

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

Injury No.: 03-125407

Employee: Cory Washington
Employer: Commercial Letter, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: Alleged April 1, 2003
Place and County of Accident: Alleged City of St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 11, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued April 11, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 22nd day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Cory Washington

Injury No.: 03-125407

Dependents: N/A Before the
Division of Workers'
Employer: Commercial Letter, Inc. **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund (Open) Relations of Missouri
Jefferson City, Missouri
Insurer: Self-insured
Hearing Date: March 10, 2005 Checked by: EJK

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: April 1, 2003 (alleged)
5. State location where accident occurred or occupational disease was contracted: City of St. Louis, Missouri (alleged)
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
8. Did accident or occupational disease arise out of and in the course of the employment? No
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:
The claimant testified that he experienced low back pain after lifting thirty boxes, each weighing forty pounds.
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: None
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Cory Washington Injury No.: 03-125407

17. Value necessary medical aid not furnished by employer/insurer? \$21,818.78
18. Employee's average weekly wages: \$388.59
19. Weekly compensation rate: \$259.06
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

None

22. Second Injury Fund liability: Open

TOTAL: None

23. Future requirements awarded: None

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: Ronald A. Caimi, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Cory Washington Injury No.: 03-125407
Dependents: N/A Before the
Division of Workers'
Employer: Commercial Letter, Inc. **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund (Open) Relations of Missouri
Jefferson City, Missouri
Insurer: Self-insured
Hearing Date: March 10, 2005 Checked by: EJK

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant developed a herniated disc in his lower back. The issues for determination are (1) Accident or occupational disease arising out of and in the course of employment, (2) Notice, (3) Medical causation, (4) Liability for Past Medical Expenses, (5) Temporary Disability, and (6) Permanent disability. The Second Injury Fund claim remains open pursuant to an agreement among the attorneys. The evidence compels an award for the defense.

At the hearing, the claimant testified in person and offered a deposition of Shawn L. Berkin, D.O., medical records from Back Pain Institute of St. Louis, and various medical bills. The defense offered depositions of the claimant and David R. Lange, M.D., and medical records from Jonathon A. Gold, M.D., Christian Hospital, Internal Medicine and Rheumatology, and John R. Wagner, M.D., the claimant's personnel records, the employer's minor injury log, and records from the Division of Workers' Compensation.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri.

SUMMARY OF FACTS

This thirty-one year old claimant, a warehouse worker, worked for this employer from August 1993 to December 5, 2003, full time in the warehouse lifting flour, sugar, and paper towels among other things. While working for this employer, the claimant testified that he experienced low back pain after lifting thirty boxes, each weighing forty pounds.

The claimant testified that on April 1, 2003, he felt a shooting pain in his low back and down his left leg while lifting forty pound boxes and putting them on a skid. He testified that he felt the pain after lifting the thirtieth

box. The claimant testified that he told his supervisor, Matt Domescik, and perhaps Jason Hess, the assistant supervisor, that he had lifted boxes and felt pain down his leg and back at the end of his shift. He testified that Matt Domescik told him to go to a doctor and get it checked.

The claimant testified that he worked the next day and his back was fine until he started lifting again, when the pain returned, mainly in his back. He did not complete an injury report that day. He continued to work the next two weeks without seeking treatment, and the pain continued to worsen. The claimant testified that he told Matt Domescik about the back pain on four or five occasions. The only discussion regarding treatment was that Matt Domescik told him to see a doctor.

The claimant consulted Dr. Cabral on April 30 and July 1, 2003, but the claimant did not offer the medical records. See Exhibit G. The claimant was off work for medical treatment from June 30 to July 1, 2003. See Exhibit 8. Dr. Cabral ordered an MRI revealing "prominent protrusion L4-L5 disc centrally and slightly more to the right of ht midline" and a milder bulge at L50S1 and slight bulges at L2-L3, and L30L4." See Exhibit 2.

On September 2, 2003, he consulted Dr. Gold with a medical history that in April, he began having pain in his left testicle and down his left leg, and "At work, it is difficult for him to straighten up." See Exhibit 2. Before April 2003, he had occasional throbbing in his low back but nothing of any consequence. See Exhibit 2. On September 10, 2003, a lumbosacral myelogram with a post myelogram CT revealed congenital spinal stenosis due to short pedicle spinal stenosis, a central disc herniation at L4-L5 with further compromise of the spinal canal, and the possibility of a small disc herniation on the left side at L5-S1. See Exhibit 2.

From October 1 to November 25, 2003, the claimant received medical care from the Back Pain Institute and gave an initial history of low back pain with radiating pain to the left hip and leg and testicular pain with paresthesia. The claimant reported that his pain increased with activity level and that he had morning stiffness and soreness. He reported the onset in 1994 with a recurrence in April 2003, but the claimant specifically denied any fall or accident and he denied any prior treatment. The claimant testified that he got little benefit from the treatment.

On December 4, 2003, Dr. Gold performed a decompressive laminectomy at L4-5 and S-1 and diskectomy, central disc at L4-5 and S-1. See Exhibit 2. His final diagnosis was ruptured disc L4-5 and L5-S1. See Exhibit 2. On December 5, 2003, this employer terminated the claimant's employment after the claimant's low back surgery, because the claimant could no longer perform his duties. On follow-up January 6, 2004, Dr. Gold found that the claimant was doing really well with no leg problems. See Exhibit 2. He was walking 45 minutes a day and having no pain. See Exhibit 2. The last visit was February 10, 2004, and he was to have a little more therapy and return to work in two weeks. See Exhibit 2. Dr. Gold gave him no restrictions.

The claimant is now employed as a school bus driver and testified that his back does not hurt while driving the school bus and is fine unless he is lifting or driving for a long time. His back may be stiff in the morning three to four times a week, and he will take Tylenol. His left leg has not bothered him since he stopped doing the lifting for this employer. He has not lost time from driving the bus due to his back.

Matt Domescik

Matt Domescik, the employer's manager of shipping and warehouse, supervised the claimant for six years and described the claimant as a good, respectful worker. As a supervisor, he keeps an injury logbook, reporting any work injury, however minor. For a serious injury, such as a back injury, he would also notify the safety coordinator. He only had two entries for the claimant in the logbook: a cut to the hand on February 12, 2002, and a cut on the top of his hand on March 25, 2002. There was no entry for any time in April 2003.

The claimant's personnel file revealed that the claimant missed March 17, 2003, for a family matter and June 30 to July 2, 2003 due to his back. The claimant was also off work from September 3, 2003, for his back surgery. A September 2, 2003, note from Dr. Cabral indicated he needed to be off work due to a herniated disk. Matt Domescik testified that that was his first notice that the claimant had a back injury. Matt Domescik questioned the claimant about the cause of his back injury and the claimant reported that it was "hereditary." Matt Domescik testified that if the claimant had reported the accident in April 2003, Matt Domescik would have sent him for

treatment, and he would have been able to give him lighter duties or get him help for heavier lifts.

Preexisting Conditions

On July 7, 1997, the claimant had low back and groin pain after lifting a box one week earlier. See Exhibit 4. He had tenderness at L5-S1 bilaterally, there was pain to palpation of the left groin, there was left groin pain on external rotation of the hip, he had low back pain with straight leg raising, and the diagnosis was that a herniated disk needed to be ruled out. See Exhibit 4. On July 24, 1997, Dr. Wagner examined the claimant for low back pain radiating to the left groin on June 30, 1997. See Exhibit 6. The symptoms were worse with sitting or standing for a period of time. See Exhibit 6. The claimant reported that a physician told him that he had a herniated disk. See Exhibit 6. On July 7, 1998, the claimant made an emergency room visit for low back pain after spinning while playing basketball. On August 8, 1998, a lumbar spine CT revealed a diffusely prominent annulus at L4-5.

Dr. Berkin

Dr. Berkin examined the claimant on February 18, 2004, and took a medical history of lifting a forty-pound box when he felt a burning pain in his low back. Dr. Gold eventually performed a laminectomy. The patient had not yet returned to work. On exam, Dr. Berkin found a surgical scar, tenderness, muscle spasm, and lost motion. Straight leg raising caused low back pain. The exam also showed normal lumbar curvature, normal gait, normal leg strength, normal reflex testing, and there was no atrophy or swelling. He diagnosed a herniated disk related to the work injury and rated him at forty-five percent permanent partial disability of the low back. Dr. Berkin did not get a history of prior back injury, prior treatment to the back, prior diagnostic testing to the back or prior disability to the back. Dr. Berkin testified that obesity puts extra stress on the claimant's back.

Dr. Lange

Dr. Lange, a board certified orthopedic surgeon, examined the claimant on February 1, 2005, and took a history of the claimant lifting 40 to 60 pound boxes when he felt a sharp pain in his back. The claimant subsequently developed left leg pain. The claimant reported that he continued to have symptoms in the back and the leg and that exertion and prolonged sitting increased those symptoms. The claimant reported he had an MRI in 2002, but no other history. On exam, Dr. Lange observed the surgical scar, which was not tender, and a pulling sensation at 70 to 75 degrees of flexion. The neurological exam was normal, straight leg raising was normal; there was no spasm, no trigger points, and full motion for his body habitus. Strength and reflex testing was normal. He described the discs as contained herniations, meaning there is still a membrane over the disc material and none has actually been extruded. He opined that the claimant suffered a twenty-five percent permanent partial disability, from all sources. He restricted the claimant from lifting over fifty pounds and opined that the claimant needed to lose weight to protect his back.

Regarding causation, Dr. Lange could not determine whether the disability was related to the injury. The physicians treating him, Dr. Cabral and Dr. Gold, did not get a history of work injury. When the complaints from the 1997 injury were hypothesized, Dr. Lange testified that they were very similar in terms of left leg and low back pain, and the physical exam is very similar to Dr. Wagner's findings in 1997. Dr. Lange testified that he did not have enough information to opine whether the herniated the disk originated in 1997 but was not surgically repaired until 2004. The 1998 CT scan from Christian Hospital indicated a diffusely prominent annulus at L4-5.

COMPENABILITY

The claimant has the burden to establish that he has sustained an injury by accident arising out of and in the course of her employment, and the accident resulted in the alleged injuries. Choate v. Lily Tulip, Inc., 809 S.W.2d 102, 105 (Mo.App. 1991).

Claimant must establish a causal connection between the accident and the injury. Claimant does not, however, have to establish the elements of her claim on the basis of absolute certainty. It is sufficient if she shows them by reasonable probability. "Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt." The Commission's awards on disability claims are not solely dependent on medical evidence given by expert witnesses, but its findings are to be judged on the basis of the evidence as a whole. The testimony of the claimant, or other lay witnesses, as fact within the realm of lay understanding can constitute substantial evidence of the nature, cause and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence. The Commission is

authorized to base its findings and awards solely on the testimony of the claimant; her testimony alone, if believed, constitutes substantial evidence. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 198, 199 (Mo.App. 1990).

Where the performance of duties of an employee leads to physical breakdown or a change in pathology, the injury is compensable. Wolfgeher v. Wagner Cartage Service, 646 S.W.2d 781, 784 (Mo. banc 1983). However, there are statutory limitations on compensability:

An injury is compensable if ... work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor. ... Ordinarily, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment. An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent ... that the employment is a substantial factor in causing the injury; and

(b) It can be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. Section 287.020, RSMo 1994.

The claimant bears the burden of proving that not only did an accident occur, but it resulted in injury to him. Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001); Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman, supra at 175, 176. This requires claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath, supra. The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

The only evidence submitted by the claimant was his own uncorroborated testimony that he began having back pain after lifting thirty boxes. Although he testified that he reported the alleged occurrence to his supervisor, his supervisor testified to the contrary and produced his accident log with no such entries. The claimant did not fill out a written accident report. The claimant's supervisor testified that the claimant told him that his low back pain resulted from a hereditary condition. The claimant did not seek medical care for three months. In September 2003, five months after the injury, when he knew he was going to have surgery and miss several months of work, he still had not filed an accident report.

The medical records following the alleged occurrence show that the claimant consulted Dr. Cabral on April 30 and July 1, 2003, but the claimant did not offer the medical records. See Exhibit G. The claimant was off work for medical treatment from June 30 to July 1, 2003. See Exhibit 8. Dr. Cabral ordered an MRI revealing "prominent protrusion L4-L5 disc centrally and slightly more to the right of ht midline" and a milder bulge at L5/S1 and slight bulges at L2-L3, and L3/L4." See Exhibit 2.

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initial history of low back pain with radiating pain to the left hip and leg and testicular pain with paresthesia. The claimant reported that his pain increased with activity level and that he had morning stiffness and soreness. He reported the onset in 1994 with a recurrence in April 2003, but the claimant specifically denied any fall or accident and he denied any prior treatment. The claimant testified that he got little benefit from the treatment.

On February 18, 2004, he reported to Dr. Berkin a medical history of low back pain beginning in April 2003, while lifting a forty-pound box. See Dr. Berkin deposition, page 6. He did not report any prior low back treatments, injuries, or disabilities. See Dr. Berkin deposition, page 15.

The claimant did not present any medical records showing any medical history of a work related back injury until he consulted Dr. Berkin for this claim. Thus, the medical histories from the treating physicians do not corroborate the claimant's position. In addition, Dr. Berkin testified:

Q If he did have a prior injury or treatment or imaging or disability, is that something that could change your opinion ... about causation or permanent disability?

A Well, it would depend. I mean, if he had a previous treatment for his back and had one or two visits to a doctor and his symptoms were completely resolved and he went back to work and had no restrictions, I would think that wouldn't be very significant in this particular point. See Dr. Berkin deposition, page 16.

The inconsistencies regarding the claimant's medical history and the onset of low back pain together with his delay in obtaining medical care present significant questions about the etiology of the claimant's low back condition. Certainly, medical testimony is not required to establish cause and disability where such matters are within the understanding of laypersons. Cautious or indefinite expert testimony on medical causation combined with lay testimony can provide sufficient competent evidence to support causation of injury. Johnson v. City of Duenweg Fire Dept., 735 S.W.2d 364, 367 (Mo. banc 1987). In line with the general tendency of administrative law to recognize the expertise of specialized tribunals, compensation boards may rely to a considerable extent on their own knowledge and experience in uncomplicated medical matters, and in such cases, awards may be upheld without medical testimony or even in defiance of the only medical testimony. Larson, *The Law of Workers' Compensation*, § 79.

However, medical causation of the claimant's medical conditions in this case cannot be considered uncomplicated. The commission may not substitute a personal opinion on the question of medical causation of complicated medical conditions for the uncontradicted testimony of a qualified medical expert. Merriman v. Ben Gutman Truck Service, Inc., 392 S.W.2d 292, 297 (Mo. 1965). Of course, it is possible that the existence or absence of injury and causation are so obvious from the physical facts that one of ordinary understanding may reject even unchallenged medical expert testimony to the contrary. However, the specific medical conclusion that such complicated medical conditions are due to the claimant's trauma is not clear, simple, or well recognized by lay persons and is not a matter within the expertise of an administrative law judge. See Wright v. Sports Associated, 887 S.W.2d 596, 600 (Mo. Banc 1994).

Here, the claimant's expert assumed that the claimant had no prior disability to his low back, but the medical records and public records from the Division of Workers' Compensation show that the claimant had significant preexisting low back pain that began long before the alleged occurrence. Generally, where two events, one compensable and the other non-compensable, contribute to the claimant's alleged disabilities, the claimant has the burden to prove the nature and extent of disability attributed to the job related injury. Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 420 (Mo.App. E.D. 1993); Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. E.D. 1991). Dr. Lange, an orthopedic surgeon testified that he did not have enough information to opine whether the disc injury resulted from the accident or was a preexisting condition. Dr. Berkin's opinion is far less credible, because he is not an orthopedic surgeon and, more importantly, he lacked information about the claimant's preexisting condition. Since the claimant failed to present a prima facie case, the claim is denied.

NOTICE

Section 287.420, RSMo 1994, requires that written notice be given to the employer as soon as practical but not later than 30 days after the accident. The purpose underlying the notice requirement is twofold. Saylor v. Spiritas Industrial, 974 S.W.2d 536 (Mo.App. E.D. 1998). First, the notice requirement is designed to ensure that the employer will be able to conduct an accurate and thorough investigation of the facts surrounding the injury. Id. The second purpose of the notice requirement is to ensure that the employer has the opportunity to minimize the

employee's injury by providing prompt medical treatment. Id. Thus, in cases where the employer does not have actual notice of the accident, courts have examined whether the claimant has proffered evidence on both the employer's ability to investigate the accident and the minimization of the employee's injury in determining whether the employer was prejudiced by the claimant's failure to provide written notice. See Id.; Klopstein v. Schroll House Moving Co., 425 S.W.2d 498, 504-05 (Mo. App. 1968).

The written notice may be circumvented if the claimant makes a showing of good cause or the employer is not prejudiced by the lack of such notice. Dunn v. Hussman Corporation, et al., 892 S.W.2d 676, 681 (Mo. App. E.D. 1994). Claimant has the burden of showing that the employer was not prejudiced. Hannick v. Kelly Temporary Services, 855 S.W.2d 497, 499 (Mo.App. E.D. 1993). One way a claimant may meet claimant's *prima facie* burden of showing that an employer was not prejudiced by the failure to give written notice within thirty days is to demonstrate that the employer had actual notice of the accident. Saylor, Id. Missouri Courts have held that no prejudice exists where the evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact finder. Id.

The claimant did not give written notice until his claim was filed in December 2003. However, he testified that he told his supervisors about the accident, but neither witness knew about the accident. His supervisor kept an injury log, in which he would write any work injury. The log contained no entry for April 2003 or an entry for a back injury at all. The claimant's first off work slip from June 2003 did not indicate it was for the back. When the claimant's supervisor asked him if the injury was work related in September 2003, the claimant reported that the injury was not work related, but hereditary.

The claimant's supervisor testified that if the claimant had reported the injury, the supervisor would have filed a report with the safety committee and sent the claimant to the clinic. The safety committee would have had an opportunity to investigate the claim and to question co-workers about any symptoms he may have voiced before the alleged accident. The claimant's supervisor testified that he could have given him lighter duty or help with lifting, so between the treatment and less aggravation from continued lifting, the claimant may never have continued getting worse, as he testified to. Clearly, the employer was prejudiced in this case.

Although the claimant testified that he verbally notified the employer about the alleged accident on a timely basis, the weight of the evidence, including the supervisor's denial and his safety log, support a finding that the claimant failed to give proper notice.

LIABILITY FOR PAST MEDICAL EXPENSES

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. Id. at 111, 112.

The claimant offered several medical bills relating to his low back condition:

| | | |
|----------------------|--|-------------|
| Apr. – Oct. 2003 | C & M Medical Group, Unknown | \$ 283.62 |
| September 9, 2003 | Christian Hospital, Myelography, Exhibit C | \$ 3,842.80 |
| Oct. – Nov. 2003 | Back Pain Institute, Exhibit D | \$ 7,318.00 |
| Sept. 2003- Feb 2004 | Dr. Gold, Myelogram & Surgery, Exhibit F | \$ 3,863.32 |

| | | |
|--------------------|---|-------------|
| December 4-5, 2003 | Christian Hospital, surgery, Exhibit B | \$ 9,877.05 |
| December 7, 2003 | Christian Hospital, ER, Exhibit C | \$ 788.60 |
| Feb. – Mar. 2004 | Healthsouth, Physical Therapy, Exhibit F. | \$ 511.00 |
| Total | | \$26,484.39 |

The claimant failed to present medical records relating to the C & M Medical Group and the treatment is unknown. The claimant failed to meet his burden of proving the bills of Dr. Cabral. Where a claimant submits medical bills, but not the medical records, such bills are properly excludable because the employee has failed to show that the bills relate to the professional services rendered....". Cahill v. Riddle Trucking, Inc., 956 S.W.2d 3 15, 322 (Mo. App. 1997). The claimant failed to show that those charges relate to his low back condition. However, since the claim is not compensable, the claim for medical care is denied.

TEMPORARY DISABILITY

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury. Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.170.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id. Temporary total disability awards are designed to cover the employee's healing period, and they are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. When further medical progress is not expected, a temporary award is not warranted. Any further benefits should be based on the employee's stabilized condition upon a finding of permanent partial or total disability. Shaw v. Scott, 49 S.W.3d 720, 728 (Mo.App. W.D. 2001).

The evidence presented few specific work release slips to resolve this question, the employer's personnel file contained an off work slip suggesting time off from September 2 to December 8, 2003, while he was receiving medical treatment from Dr. Gold and the Back Pain Institute. On December 4, 2003, Dr. Gold performed a decompressive laminectomy at L4-5 and S-1 and discectomy, central disc at L4-5 and S-1. See Exhibit 2. His final diagnosis was ruptured disc L4-5 and L5-S1. See Exhibit 2. On December 5, 2003, this employer terminated the claimant's employment after the claimant's low back surgery, because the claimant could no longer perform his duties. On follow-up January 6, 2004, Dr. Gold found that the claimant was doing really well with no leg problems. See Exhibit 2. He was walking 45 minutes a day and having no pain. See Exhibit 2. The last visit was February 10, 2004, and he was to have a little more therapy and return to work in two weeks. See Exhibit 2. Dr. Berkin opined that the claimant had reached maximum medical improvement on February 18, 2004. The evidence suggests that the claimant was unable to work due to his low back condition from June 30 to July 1, 2003, and from September 3, 2003, to February 18, 2004, 24 3/7 weeks. However, since the claim is not compensable, no benefits are awarded.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission

has discretion as to the amount of the award and how it is to be calculated." *Id.* "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." *Id.* In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. *Id.*

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. *Rana*, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." *Id.* See also, *Lawton v. Trans World Airlines, Inc.*, 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); *Indelicato v. Mo. Baptist Hosp.*, 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." *Rana*, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. *Id.* at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. *Id.* at 630.

Dr. Berkin rated the claimant's low back disability from all causes as a forty-five percent permanent partial disability to the low back. Dr. Lange rated the permanent partial disability to the low back at twenty-five percent. Dr. Lange's rating appears to be more accurate given the claimant's good result. The evidence shows that the claimant had a prior five percent permanent partial disability from an earlier work related accident. The evidence is unclear regarding preexisting non-work related disability due to his degenerative condition exasperated by his weight. However, our Supreme Court has proclaimed that low back injuries are complicated issues and that an administrative law judge cannot make findings based on his own experience, because the subject is clearly appropriate for expert opinion evidence. Thus, if the experts were unable to sort out the complications, it would strain credulity for the commission to do so. However, if one could assume that the claimant's only preexisting low back disability was from his earlier work related accident, then one could conclude that the claimant suffered a twenty percent permanent partial disability from the this occurrence. However, since the claim is not compensable, no benefits are awarded.

Date: _____ Made by: _____

EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation