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

Injury No. 10-108268

Employee: Mark Barrientos

Employer: Ben Hur Construction

Insurer: Travelers Indemnity Company of America

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Accident

The administrative law judge determined that employee failed to prove that he sustained an accident, as defined in § 287.020.2 RSMo:

> The word "accident" as used in this chapter shall 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. An injury is not compensable because work was a triggering or precipitating factor.

The administrative law judge thoroughly considered the merits of employee's claim with respect to the foregoing definition, and we appreciate the careful analysis set forth in his well-written award. We agree with the administrative law judge that employee failed to prove he sustained an accident, but for somewhat different reasons. We write this supplemental opinion simply to make our views clear, rather than to criticize the administrative law judge or his analysis.

First, we note that the administrative law judge reasoned that because the legislature chose the singular forms of the words "event" and "strain" in the above definition, a worker's act of spending an entire shift performing a repetitive lifting task could not constitute an accident. We disagree. We believe it is possible to deem a worker's activity of repetitive lifting throughout a single work shift to constitute a singular "event" or "strain" for purposes of proving an accident, so long as the worker can identify the time and place of the occurrence. This is because the only temporal limitations we find in § 287.020.2 are that an accident must be identifiable by time and place, and that an accident must occur during a single work shift. We believe this also comports with the common, everyday usage of the words "event" and "strain," as it is not unusual to refer to a series of discrete occurrences as a singular "event" (e.g., "I attended the event last night with my spouse") or to a series of discrete exertions as a "strain" (e.g., "I think I

strained my back lifting and drilling screens for 8 hours"). "It accords with legislative intent to let the words actually have their ordinary meanings." *Valdez v. MVM Sec., Inc.*, 349 S.W.3d 450, 456 (Mo. App. 2011).

Second, we cannot endorse the administrative law judge's suggestion that "at the time" as set forth in § 287.020.2 necessarily means "immediately." We believe that if the legislature intended that an employee must experience objective symptoms of an injury immediately after the causative event in order to prove an accident, the legislature would have used that word in its definition. Notably, the legislature framed the objective symptoms requirement in the context of "causation," suggesting that if a qualified medical expert is able to credibly link an employee's objective symptoms of injury to a specific event during a single work shift, such proof may assist an employee in demonstrating an accident, even though the objective symptoms do not manifest immediately.

For purposes of this case, we need not determine the legal question whether employee's history at trial of experiencing no symptoms whatsoever until lying in his bed the night following the work shift constitutes an accident for purposes of § 287.020.2, because we ultimately agree with the administrative law judge that employee failed, as a factual matter, to prove that he suffered any identifiable injury as a result of his work duties on December 28, 2010. In his award, the administrative law judge thoroughly detailed employee's various histories and the competing versions of what happened on that date; we agree that in light of these inconsistencies, employee's evidence simply is not sufficiently persuasive to support the requisite factual findings necessary for employee to prevail on the issues of accident and medical causation. For this reason, we affirm the award denying employee's claim.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge John K. Ottenad, issued September 22, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 10th day of February 2015.

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:

_____

Secretary

AWARD

Employee: Mark Barrientos

Dependents: N/A

Employer: Ben Hur Construction

Additional Party: Second Injury Fund

Insurer: Travelers Indemnity Company of America

Hearing Date: May 6, 2014
Record Closed on June 5, 2014

Injury No.: 10-108268

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: JKO

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: December 28, 2010

5. State location where accident occurred or occupational disease was contracted: St. Louis County

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? 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: Claimant worked as a journeyman ironworker for Employer and allegedly injured his low back as he performed his job duties for Employer erecting steel and cutting security screening.

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: (Alleged) Low Back

14. Nature and extent of any permanent disability: N/A

15. Compensation paid to-date for temporary disability: $0.00

16. Value necessary medical aid paid to date by employer/insurer? $0.00

Employee: Mark Barrientos Injury No.: 10-108268

17. Value necessary medical aid not furnished by employer/insurer? $32,929.88

18. Employee's average weekly wages: $1,321.49

19. Weekly compensation rate: $799.11 for TTD/ $418.58 for PPD

20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer/Insurer Claim denied $0.00

22. Second Injury Fund liability:

Second Injury Fund Claim denied $0.00

TOTAL: $0.00

23. Future requirements awarded: N/A

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: Matthew J. Padberg.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mark Barrientos	Injury No.: 10-108268
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Ben Hur Construction	
Additional Party:	Second Injury Fund	
Insurer:	Travelers Indemnity Company of America	Checked by: JKO

On May 6, 2014, the employee, Mark Barrientos, appeared in person and by his attorney, Mr. Matthew J. Padberg, for a hearing for a final award on his claim against the employer, Ben Hur Construction, its insurer, Travelers Indemnity Company of America, and the Second Injury Fund. The employer, Ben Hur Construction, and its insurer, Travelers Indemnity Company of America, were represented at the hearing by their attorney, Mr. Gregory L. Temme. The Second Injury Fund was represented at the hearing by Assistant Attorney General E. Joye Hudson.

To allow the parties time to prepare and submit their briefs or proposed awards in this matter, the record was technically left open for a period of thirty days. Although we did not go back on the record or take any further evidence in this matter after May 6, 2014, the record was, then, finally closed on June 5, 2014 and the briefs were submitted by the parties by June 6, 2014, pursuant to the agreement of the parties.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

1) On or about December 28, 2010, Mark Barrientos (Claimant) allegedly sustained an accidental injury.

2) Claimant was an employee of Ben Hur Construction (Employer).

3) Venue is proper in the City of St. Louis.

4) Employer received proper notice.

5) The Claim was filed within the time prescribed by the law.

6) At the relevant time, Claimant earned an average weekly wage of $1,321.49, resulting in applicable rates of compensation of $799.11 for total disability benefits and $418.58 for permanent partial disability (PPD) benefits.

7) Employer has not paid any benefits to date.

8) Claimant sustained pre-existing permanent partial disability of 20% of the right knee, prior to the alleged accident on December 28, 2010.

9) If the Administrative Law Judge should find that Claimant's pre-existing right knee disability was a hindrance or obstacle to employment that combined synergistically with the primary low back disability, then a load factor of 10% for the combination of the disabilities should be applied to calculate the extent of Second Injury Fund liability in this case.

ISSUES:

1) Did Claimant sustain an accident?

2) Did the accident arise out of and in the course of Claimant's employment for Employer?

3) Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged accident at work for Employer on December 28, 2010?

4) Is Employer responsible for the payment of past medical expenses in this case in the stipulated amount of $32,929.88?

5) Is Claimant entitled to the payment of temporary total disability benefits for a period of time from January 1, 2011 to January 17, 2011, or 2 weeks?

6) What is the nature and extent of Claimant's permanent partial disability attributable to this injury?

7) What is the liability, if any, of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

A. Deposition of Dr. Robert Margolis, with attachments, dated February 4, 2013
B. Medical treatment records of Mercy Hospital St. Louis
C. Certified medical treatment records of St. John's Mercy Medical Center
D. Certified medical treatment records of Dr. Peter Yoon
E. Certified medical bills from Mercy Hospital, St. John's Mercy Medical Center and Dr. Peter Yoon

F. Stipulation for Compromise Settlement for Injury Number 10-013937 (Date of Injury of February 22, 2010) between Claimant and Employer
G. Compilation of medical treatment records for Claimant's pre-existing right knee and left shoulder from Orthopedic Associates, LLC (Dr. James Burke), Concentra Medical Centers and SSM Physical Therapy

Employer/Insurer Exhibits:

1. Curriculum vitae of Dr. Michael Chabot
2. Medical report of Dr. Michael Chabot dated July 20, 2012
3. Deposition of Dr. Michael Chabot dated July 12, 2013
4. Excerpts of the deposition of Claimant taken on April 5, 2013 (Page 28, line 15 through page 29, line 7, and page 33, lines 1 through 11)

Second Injury Fund Exhibits:

Nothing offered or admitted at the time of hearing

Notes: *1) Unless otherwise specifically noted below, any objections contained in the deposition exhibits are overruled and the testimony is fully admitted into evidence in this case.*

2) Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on May 6, 2014.

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and depositions, the medical records, the medical bills, and the Stipulation for Compromise Settlement in the pre-existing injury, as well as based on my personal observations of Claimant at hearing, I find:

1) **Claimant** is a 65-year-old, currently retired individual, who worked as an ironworker his whole career. He began as a union ironworker in 1973, became a journeyman ironworker in 1976 and continued working in that capacity until his retirement on June 1, 2011. He testified that he worked for Ben Hur Construction (Employer) for the majority of his career. Claimant explained that, as an ironworker, he worked with structural steel to fabricate buildings, including erection, bolting and welding.

2) Claimant denied any prior back injuries, despite his job duties, which included lots of heavy lifting and climbing.

3) Claimant testified that leading up to December 28, 2010, he was working on the Thomson Reuters building. He said that Employer was a subcontractor hired to build the mezzanine of the building using hollow structural tubes. Claimant was in charge of the job, which included scheduling, ordering materials, working with the general

contractor and supervising up to six other workers. He noted that everything for this job had to be moved by hand into the building, including the 250-1,400 pound tubes for the construction. He explained that they would load the tubes onto carts and move the carts into the building. He was actively involved in moving the tubes into the building as a part of this job. Claimant admitted that he had some pain in his low back for at least a week leading up to December 28, 2010, but he was adamant that he had no leg pain.

4) Claimant testified that on December 28, 2010, he was performing his regular job duties for Employer. On that day, he had to cut security screening because the screening they were given was 6 inches too long. Claimant performed all the cutting. He said that he had to take one screen (weighing 5-10 pounds), cut it with a grinder, and, then, move to the next one and do the same thing. He said that he had over 100 screens to cut on this date. He performed this job, lifting and twisting, all day long. He estimated that the most he lifted at any one time was approximately 30-40 pounds.

5) Claimant denied feeling anything out of the ordinary in his back, leg or otherwise during that particular day when he was performing this work for Employer. He said that he went home after work, went to bed and woke up in the middle of the night with excruciating pain in his back and down his left leg. He indicated that he had never experienced this type of pain before.

6) Claimant testified that he went to St. John's Mercy Medical Center, where he was given some pain injections and sent home. Medical treatment records from **Mercy Hospital St. Louis** (Exhibit B) confirm a visit on December 29, 2010 for rapidly worsening back pain that was radiating to the left thigh. The history contained in the record indicates that the current episode of back pain started more than one week prior to the visit. It indicates, "The pain is associated with no known injury (iron worker so does lots of heavy lifting at work but no specific event.)." Claimant was diagnosed with sciatica, given medications, and released.

7) Claimant testified that he called work the next morning and said that he would not be coming to work because of back pain. He said that he basically laid on the floor, but the pain never went away, so he sought further treatment.

8) Claimant returned to **St. John's Mercy Medical Center** (Exhibit C) on January 1, 2011, at which time he again provided a history of "no known injury," but complaints from his low back into his left leg. After an MRI showed a far lateral disc herniation at L3-4 on the left, consistent with his complaints, he was taken to surgery by **Dr. Peter Yoon** (Exhibit D), who performed a far lateral discectomy, minimally invasive, at L3-4 on the left. Following surgery, Claimant was found to have good pain relief and he was discharged from the hospital on January 5, 2011. Claimant continued to follow up with Dr. Yoon after surgery, through March 9, 2011. Although he reported some residual nerve pain, it was definitely improved from what he had prior to surgery. Dr. Yoon released Claimant to return to work with some weight restrictions on January 17, 2011.

9) Claimant submitted into evidence the **certified medical bills** (Exhibit E) from Mercy Hospital totaling $1,606.50, from St. John's Mercy Medical Center totaling $25,744.38 and from Dr. Peter Yoon totaling $5,579.00, for a grand total of $32,929.88 in medical bills for his low back treatment in this matter.

10) Claimant testified that he went back to work approximately two weeks after his surgery because he was out of money and was not getting any workers' compensation benefits. He said that he went back to a different job at Webster University directing traffic, but not lifting anything. He continued to work until May 27 or 28, 2011, and retired as of June 1, 2011. He said that he retired because he could not perform the job duties anymore, such as climbing ladders and lifting.

11) In terms of his current complaints, Claimant testified that his back hurts all the time. Activities such as sleeping, standing or sitting increase his complaints. He said that he has lost some muscle in his left leg. He has a constant ache in the lower middle back and if he sits the wrong way, his leg starts twitching. He said that after a couple hours of sitting, he has to stand up to relieve his back pain. He noted that picking up anything over 20 pounds is a problem, and he has limited bending and stooping, which limits his ability to do his hobby of working on old cars. He said that he does not cut firewood anymore, and fishing is difficult because he has to stand, even if he is in a boat, because of his back. Claimant noted that he used to take Aleve every day, but he stopped, so he just has to stand up and move around when his back starts hurting. He testified that the back pain is getting worse as time goes by.

12) On cross-examination, Claimant confirmed that he was injured, in his opinion, because of the 8 hours of cutting and stacking security screens. However, he was presented with his **deposition testimony from April 5, 2013** (Exhibit 4), wherein at page 28, line 15 through page 29, line 7, he was asked about the cause of his low back condition and he responded that it could have been the steel erection, doing everything by hand, unloading the truck or moving the steel into the building by hand. Claimant confirmed that he did not injure himself (his low back) walking in a parking lot.

13) The deposition of **Dr. Robert Margolis** (Exhibit A) was taken by Claimant on February 4, 2013, to make his opinions in this case admissible at trial. Dr. Margolis is board certified in neurology, internal medicine and as a medical examiner. He examined Claimant on one occasion, December 21, 2011, at the request of Claimant's attorney and issued his report on January 10, 2012. Dr. Margolis took an extensive history from Claimant of his work activities, problems and complaints, as well as the medical treatment he received, and reviewed the medical treatment records. Interestingly, Claimant provided Dr. Margolis a history of developing pain radiating into his left thigh, when he was walking in the parking lot at work in December 2010. He, then, awakened from sleep on December 29, 2010, with pain in his low back radiating down his left leg and sought treatment. The report contains no history of cutting screens or lifting the heavy materials at work as the source of the onset of his complaints. However, at the deposition, Dr. Margolis was specifically asked about the other work activities of cutting steel tubes by hand, assembling them with screws and cutting security screens, including "bending, twisting, stooping and lifting

throughout the whole day," and he opined that those work activities were causative of the disc herniation (the prevailing factor) in this case. In this hypothetical that was given to Dr. Margolis during his deposition, Claimant's counsel specifically included the fact that, "He did not feel any significant pain on that day other than the walking episode that he described to you." Physical examination revealed full range of motion in the lumbar spine without spasm, intact sensory examination and normal gait, with some tenderness in the lumbar spine and some atrophy of the left quadriceps muscle.

14) Dr. Margolis opined that, "The activity that this patient performed at work was the substantial and prevailing factor in his suffering a herniated disc at L3-L4." He rated Claimant as having 30% permanent partial disability of the body as a whole, referable to the herniated lumbar disc and subsequent surgery. Dr. Margolis rated pre-existing permanent partial disability of 25% of the right knee. He opined that the conditions he rated were hindrances or obstacles to employment and that the disabilities combined to create a greater disability to the body as a whole, when compared to the simple sum, and, so, a loading factor should be added.

15) On cross-examination, Dr. Margolis confirmed that the history Claimant gave him was of waking up with back pain on December 29, but that the walking incident was approximately a week prior to that. Claimant was unable to give him a specific date. He confirmed that Claimant provided no history regarding the erection of the mezzanine floor or the steel tubes.

16) The deposition of **Dr. Michael Chabot** (Exhibit 3) was taken by Employer on July 12, 2013, to make his opinions in this case admissible at trial. Dr. Chabot is an osteopathic physician, board certified in orthopaedic surgery (Exhibit 1). He examined Claimant on one occasion, July 20, 2012, at Employer's request, and issued his report (Exhibit 2) on that same date. He took a history from Claimant, reviewed the medical treatment records and performed a physical examination of Claimant, in reaching his conclusions in this case. Claimant provided a history to Dr. Chabot of working on erecting a mezzanine floor on December 27, 2010, where everything had to be done by hand, including assembling steel tubes, which required him to drill approximately 800 holes. Claimant also reported walking about an eighth of a mile from his car to the work site, and developing an aching pain in his back while walking up hill to get to the work site. He said that he also had to cut security screening for a period of 8 hours. The report noted that he was unable to recount any specific injury. Claimant specifically denied having any back pain or complaints while he was drilling or performing the cutting activities. He said that he began experiencing the low back pain in the middle of the night. Dr. Chabot diagnosed a history of a lateral disc herniation at L3-4, status post L3-4 lateral discectomy, chronic back pain, disc degeneration and scoliosis. Dr. Chabot opined that there was insufficient documentation to show that Claimant sustained a work injury or that his alleged work duties were the prevailing factor in his disc herniation and leg complaints, because, by Claimant's own admission, he did not have a significant increase in his complaints following stacking the security mesh. It was not until he was at home, in the middle of the night, when he was sleeping, that the pain intensified. Dr. Chabot also did not think that walking from his vehicle to the work site would provide the physiologic

trauma necessary to result in a disc herniation. Dr. Chabot opined that Claimant's age and lumbar spine degeneration is the prevailing factor in him developing the disc protrusion at L3-4 and need for the subsequent surgery. He did not believe that Claimant sustained any permanent partial disability as a result of the alleged work injury.

17) On cross-examination, Dr. Chabot testified that generally, when someone develops a disc herniation, if it was traumatically related, the person would experience pain almost immediately, but in this case, Claimant never recounted a history of developing symptoms while he was performing the work activities. He also noted that disc herniations can occur in your sleep, and, in this case, he believes the herniation did occur while Claimant was sleeping. Dr. Chabot acknowledged that leg pain and symptoms could develop at a later date after an injury and be related to the injury, but there would still be some recognition that something happened or an injury occurred at a specific time, which is not the case here, since Claimant finished work, went home and only woke up with acute pain and complaints. He opined that that was not a typical mechanism for a traumatic injury.

RULINGS OF LAW:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and depositions, the medical records, the medical bills, and the Stipulation for Compromise Settlement in the pre-existing injury, as well as based on my personal observations of Claimant at hearing, and based on the applicable statutes of the State of Missouri, I find:

As the first three issues in this matter are inter-related, I will address all three of them in the same section of the Award.

Issue 1: Did Claimant sustain an accident?

Issue 2: Did the accident arise out of and in the course of Claimant's employment for Employer?

Issue 3: Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged accident at work for Employer on December 28, 2010?

Considering the date of the alleged injury, it is important to note the statutory provisions that are in effect, including **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court "shall construe the provisions of this chapter strictly" and that "the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any

party when weighing evidence and resolving factual conflicts." Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, "In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true."

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. ***Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute***, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).* The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. ***Id***. at 199.

Under **Mo. Rev. Stat. § 287.120.1 (2005)**, every employer subject to the Workers' Compensation Act shall furnish compensation for the personal injury of the employee by accident arising out of and in the course of employee's employment. According to **Mo. Rev. Stat. § 287.020.2 (2005)**, accident is defined 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." Further, under **Mo. Rev. Stat. § 287.020.3 (1) (2005)**, "An injury by accident is compensable only if the accident 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." Finally, under **Mo. Rev. Stat. § 287.020.3 (2) (2005)**, an injury is deemed to arise out of and in the course of the employment only if the accident is the prevailing factor in causing the injury and 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 order to meet his burden of proof in this matter, Claimant needed to present credible evidence that supports his contention that he sustained an acute, unexpected traumatic event or unusual strain while working for Employer that resulted in an injury to his low back, identifiable by the 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, necessitating the treatment he ultimately received. Additionally, he needed to present competent, credible and reliable medical evidence to medically causally connect his low back injury, need for treatment and disability to this acute, accidental injury at work. Having thoroughly reviewed and considered all of the evidence in this matter, I find that Claimant has failed to meet his burden of proof in this regard.[1]

In order to meet his burden of proof in this matter, Claimant, first, needed to present credible testimony on his own behalf regarding the alleged accident that occurred at work that resulted in the low back injury. Claimant failed to meet his burden of proof in this regard. Between his testimony at hearing and his statements to the various treating and examining physicians, there are multiple histories of what Claimant was doing at work in the days preceding the onset of his low back complaints. At trial, he testified that it was the cutting and stacking of the screens all day long that resulted in his low back injury. He did not tell Dr. Margolis

[1] I should note that Claimant did not make the presence of an occupational disease an issue in this case, and only put the presence of an accident at issue, so I will not address any potential occupational disease exposure for this alleged injury and will focus solely on the alleged accident claim at issue.

anything about the screens, but said that he developed that back pain when he was walking in a parking lot at work about a week before his visit to the hospital on December 29, 2010. At his deposition, he said that the back pain could have come from the steel erection, doing everything by hand, unloading the truck or moving the steel into the building by hand, but he confirmed at trial that he did not injure himself (his low back) walking in a parking lot. Finally, Claimant provided a history to Dr. Chabot of working on erecting a mezzanine floor on December 27, 2010, where everything had to be done by hand, including assembling steel tubes, which required him to drill approximately 800 holes. Claimant also reported walking about an eighth of a mile from his car to the work site, and developing an aching pain in his back while walking up hill to get to the work site. He also said that he had to cut security screening for a period of 8 hours, but the report noted that he was unable to recount any specific injury.

With so many different descriptions, sometimes contradicting each other, I find that the one common thing they all share is that there is no description of a specific, discrete, event or unusual strain identifiable by time and place of occurrence that gave rise at that time to low back complaints. Given that I am required to strictly construe the statute, I find that it is significant that Claimant must have suffered "an unexpected traumatic ***event*** or unusual ***strain***" to have a compensable accident, not a series of ***events*** or ***strains***. I find the fact that the statute only includes these words as singular is paramount in this case. Even if Claimant had consistently pointed to the cutting and stacking of the screens or the repetitive lifting and drilling of holes over the course of his 8-hour work day, as the reason for his low back injury in this case, I find that he could still not make a compensable accident claim, because he is unable to point to a singular event or strain on the day in question that caused the low back problems.

Additionally, by Claimant's own admission at trial, he had no complaints at all during his work shift on the day he was cutting and stacking the screens. By his own admission at hearing, it was not until after he had gone home and went to bed that he first felt the excruciating pain when he woke up in the middle of the night, well after his work shift that day had obviously ended. To the extent that the statute also requires the event or strain to produce "at the time objective symptoms of an injury caused by a specific event during a single work shift," then, I also find Claimant has failed to meet his burden of proving this element of an accident claim, as well. Claimant described no objective symptoms of an injury ***at the time***, on December 28, 2010, ***caused by a specific event during a single work shift***. In fact, I find that Claimant described no symptoms at all, at trial, that occurred during that single work shift, caused by a specific event or otherwise. My finding in this regard is bolstered by the histories contained in the various medical treatment and examination records, wherein one after another, they confirm that there was no specific event or no known injury.

In order to meet his burden of proof in this matter, he also needed to present competent, credible and persuasive medical testimony to support his contention that an accident occurred at work and was responsible for the low back injury that he suffered. Again, I find that he failed to meet his burden of proof in this regard. The only history of a potential specific injury to the low back arguably at work, is contained in the medical report of Dr. Robert Margolis, who examined Claimant at the request of his attorney. The history from Claimant in Dr. Margolis' report included a description of an onset of low back complaints about a week prior to December 29, 2010, when he was walking in the parking lot at work and developed pain radiating into his left thigh. However, at trial, Claimant testified that he did not injure himself (his low back) walking

in a parking lot. Although, admittedly, in his deposition testimony, Dr. Margolis also agreed that Claimant's other work activities were also the prevailing factor in causing his low back complaints (albeit not a specific event or strain, just the heavy activities in general that he was performing for Employer), I find that Dr. Margolis clearly had a defective foundation for his opinions in this matter, given Claimant's subsequent denial of ever injuring himself while walking in a parking lot. This is even more so, since Claimant did not even give Dr. Margolis the history of cutting the screens or erecting the mezzanine floor with the steel tubes, at the time he examined him and only learned about those facts during his deposition in this matter. Given the incorrect or incomplete information Dr. Margolis was given by Claimant, which formed the basis of his opinions in this matter, I find that I cannot rely on Dr Margolis' opinions or testimony to support an award of compensation in this matter.

Contrary to the opinions of Dr. Margolis, Employer offered into evidence the opinions and testimony of Dr. Chabot. I find Dr. Chabot's opinions and testimony more persuasive and more clearly supported by the rest of the medical treatment records and evidence in this case. Dr. Chabot opined that a person can herniate a disc in their sleep and he believed that is what happened in this case. I agree. Based on Claimant's own admissions at hearing, he had no symptoms or complaints out of the ordinary during his work shift and it was not until the middle of the night when he woke up in excruciating pain. Combined with the fact that all of the initial medical treatment records consistently record no history of a known injury, Claimant's absence of any low back or leg complaints during his work shift, and the onset of those complaints in the middle of the night, suggests more persuasively that the herniation occurred in his sleep, as opined by Dr. Chabot, than during his work shift many hours earlier, as opined by Dr. Margolis. Therefore, based on the competent, credible and persuasive testimony of Dr. Chabot, I also find that Claimant has failed to meet his burden of proof on the medical causation issue in this case.

Without any credible testimony or medical evidence to support his contention that he sustained an accident in this case on December 28, 2010, I find that Claimant has failed to meet his burden of proving that he suffered an accident at work that arose out of and in the course of his employment for Employer. He failed to prove that he experienced 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. I further find that he failed to meet his burden of proof on the medical causation issue as well, by failing to secure medical testimony/evidence that supported his accidental injury theory of the case. By failing to meet his burden of proof, I find that Claimant's Claim in this matter is properly denied on each of these three separate and distinct bases.

As the rulings on the first three issues are dispositive of this case, I find that the rest of the issues for consideration are moot and will not be ruled on in this award. Specifically, since I have found that Claimant did not have a compensable primary Claim against employer, then his Second Injury Fund Claim fails as well.

CONCLUSION:

Claimant has failed to meet his burden of proving that he suffered an accident at work that arose out of and in the course of his employment for Employer. He failed to prove that he experienced 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 also failed to meet his burden of proof on the medical causation issue, by failing to secure medical testimony/evidence that supported his accidental injury theory of the case. By failing to meet his burden of proof, Claimant's Claim in this matter against Employer/Insurer and the Second Injury Fund is properly denied on each of these three separate and distinct bases.

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation