

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

Injury No.: 07-104113

Employee: Kirk Wilson
Employer: Allied/Midwest Waste Bridgeton
Insurer: American Home Assurance c/o AIG Domestic Claims
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 section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated January 16, 2009.

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 section 287.510 RSMo.

The award and decision of Chief Administrative Law Judge Kathleen M. Hart, issued January 16, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of June 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Kirk Wilson

Injury No.: 07-104113

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Allied/Midwest Waste Bridgeton

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

Additional Party: Second Injury Fund (open)

Insurer: American Home Assurance c/o AIG Domestic Claims

Hearing Date: October 29, 2008

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: August 6, 2007
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
- Did accident or occupational disease arise out of and in the course of the employment? Yes
- 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 was moving a heavy steel trash container when he injured his low back.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Parts of body injured by accident or occupational disease: Low Back, Body as a Whole
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? Unknown
16. Value necessary medical aid not furnished by employer/insurer? \$11,533.55

Employee: Kirk Wilson

Injury No.: 07-104113

- 17. Employee's average weekly wages: sufficient to entitle him to maximum rate
- 18. Weekly compensation rate: \$742.72/\$389.04
- 19. Method wages computation: by operation of law

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:	\$8,702.55
57 6/7 weeks of past temporary total disability from September 20, 2007 through October 29, 2008	\$42,971.66
future temporary total disability benefits beginning October 30, 2008, and continuing until further order of the Division	*
future medical care	**
Total:	\$51,674.21 * **

(Use of an asterisk (*) denotes contingent future benefits)

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:

Ann Dalton

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kirk Wilson

Injury No.: 07-104113

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Allied/Midwest Waste

Department of Labor and Industrial
Relations of Missouri

Additional Party: Second Injury Fund (open)

Jefferson City, Missouri

Insurer: American Home Assurance c/o AIG Domestic Claims

Checked by: KMH

A hearing was held on the above captioned matter October 29, 2008. Kirk Wilson (Claimant) was represented by attorney Ann Dalton. Allied/Midwest Waste (Employer) was represented by attorney Kevin Leahy. The Second Injury Fund was left open.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law and Employer's liability was fully insured by American Home Assurance c/o AIG Domestic Claims on the alleged date of injury.

ISSUES

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

- Whether Claimant sustained an injury by accident arising out of and in the course of his employment.
- Whether Claimant provided proper notice of the injury to Employer.
- Whether Claimant's back condition and complaints are medically and causally related to the alleged work injury.
- Whether Employer is liable for past medical expenses.
- Whether Employer is liable for future medical care.
- Whether Employer is liable for TTD benefits.

- Whether Claimant is entitled to the maximum rates of TTD and PPD.
- Whether the hearing was properly held over Employer Attorney's objection.

FINDINGS OF FACT

Based on the competent and substantial evidence, I find:

- Claimant is a 41 year-old male who was employed by Employer as a driver since 1997. His duties included hauling and picking up trash, yard waste, and recyclables.
- On August 6, 2007, Claimant was pushing a heavy, ten yard long, steel container weighing over 100 pounds when he felt pain in his low back and into his left lower extremity. As per company policy, Claimant reported the incident to his supervisor, Jason Belt, that same day. Claimant continued working in pain the rest of the week. Because the pain persisted, on August 9, 2007 he called his family physician, Dr. Schmidt-Turner. She prescribed pain medications.
- Despite the pain medications, Claimant continued to experience severe back pain. On August 11, 2007, after moving his lawn mover, Claimant became incapacitated for the weekend. He was able to return to work Monday, August 13, 2007.
- Due to his ongoing severe back pain, Dr. Schmidt-Turner recommended an MRI. This was performed August 21, 2007, and showed a moderately large disc herniation at L5-S1 centrally and to the left of the midline with nerve root compression on the left side. There was also degenerative disc disease at L5-S1. Based upon the MRI findings, Dr. Schmidt-Turner referred Claimant to Dr. Hoffman, a neurosurgeon.
- Prior to seeing Dr. Hoffman, Claimant met with his supervisor, Jason Belt, to update Employer on his medical condition and seek authorization for treatment. Mr. Belt told Claimant Employer would authorize treatment if Claimant completed a report of injury indicating his injury occurred September 14, 2007, not August 6, 2007. This new injury date was chosen by Employer and is discussed in the Barnes Care note of September 25, 2007. (Exhibit A)
- Employer referred Claimant to Barnes Care September 18, 2007. The records from that date indicate a history of low back pain with left posterior thigh/calf pain that began while pushing a dumpster over a rocky area. This history is consistent with the history contained in all the other medical records. The Barnes Care doctor prescribed a muscle relaxer, discussed an MRI, and returned Claimant to work on light duty. Employer did not

have light duty available after September 20, 2007.

- On or about September 19, 2007, Employer filed a Report of Injury with the Division indicating Claimant was injured September 14, 2007, when he was pushing a container and felt a sharp pain in his low back.
- After reviewing the August MRI, the doctor at Barnes Care recommended Claimant see a back specialist. Before Claimant could get to a specialist, Employer sent Claimant a denial letter explaining benefits were denied due to the alleged late reporting of the incident.
- Claimant testified following receipt of the denial letter he returned to Dr. Schmidt-Turner. She referred Claimant to Dr. Khader who initially ordered physical therapy. This did not relieve Claimant's symptoms. Dr. Khader then performed a series of injections in late 2007. These injections did not relieve Claimant's symptoms. Dr. Khader referred Claimant to Dr. Shitut.
- Claimant testified he saw Dr. Shitut who recommended surgery. In an effort to avoid surgery, Claimant had several more injections in the spring of 2008. Claimant had little relief from these injections, and Dr. Stynowick referred Claimant to Dr. Hoffman. Dr. Hoffman also recommended surgery. Dr. Stynowick agreed Claimant would need surgery since the injections provided little relief.
- Since his last injection in April 2008, Claimant has been unable to obtain any further medical treatment on his own because he has no health insurance. He has received no TTD benefits.
- On August 4, 2008, Claimant was examined by Dr. Fallon Maylack, an orthopedist, at the request of Claimant's attorney. Dr. Maylack noted Claimant was injured August 6, 2007, when he pushed a yard waste container and experienced a sharp, sudden pain in his back and down his left leg. Dr. Maylack examined Claimant and reviewed his treatment records. He opined the August 6, 2007 work injury was the prevailing factor in the development of the herniated disc at L5-S1. Dr. Maylack concurred with Claimant's course of treatment and opined Claimant would require surgery to repair the disc herniation. He also opined Claimant remained temporarily disabled from his occupation as a driver for Employer.
- A claim for compensation was timely filed on October 23, 2007. The Division of Workers' Compensation acknowledged the claim and properly sent a copy to Employer and Insurer on or about November 5, 2007. (Claimant's Exhibit D)
- Claimant's attorney sent a certified request for statements pursuant to Section 287.215 (RSMo 2005) on February 11, 2008. The certification of delivery was signed by an agent of Employer/Insurer on February 14, 2008. (Claimant's Exhibit E)

- On July 18, 2008, Claimant's attorney notified Ms. Sara Hangge of AIG Claim Services that her attorney had not entered an appearance and that Claimant's attorney planned to file a hardship motion at the Division of Workers' Compensation. Claimant's attorney also demanded medical treatment and unpaid TTD benefits. (Exhibit E)
- Claimant's attorney filed a motion for hardship setting, and a hardship mediation was scheduled for September 30, 2008. Claimant's attorney notified Ms. Hangge of the mediation via facsimile on September 29, 2008. (Exhibit E)
- On September 30, 2008, the ALJ approved Claimant's request for hardship hearing. Claimant's attorney provided Ms. Hangge and Employer each a copy of the approved request the same day by certified letter. The return receipt for this certified letter was acknowledged October 1, 2008, by Employer. (Exhibit E)
- On October 6, 2008, the Division of Workers' Compensation sent all parties a notice of hearing for Monday, October 27, 2008. The hearing date was changed to October 29, 2008, and the Division sent another hearing notice to all parties. There is no evidence Employer appeared for the original October 27 hearing date or contacted the Division regarding that hearing. In addition to the notice sent by the Division, Claimant's attorney faxed a notice of the amended hearing date to Employer and to Insurer on October 28, 2008. The facsimile indicated Claimant's attorney intended to try the case on that date and time assigned by the Division and again requested that an attorney be present if Employer intended to have representation. (Exhibit E)
- On October 29, 2008, moments before beginning the hearing, attorney Kevin Leahy entered his appearance and filed an answer out of time on behalf of Employer and Insurer. Clearly Employer had notice of this hearing date.
- Claimant has had consistent and constant pain in his back since August 6, 2007. He continues to have pain in his left leg and continues to take over the counter medications in an effort to relieve some of his pain. He is unable to work and requests additional treatment. He has not been released by any doctor to return to work full-duty.
- Employer is in default and all facts alleged in the Claim are deemed admitted pursuant to 8 CSR 50-2.010(8)(B).

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:

- **Claimant sustained an injury by accident arising out of and in the course of his employment August 6, 2007.**

Claimant credibly testified he was injured at work August 6, 2007, when he was moving a heavy, large, steel trash dumpster. The treatment records corroborate Claimant's credible testimony regarding his injury and injury date. Claimant's supervisor failed to complete the proper paperwork after Claimant reported his injury on August 6, 2007. Before he would authorize treatment, Claimant's supervisor instructed Claimant to report his injury as having occurred September 14, 2007.

In addition, Section 8 CSR 50-2.010(8)(B) provides:

Unless the Answer to Claim for Compensation is filed within thirty (30) days from the date the Division acknowledges receipt of the claim or any extension previously granted, the statements of fact in the Claim for Compensation shall be deemed admitted for any further proceedings.

Claimant filed his Claim for Compensation October 23, 2007. The Division acknowledged the Claim November 5, 2007. Employer's Answer was due December 4, 2007. Employer failed to timely answer the Claim and did not request an extension of time to answer. Their Answer was not filed until October 29, 2008, shortly before going on the record to begin the hearing. Therefore, the date of injury, August 6, 2007, and the description of the injury as stated in the Claim for Compensation are deemed admitted for purposes of these proceedings.

- **Claimant provided proper notice of his work injury to Employer.**

Claimant credibly testified he reported his injury to his supervisor, Jason Belt, on the date the injury occurred. No evidence was presented to contradict this credible testimony. Claimant credibly testified he did not seek medical treatment until his pain became intolerable. In mid September, Claimant again met with his supervisor and requested treatment. This was less than six weeks after the injury. Claimant's supervisor then advised Claimant he would authorize treatment if Claimant stated his injury occurred in September. Claimant provided notice the day of his injury and six weeks after his injury. Employer had sufficient notice of the injury, and instead of providing treatment, denied the case based on Claimant's "late reporting" of the injury.

- **Claimant's lumbar herniated disc is medically and causally related to his work injury of August 6, 2007.**

Claimant has the burden of proving all essential elements of a claim, including causation. *Grime v. Altech Industries*, 83 S.W.3d 581, 583 (Mo.App. 2002)(overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. Banc 2003)).

The uncontradicted medical evidence establishes Claimant's August 6, 2007, work injury is the prevailing factor in the development of Claimant's herniated disc. The medical records indicate he had no prior back injury or complaints. When he suffered his injury at work, he had immediate low back pain radiating into his left lower extremity. Although he had an increase in symptoms the weekend after his injury, the medical experts opined the prevailing factor in causing Claimant's herniated disc is his work injury. In addition, Claimant's own credible testimony constitutes substantial evidence of the nature and cause of his disability. *Bock v. City of Columbia*, --- S.W.3d ---, 2008 WL 5396499, Mo.App. W.D., December 30, 2008 (NO. WD 69674) Claimant satisfied his burden and proved his work accident was the prevailing factor in causing his medical condition and disability. (287.020.3(1)(RSMo 2005))

- **Employer is liable for past medical expenses of \$8,702.55.**

Employer improperly refused to authorize treatment citing the alleged late injury report. Claimant has established he reported his injury in a timely manner. In addition, there is no showing of prejudice to Employer even if Claimant had reported his injury more than 30 days after the injury date. When Employer refused to authorize treatment, Claimant sought treatment on his own. Claimant's past medical bills total \$11,533.55. With the exception of the MRI which was obtained prior to Insurer's denial, all expenses were incurred after Employer's improper denial of treatment. Deducting the MRI cost of \$2,831.00 from the total medical expenses, I find Employer liable for past medical expenses of \$8,702.55.

- **Employer is liable for future medical treatment.**

The uncontradicted medical evidence establishes Claimant is not at maximum medical improvement and is in need for further medical care and possibly surgery. Claimant established this need for treatment is causally related to his work injury. Employer refused treatment and abdicated its right to control the selection of the medical provider. Employer is hereby ordered to provide medical treatment. Claimant is given the right to continue to direct his own treatment. Employer retains the obligation to pay the reasonable and necessary medical bills.

- **Employer is liable for past and future TTD benefits.**

Claimant's credible testimony and the medical records establish Claimant has been unable to work since September 29, 2007, and he remains temporarily totally disabled. He is entitled to TTD benefits from September 29, 2007, until the date of this award and into the future, until such time as he reaches maximum medical improvement according to his treating physicians.

- **Claimant is entitled to the maximum compensation rates of \$742.72/\$389.04.**

The Claim for Compensation lists Claimant's wages as "Maximum". The maximum rates of compensation at the time of Claimant's injury were \$742.72 and \$389.04 for PPD and TTD respectively. Since Employer's Answer was not timely filed, Claimant's wages as stated in his Claim are deemed admitted. He is entitled to the maximum rates of compensation for past and future benefits.

- **The hearing was properly held on October 29, 2008.**

Employer and Insurer were given ample opportunity on numerous occasions to have representation long before the need for the hardship hearing arose. Employer/Insurer chose to ignore the setting notices sent by the Division as well as the certified letters, facsimiles and requests sent by Claimant's attorney. Employer was in default by the time of the hearing. Employer's attorney appeared for trial moments before the trial began. He was given time to review the evidence before the hearing began. He was given the opportunity to engage in meaningful cross-examination during the hearing, and he presented evidence on behalf of Employer. Employer failed to appear for the hardship mediation September 30, 2008. There is no evidence Employer appeared for the original hearing date of October 27, 2008. Employer should not benefit from its willful neglect of court dates or from its failure to respond to numerous letters from Claimant's attorney, its failure to timely answer the claim, and its failure to hire an attorney.

CONCLUSION

I find Employer willfully disregarded this case and defended this case without reasonable grounds. Employer offered no evidence to substantiate their denial of benefits. Employer's complete lack of concern for Claimant is inexcusable. Under §287.560 (RSMo 2005), I therefore award attorney's fees and costs in an amount to be determined.

In addition, I am referring this case to the Fraud and Noncompliance unit to investigate whether Employer/Insurer violated any provisions of §287.128 (RSMo 2005).

Date: _____

Made by: _____

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

A true copy: Attest:

Division of Workers' Compensation