low back when he lifted a box at work.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Parts of body injured by accident or occupational disease: body as a whole referable to the low back
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? \$2,455.10
16. Value necessary medical aid not furnished by employer/insurer? unknown

Employee: Melvin Thomas

Injury No.: 11-109231

- 17. Employee's average weekly wages: \$409.26
- 18. Weekly compensation rate: \$272.84/\$272.84
- 19. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

20. Amount of compensation payable:

Future temporary total disability or temporary partial disability	*
Future medical expenses:	**
<b>TOTAL:</b>	<b>* **</b>

(use of an asterisk (\*) denotes an uncertain contingent future benefit)

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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

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

Employee: Melvin Thomas

Injury No.: 11-109231

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Express Scripts

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

Additional Party: None

Insurer: Travelers

Checked by: KMH

A hearing was held on the above captioned matter March 25, 2013. Melvin Thomas (Claimant) was represented by attorney Bob Keefe. Express Scripts (Employer) was represented by attorney Mark Bates.

Claimant alleges he needs additional medical treatment related to his work accidents of September 23, 2011, and May 9, 2012. Employer denies liability for further treatment.

Employer requested the Court take judicial notice of an amended Report of Injury for the 2011 case. There is no amended Report of Injury in the Division file, and the only Report of Injury in evidence is the original Report of Injury completed by Employer April 6, 2012.

### **STIPULATIONS**

The parties stipulated to the following:

1. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law on the alleged date of injury.
2. Employer's liability was fully insured by Travelers.
3. A claim for compensation was timely filed.
4. Claimant's average weekly wage was \$409.26. His rate for TTD and PPD is \$272.84.
5. Employer paid no TTD benefits and has paid \$2,455.10 in medical benefits.

### **ISSUES**

The parties stipulated the issues to be resolved are as follows:

1. Accident
2. Arising out of and in the course of employment
3. Notice

4. Medical causation
5. Future medical treatment

### **FINDINGS OF FACT**

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 59 year-old male who began working for Employer in March 2011 as a Pharmacy Technician. He matched up prescription paperwork and put it into manila folders in boxes that weighed from two to forty pounds.
2. On or about September 23 or 27, 2011, Claimant lifted a box of paperwork off a shelf that was shoulder height. The box was full and weighed between 35 and 40 pounds. Claimant twisted to put the box on the floor and felt and heard a snap in his mid body and groin area. He told a co-worker, Jamie Luckett, what had happened. Claimant thought he had simply strained his back, so he finished his shift and didn't immediately report the injury.
3. Claimant testified he told his boss, Sheilah Johnson, about the injury two days later and advised he was going to his own doctor the next week. He did not request treatment.
4. Claimant saw his doctor, Dr. Montes, October 3, 2011 for a previously scheduled appointment. Dr. Montes noted Claimant's low back pain, ordered x-rays, gave Claimant a prescription, and sent him back to work.
5. Claimant testified he told Ms. Johnson he had seen Dr. Montes and his x-rays were negative. He told her he still had back pain and Ms. Johnson said she would find him a lighter job. In December 2011, Ms. Johnson moved Claimant to a sit down job.
6. Ms. Johnson, a fourteen year employee, testified at trial, but did not bring any records. She testified Employer's policy was to complete an injury report form and send it to the insurance company whenever an employee says they had a work injury. She was unsure when asked if she had reported more than one workers' compensation injury, and then testified she had. She testified Claimant did not report an injury to her and the job change had nothing to do with back problems.
7. Ms. Johnson testified she had daily conversations and monthly "one-on-one" meetings with Claimant. She documented each meeting. She testified she had a one-on-one with Claimant in October, November, and December, and he did not report an injury or back problems. Those forms are not in evidence. At the January 2012 one-on-one, Claimant mentioned he had low back pain. She testified Claimant told her it was not work related, he would go to his own doctor, and he did not want to bring it to the attention of Employer.

8. Ms. Johnson completed a form regarding her January 13, 2012, one-on-one session with Claimant. Ms. Johnson indicated Claimant told her he had low back pain which started September 23, 2011. He had seen his own doctor and x-rays didn't show anything. Ms. Johnson noted she would complete workers' compensation papers and forward them to HR. Ms. Johnson indicated carpeting on the floor could help because "believe lower back pain is a direct result of walking on the concrete all day. It works on your legs". Ms. Johnson testified she wrote this on the form because she wanted to see what she could do to make his back better.
9. Claimant testified his back symptoms didn't change. He talked to Ms. Johnson several times about his back, and then told her he thought they needed to file a claim.
10. Employer completed a Report of Injury April 6, 2012, and filed it with the Division. The Report of Injury states Claimant injured his back lifting boxes September 23, 2011 and notified Employer of his injury September 26, 2011. Employer sent Claimant to Concentra April 6, 2012.
11. The Concentra records are consistent with Claimant's testimony that he injured his back lifting a box at work in September. He was given medications and sent to physical therapy. His symptoms worsened, and he was sent to a physiatrist, Dr. Khariton, who ordered an MRI. This showed a disc herniation at L5-S1 to the right of the midline.
12. On May 9, 2012, Claimant was at work climbing the stairs to clock in. At the top of the stairs, he felt a pain in his side and back. He moved in order to relieve the pain, and he fell down eight to ten steps onto his side.
13. Claimant was taken by ambulance to De Paul Hospital and a second MRI was ordered. It also showed a focal disc herniation on the right at L5-S1 impinging on the right S1 nerve root. His symptoms did not improve and he continued to have weakness in his legs, so Dr. Khariton referred him to Dr. Mirkin.
14. Dr. Mirkin noted Claimant's history of a twisting accident at work, complaints of low back pain and leg pain, and noted Claimant had been falling because his legs gave out. He had no back injury or problems before the work accident. Dr. Mirkin reviewed the MRIs and sent Claimant to Dr. Shelton for injections.
15. The injections did not relieve Claimant's symptoms. By July 2012, Dr. Mirkin felt he had exhausted conservative treatment and recommended Claimant either live with his symptoms or proceed to surgery. Travelers had paid for all the treatment to date. Dr. Mirkin's office contacted Travelers for authorization for surgery. Employer/Insurer denied additional treatment.
16. On July 5, 2012, Claimant filed a Claim for Compensation for the 2011 accident and stated he gave timely notice to Employer and needed medical treatment. Employer filed an Answer to Claim admitting an accident occurred and did not assert a notice defense.
17. Claimant continues to have daily back and leg pain and requests medical treatment.

18. Dr. Mirkin credibly testified Claimant has a herniated disc impinging on his nerve root and needs additional treatment. The September 2011 accident was the prevailing cause of the disc herniation. The herniation occurred before the May 2012 fall. He opined surgery is needed to cure and relieve the effects of the herniation. While the herniation could have been present before the September 2011 accident, he relied on Claimant's symptoms and history in formulating his causation opinion. There was no indication of a back injury or problems before the September 2011 accident.
19. Claimant is credible.

### **RULINGS OF LAW**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

**1. Claimant was injured by accident on or about September 23, 2011.**

Section 287.020.2 defines "accident" to "mean 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."

Claimant credibly testified he was injured by accident in September 2011. He did not immediately seek treatment because he thought he simply strained his back. He saw his own doctor the next week and advised him of his low back pain. While Claimant's supervisor testified Claimant did not tell her he was injured, her one-on-one form indicates Claimant told her his back pain began September 23, 2011. Claimant credibly testified his symptoms worsened, and he asked Ms. Johnson to complete an injury report.

Employer later completed a Report of Injury admitting Claimant had a work accident September 23, 2011. Employer's Answer to Claim also admits the accident.

Employer then provided treatment for over three months. The history in each of these medical records indicates Claimant sustained the work accident. Employer did not question the accident or causation of the injury until Dr. Mirkin recommended surgery.

I find Claimant met his burden and established he had a work accident on or about September 23, 2011.

**2. Claimant's injury arose out of and in the course of employment and is medically and causally related to his work.**

Section 287.020.3(1) states in part, "An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." This section also provides an injury arises out of and in the course of the employment if the accident is the prevailing factor in causing the injury.

Claimant had no back injuries or treatment prior to the September 2011 work accident. He treated at Concentra, with Dr. Khariton, and had physical therapy before seeing Dr. Mirkin. Each of these providers noted Claimant's history of a back injury and agreed this injury caused Claimant's symptoms. Dr. Mirkin credibly testified Claimant's September 2011 work accident was the prevailing cause of the disc herniation and need for surgery. While Dr. Mirkin agreed the MRI can't pinpoint the date of accident, based on Claimant's history of symptoms he opined the work accident caused the herniated disc. Employer presented no evidence to the contrary.

I find Claimant's work accident was the prevailing factor in causing the injuries and disabilities to Claimant's low back. His low back injury arose out of and in the course of his employment and is medically and causally related to the work accident.

### **3. Claimant provided timely notice of the injury.**

Section 287.420 (RSMo 2005) provides written notice of the injury must be provided to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

Claimant credibly testified he reported the injury to his supervisor within two days. The Report of Injury corroborates this testimony. Ms. Johnson testified Claimant did not report an injury to her, but her January 2012 memo indicates knowledge of back pain related to work since September 23, 2011. Employer had knowledge of the work accident and authorized treatment in April 2012. All Claimant's medical treatment has been at the direction of Employer.

I find Employer had notice of the injury and there has been no showing of prejudice by any alleged failure to receive notice.

### **4. Claimant is entitled to future medical treatment.**

Section 287.140.1 provides a claimant is entitled to medical treatment as may reasonably be required to cure and relieve the effects of the injury. Dr. Mirkin opined Claimant is in need of treatment, namely back surgery, to cure and relieve the effects of the disc herniation. There is no evidence to the contrary.

I find Claimant has satisfied his burden of establishing by reasonable probability that he will require ongoing medical treatment. Claimant is entitled to, and Employer is directed to provide additional medical treatment to cure and relieve the effects of the injury.

**5. Claimant is entitled to future TTD benefits.**

Pursuant to this award, Claimant will receive additional medical treatment. Employer is ordered to provide TTD benefits to cover the healing period associated with such treatment, if Claimant is unable to work during that period.

**CONCLUSION**

Claimant sustained an injury by accident in the course and scope of his employment. He is entitled to additional medical treatment and TTD if he is unable to work while undergoing treatment. All remaining issues are left open for future determination.

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

**KATHLEEN M. HART**  
*Administrative Law Judge*  
*Division of Workers' Compensation*