

**SIMON LAW GROUP, P.C.**  
**WORKERS' COMPENSATION CASE LAW UPDATE**  
**OCTOBER 2011-DECEMBER 2011**

**Injury Sustained at Golf Tournament Not Compensable**

**Scott Beine v. County of St. Charles and the Second Injury Fund, No. ED96581 (Mo. App. E.D. 2011)**

**FACTS:** The claimant worked for the St. Charles County Sheriff's Department as a school resource officer. He was an active member of the St. Charles County Deputy Sheriff's Association, a voluntary non-profit association of sheriff's deputies whose primary purpose was to raise money for charity. The association sponsored a charity golf tournament. The claimant helped set up and then golfed in the tournament. While playing, another golfer hit a ball, striking the claimant in the forehead. The ALJ denied the claimant benefits on the ground that the claimant's injury did not arise out of and in the course of his employment. The Commission affirmed.

**HOLDING:** The Court noted the uncontested facts showed that golfing was not one of the claimant's assigned duties. Also, the employer required the claimant to use vacation days to participate in the golf tournament. The employer did not plan or promote the golf tournament, did not receive or control the proceeds of the tournament, had no right to control or direct claimant's actions at the golf tournament, and the employer and association were entirely separate and independent entities. Therefore, the Court concluded that there was sufficient competent evidence on the record to support the finding that the claimant's injuries resulted from a hazard or risk unrelated to the claimant's employment to which he would have been equally exposed on any golf course in his normal non-employment life. Therefore, the Commission's decision was affirmed.

**Injury Sustained Washing Patrol Car Windows Found Compensable**

**Danny Whiteley v. City of Poplar Bluff, No. SD31287 (Mo. App. S.D. 2011)**

**FACTS:** The claimant became the Chief of Police of Poplar Bluff Police Department in 2000. Prior to that, he was a professional bull rider. On October 29, 2006, the claimant was cleaning the windshield of his patrol car when he felt a tearing sensation in his neck. The claimant testified that keeping patrol cars clean was an integral part of the job, which was noted in the motor equipment policy. Officers had a vehicle equipment check safety checklist which required them to clean their patrol cars. The city also had a designated area for the officers to do so.

The claimant was seen by Dr. Tinsley who diagnosed the claimant with an acute cervical

strain and suspected pre-existing cervical degenerative joint disease (DJD). In light of the pre-existing DJD the claimant was denied any further treatment.

The claimant also had a prior work related car accident on July 15, 2002. The settlement noted he received 6% PPD referable to his back, neck and shoulders, however, the medical records show that the claimant received no treatment for his neck. Dr. Cohen only noted that he had moderately severe thoracic myofascial pain disorder as a result of the motor vehicle accident.

For the October 29, 2006 injury, Dr. Musich found no history of any pre-existing problems with the claimant's neck or cervical spine. Dr. Cantrell performed an IME on behalf of the employer and found that the 2006 accident was not the prevailing factor in causing the claimant's medical condition. The ALJ found Dr. Cantrell's opinion more credible than Dr. Musich's, in that the claimant's cervical injuries sustained on October 29, 2006 were not related to the work accident and the work accident was not the prevailing factor in causing the claimant's medical condition. The Commission reversed the ALJ.

**HOLDING:** With regard to the arising out of issue, the employer contended that the claimant was not engaged in a work activity integral to his employment and was equally likely to experience a similar neck injury while performing similar movements outside his employment. The Court disagreed and found that the claimant offered extensive evidence to establish that keeping the windshield of his patrol car clean was an integral part of his job. Thus, there was a clear nexus between being a police officer and keeping patrol cars clean. The Court further noted that because the work nexus is clear, they do not need to consider whether the worker would have been equally exposed to the risk in normal employment life.

With regard to the claimant's prior injury, the City argued that the Commission improperly disregarded uncontroverted evidence of the claimant's prior whiplash injury. The Court noted that a whiplash type injury does usually denote injury to the neck, however, the medical records made it clear that he sustained only an injury to his thoracic spine. The Court also found that there was no evidence on the record noting that the claimant had pre-existing symptomatic cervical degenerative disease. Therefore, the Court found that the claimant's work activity was the prevailing factor in causing his symptoms and need for treatment.

### **Making Coffee Found Not in Course and Scope of Employment**

#### **Sandy Johme v. St. John's Mercy Health Care, No. ED96497 (Mo. App. E.D. 2011)**

**FACTS:** The claimant worked as a billing representative for St. John's and on June 23, 2008, she went to the kitchen area of her office, began making coffee when she turned and slipped off the side of her sandal injuring her right hip. The floor did not have any irregularities or hazards. The ALJ determined that the claimant was not performing her job

duties at the time of her fall, and she would have been exposed to the same hazard or risk during her normal non-employment life. The Commission disagreed and awarded the claimant TTD, past medical expenses and PPD.

**HOLDING:** The employer argued that the claimant's accident did not arise out of and in the course and scope of her employment. The Court noted that in 2005, the Legislature amended several provisions of the workers' compensation law, narrowing the definitions of "injury", "accident" and "arising out of and in the course of." The Court further noted that whether the injury arose out of the employment depends on if it came from a hazard or risk unrelated to the employment which workers would have been equally exposed to outside of and unrelated to the employment in the non-employment life. The Court found that the only risk involved here was making coffee, or performing a normal kitchen-related activity. The claimant did testify that the office culture dictated that the last person to pour a cup of coffee should make a new pot, however that was not sufficient to establish that making coffee was a function of her employment as a billing representative. The Court found that the claimant wore sandals to work on her own accord, and there was no allegation that the kitchen floor had any spills or other hazards. The Court noted that prior to the 2005 amendments, the claimant's argument would have been more persuasive but the Legislature has raised the bar, and the facts of this matter do not meet the threshold for an Award of workers' compensation.

Additionally, the Commission asserted that courts traditionally recognize that some activities were inevitable and essential to a worker's personal comfort and convenience and that an injury which arose during performance of one of these activities was nevertheless compensable. The Court disagreed noting that the personal comfort doctrine language is absent from the statute and reading it into the statute violates the Legislature's explicit instructions for strictly construing provisions of the Act since 2005. Therefore, the Commission acted beyond its powers in applying the doctrine.

The Court denied benefits since the injury did not arise out of and was not in the course of employment. The Court did note that because of the general interests of this question, this matter was transferred to the Supreme Court. At this point, we are currently awaiting the decision.

### **Claimant PTD Due to Hepatitis C Alone**

#### **David Pursley v. Christian Hospital Northeast/Northwest and the Second Injury Fund, No. ED96496 (Mo. App. E.D. 2011)**

**FACTS:** In July 1998 the claimant was working for the employer when he contracted hepatitis C. Due to his symptoms associated with hepatitis C the claimant stopped working. He filed a Claim against the Fund for PTD due to a combination of the effect of his primary injury, hepatitis C, and pre-existing injuries including depression, asthma and hypertension. The employer settled their claim and the ALJ held a hearing against the Fund.

The claimant testified that about two months after he started treating for hepatitis C, he began to suffer depression, fatigue, and insomnia. He also testified that he stopped working in November 1998 because “it was the symptoms from the hepatitis caught up to [him].” The claimant’s expert Mr. Lalk even testified on cross that the claimant was attributing his inability to work to the hepatitis C.

The ALJ found the claimant was PTD as a result of the hepatitis C and, therefore, the Fund had no liability for this disability. The Commission considered the effects of the claimant’s last injury, namely the hepatitis C, and found that it alone resulted in the claimant’s PTD, basing its conclusion in large part on the claimant’s own credible description of his continued problems and complaints that he related to the 1998 hepatitis C occupational exposure.

**HOLDING:** The Court found that there was competent and substantial evidence upon which the Commission could rely in concluding the claimant was PTD as a result of hepatitis C. The Court also noted that even if the claimant were able to prove that the Commission erred in finding that his PTD resulted from the primary injury alone, the claimant could not establish Fund liability because he has to demonstrate that his pre-existing disability represented an obstacle or hindrance to his ability to work. Here the claimant acknowledged that prior to contracting hepatitis C, his clinical depression was not an obstacle or hindrance to his ability to work. This is an old law case.

### **Commission Must Decide if Injury is “Accident” Before Claimant Can Proceed with Civil Claim**

#### **Kevin Cooper v. Chrysler Group, LLC, No. ED96549 (Mo. App. E.D. 2011)**

**FACTS:** The claimant filed a Claim for injuries to his back he sustained when he slipped and fell. The defendant filed an Answer in which it admitted the employee/employer relationship, that the parties were subject to Missouri Workers’ Compensation Law, and the claimant sustained a workplace accident. While the claimant’s Claim was still open he filed a civil lawsuit against the defendant. The defendant filed a motion for summary judgment on the ground that the claimant’s exclusive remedy was with the Division of Workers’ Compensation. The claimant argued that the employer’s refusal to admit that a certain surgery was caused by the March 2007 accident is grounds to allow him to maintain two causes of action against the employer. The trial court granted the defendant’s motion for summary judgment.

**HOLDING:** The Appellate Court held that the entry of summary judgment is premature until the Commission decides the question of accidental injury. The Court noted that under the primary jurisdiction doctrine, the Circuit Court does not have the authority to determine the question of whether there was an accidental injury within the definition of the Workers’ Compensation Law, as this is a question of fact involving Administrative expertise. If the Commission determines there was an accidental injury, then the exclusivity provisions of the Workers’ Compensation Law would require termination of the civil lawsuit. However, if the Commission determines that there was no accidental injury, the

plaintiff would be able to proceed with the civil lawsuit. Therefore, the appropriate remedy in the Circuit Court at this stage of the proceedings is a stay of the proceedings, while the Commission determines whether there has been an accidental injury. At this point the employer has asked the Court to reconsider its decision.

### **SIF Not Responsible for Progression of Pre-existing Disabilities or New Conditions After and Unrelated to Primary Injury**

**Selma Lewis v. Kansas University Medical Center and the Second Injury Fund, Case No. WD73817 (Mo. App. W.D. 2011)**

**FACTS:** The claimant was a health care technician and on October 6, 2001, she was assisting a co-worker move a patient when she felt a pop in her back. She continued to work with restrictions until February 6, 2003. She also had pre-existing diabetes and coronary artery disease. Ms. Titterington, a vocational rehabilitation counselor, testified that the claimant was permanently and totally disabled and was not employable in the open labor market.

The ALJ noted that the medical records, along with the claimant's testimony, established that the claimant's physical condition deteriorated after October 6, 2001. The ALJ further noted the claimant was subsequently hospitalized in 2004 due to diabetic complications and in 2005 due to pericarditis. She also had a neck condition that appeared to have deteriorated since 2002. Therefore, the ALJ said that the claimant's unemployability appeared to be from the subsequent deterioration of her conditions unrelated to the work accident and her pre-existing conditions at the time of the work accident. Therefore, the ALJ denied the claimant's claim for PTD benefits against the Second Injury Fund. The ALJ also found that the claimant demonstrated that she could work in sedentary positions by performing data entry, answering phones, and monitoring suicidal patients for almost a year and a half after the work accident which demonstrated her ability to work in the open labor market. The Commission affirmed.

**HOLDING:** The Court noted that the SIF is not responsible for progression of pre-existing conditions or new conditions that develop after and are unrelated to the work injury. The Court concluded that the claimant's unemployability was due to the deterioration of her pre-existing conditions since October 6, 2001. Therefore, the Commission's decision denying the claimant's claim against the SIF for PTD benefits was supported by substantial and competent evidence. The Court noted that the Commission did not arbitrarily cast aside or disregard Ms. Titterington's testimony that the claimant was unemployable in the open market, but instead based its decision upon competent and substantial evidence which indicated she was employable on the open market after the work accident. Therefore, the Commission's decision denying SIF liability for PTD benefits was affirmed. This is an old law case.

### **Commission Trends**

## **Old Law (Pre August 28, 2005)**

Over the past six months the Commission has ruled on forty-four (44) old law cases. They have reversed, modified or supplemented nineteen (19) of those cases.

### **Obesity is Pre-existing Disability**

In Carolyn Jones v. Missouri Western State College, Injury No. 04-028875, the claimant tripped and fell at work and sustained injury to both arms, her left knee and right shoulder. She also had pre-existing disability in her cervical spine which she aggravated. Dr. Koprivica testified for the claimant and was of the opinion that she had 12.5% pre-existing disability due to obesity which constituted a hindrance to employment and that she was PTD due to obesity and the effects of her primary injury. Ms. Titterington, a vocational expert, agreed with Dr. Koprivica. The employer nor the Second Injury Fund offered testimony from any expert to contradict these findings.

The Commission found that the ALJ substituted his own opinion which was inappropriate in that he found that the claimant's obesity could not be considered because it was self-inflicted. The Commission found no basis in the law or facts of this case for the ALJ's finding on this issue. It is well established that obesity can be a permanent disability and the uncontested expert opinions noted that obesity was a permanent disability in this case. Therefore, the ALJ cannot ignore this when resolving the issue of PTD.

### **SIF Liable for Medical Expenses if Employer is Uninsured**

In Ben Jones v. Sagamore Insurance Company and the Second Injury Fund, Injury No. 04-050098, the claimant expressed concern that the ALJ's award needed clarification as to what party was responsible for his medical expenses. The Commission found that pursuant to Statute, the employer was responsible for both the claimant's past and future medical expenses but because the employer was uninsured, funds must be withdrawn from the SIF to cover those expenses. Therefore, the Commission ordered the SIF to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury.

### **Statute of Limitations for SIF Claims**

In Edward Stuckey v. Underground Services Company, LLC and the Second Injury Fund, Injury No. 01-168185, the claimant timely filed his Claim for Compensation in March 2003 against the employer for an injury he sustained in August 2001. To pursue a claim against the SIF, the claimant had to file his claim within two years of his accident or within one year of filing his claim against the employer. In September 2004 he amended his claim to include the SIF. His amended claim was not filed within the two years after his August 2001 date of injury or within one year after March 2003. Therefore, the claimant did not file a timely claim, and his claim was barred by the statute of limitations against the SIF.

## **Doctor Found Credible Even Though Noted Wrong Date of Injury**

In Barbara Simpson v. Missouri Athletic Club and the Second Injury Fund, Injury No. 04-114381, the SIF challenged the claimant's proof on the issue of medical causation because Dr. Volarich in his report noted that the work accident occurred on February 7, 2004, however the proper date of injury was February 4, 2004. Dr. Volarich did later amend his report to show the proper date of injury. The Commission did not find that this trivial inconsistency undermined Dr. Volarich's medical causation opinion. Therefore, the ALJ's finding that the claimant's work was a substantial contributing factor in causing the claimant's prior low back injury was affirmed.

## **The Powers of the Commission**

In Kevin Niemann v. Ford Motor Company and the Second Injury Fund, Injury No. 95-172815, the Commission wrote a supplemental opinion to list the following four rules it follows:

1. The question of medical causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence.
2. The Commission may not substitute its personal opinion on the question of medical causation for the uncontradicted testimony of a qualified medical expert.
3. The determination of the specific amount of percentage of disability is a finding of fact within the Commission's special province.
4. There exists an exception to Rule 3 where there is more than one injury, condition, or disease which has caused disability to the same member of the body. In that event, expert medical testimony is necessary to guide the apportionment of the percentage of the overall disability between the causative injuries, conditions and diseases.

The Commission also noted that many ALJs and attorneys read prior case law to hold that the Commission is bound by the uncontradicted opinion of medical experts as to the nature and extent of disability and the Commission disagrees.

## **Date of Injury for Occupational Disease is Date of Disability**

In Louetta Elwell v. Stahl Specialty Company and the Second Injury Fund, Injury No. 04-148856, the appropriate date of injury regarding the claimant's occupational disease is the determinative issue in this matter as it controls whether the Commission would apply the 2005 amendments to the facts of this case and by extension whether the claimant could recover any benefits for a pulmonary condition. The ALJ found the appropriate date of injury was when the claimant first missed work and thus experienced disability as a result of her pulmonary condition.

The employer argued the date of injury was the date the statute of limitations began to run or

whenever it became reasonably discoverable and apparent to the claimant that she had suffered a work injury. The employer suggested this occurred on the date of the treatment record from Dr. Bower indicating the doctor's suspicion that there was a connection between the claimant's work environment and her pulmonary disease. The Commission noted a review of relevant case law reveals that the courts have consistently linked the date of injury in occupational disease cases to the date the disease first becomes compensable which typically has been interpreted to mean the date a claimant first experiences some disability from the disease. Therefore, the Commission agreed with the ALJ's finding that the appropriate date of injury was when she first missed work.

### **Claimant's Failed Attempt to Return to Work is Evidence of PTD**

In Linda Beard v. Hy-Vee Foods and the Second Injury Fund, Injury No. 05-064453, the claimant sustained an injury to her right shoulder, right wrist, right knee, right ankle, and right hip on July 5, 2005 when she slipped and fell. She returned back to work and on December 13, 2005, she was assisting another employee in lifting something onto a table when she felt intense pain in her right shoulder. She underwent conservative treatment for her right shoulder. She did not return to work after this incident. The claimant had pre-existing disability of the cervical spine and psychiatric disorder disabilities. The Commission found that the claimant was permanently and totally disabled based on the opinions of Dr. Volarich, Dr. Stillings and Mr. Eldred.

The SIF argued that the claimant was not permanently and totally disabled because she returned to work after her work injury and the ALJ failed to consider the impact of a subsequent work injury. The Commission noted that the claimant's failed attempt to continue working does not convince them that the claimant was able to compete for employment in the open labor market, particularly where the return to work failed due to her physical inability to perform her duties. With regard to the subsequent lifting incident, the Commission noted that Dr. Volarich and Dr. Haupt both testified that the lifting incident was just an irritation or aggravation of the shoulder injury caused by the July 2005 work fall, and therefore it concluded that the December 2005 incident did not cause a new shoulder injury. Ultimately, the Commission found that the SIF was liable for PTD benefits because the claimant's work injuries and preexisting disabilities rendered her unable to compete in the open labor market.

### **New Law**

Over the past six months the Commission has ruled on fifty-seven (57) new law cases. They have reversed, modified or supplemented nineteen (22) of those cases.

### **Injury Sustained After Falling on Icy Parking Lot Owned by Employer on Way Into Work Found Compensable**

In Lantie Wilson v. Buchanan County, Injury No. 08-113449, the claimant, a correctional officer, was walking through the icy parking lot owned by the employer on his way into

work when he fell. At the time he fell he was not actually walking into the Sheriff's office but instead he went around to the back of his car to check for damage to a co-worker's vehicle parked nearby. The Commission found that the claimant was on duty by virtue of his arrival at the employer's premises, was traversing in the icy parking lot controlled by the employer, and was engaged in an activity related to his work when he fell.

The Commission explained that an employee does not necessarily have to be clocked in to sustain an injury arising out of and in the course and scope of employment. Further the risk that resulted in the claimant's injuries was walking through the parking lot covered with ice, and he had to face this by virtue of reporting to work for his shift. Furthermore, the Commission found the claimant went to check on his co-worker's car in order to gather information because he had good reason to believe that this would have important implications to his work. Therefore, the Commission was convinced that the hazard or risk of traversing in the icy parking lot was related to his employment and he was engaged in a work-related task when he sustained the injuries. Accordingly, the Commission affirmed the ALJ's conclusion that the claimant sustained an injury arising out of and in the course of his employment and was therefore compensable.

Finally, the Commission agreed with the ALJ that *Hager* is not applicable to these facts. The Commission noted that the claimant in *Hager* had finished his work duties, clocked out, left the employer's premises and was traversing a parking lot not owned or controlled by his employer on his way to his personal vehicle to go about his own affairs for the evening, when he fell on the ice.

### **Psychiatric Injury After Reading Racist Chain Letter Found Compensable**

In **Gary Session v. The Boeing Company, Injury No. 06-109564**, the claimant worked for the employer as a machinist. On September 22, 2006, he had a discussion about racism with another employee, who told the claimant that he read something interesting and would bring it in so he could read it. Three days later, the claimant discovered a piece of paper in his toolbox which was a chain letter in defense of white pride. He felt shocked and threatened after reading it and thought someone was out to get him. The co-employee came forward and admitted that he placed the letter on the claimant's toolbox and the claimant felt better when he learned this was from his co-worker.

Both medical experts, Dr. Stillings and Dr. Bass, agreed the claimant suffered a psychiatric injury as a result of reading the chain letter. The ALJ determined that the opinions of Dr. Stillings and Dr. Bass were not persuasive and the evidence in the case did not demonstrate that the claimant sustained an "injury".

The Commission found that the circumstances of the claimant picking up and reading the chain letter did constitute an accident because the event was unexpected and traumatic, and it produced objective symptoms of an injury. The Commission was convinced that the claimant's injuries stemmed from a hazard or risk related to his employment because the

claimant's presence in the same work place as his co-employee subjected him to a risk that his co-employee would place an inappropriate or racially themed letter on his toolbox. The claimant's injuries came directly from that risk and therefore, the co-worker was the nexus to the claimant's work.

### **Horseplay Did Not Take Incident Outside of "Accident"**

In Kimberly Regan (Mercer) v. Quest Diagnostics and the Second Injury Fund, Injury No. 07-019520, the claimant had pre-existing disability in her neck and had undergone two surgeries prior to this work incident. The claimant, a medical records processor, got up from her work station and was walking to the restroom when her co-worker came up behind her and grabbed her around the neck, causing her neck to pop. The co-employee was a friend of the claimant and did not intend to hurt her. The claimant's neck condition deteriorated after this event and she underwent a third neck surgery. Dr. Stuckmeyer was of the opinion that the event was the prevailing reason for her increased symptoms and need for the third neck surgery.

The Commission noted that the event on February 6, 2007 met every aspect of the definition of accident and that even though the accident occurred as a result of the co-worker's joking around or horseplay, it did not take this event outside of the definition of "accident".

The Commission then looked to whether the claimant's injuries came from hazards unrelated to her employment which she could have been equally exposed to outside of work in her normal life. The Commission first had to determine whether the hazard or risk is related to the employment. Here the claimant's work involved being on the premises of the employer's offices and working in proximity to other individuals. Those individuals were as capable of presenting a hazard or risk to the claimant as any other physical condition of the work environment, such as slippery floors or heavy objects. Obviously, being unexpectedly grabbed from behind by the co-employee was not part of the employee's job duties or work tasks. However, the hazard or risk of such an event happening was a part of being present at the employer's work place and working alongside the co-employee. The Commission found that the co-employee was the nexus to the claimant's work, and therefore the hazard or risk was related to the employment and the incident was compensable.

### **Kneeling Found Compensable**

In Travis Lynn v. Boone Electric Cooperative, Injury No. 06-114884, the claimant was injured while kneeling down in a squatting position which was a necessary activity in the performance of servicing underground transformers. The Commission noted that because the claimant was performing an integral part of his job of servicing transformers, there was a clear connection between the injury and his work. Therefore the claimant's injury came from a risk related to employment and there was no need to consider whether he was

equally exposed to the risk of kneeling down in a squatted position in normal non-employment life.

### **Injury Sustained Tripping Over Cabinet Found Compensable**

In **Dawn Woods v. Camdenton Windsor Estates**, Injury No.: 10-050345, the claimant was employed as a night charge nurse at Camdenton Windsor Estates, and printed off lab reports before the day shift arrived as part of her responsibilities. The claimant fell at work as she was backing away from the printer in the medication room where she had gone to retrieve the lab reports. At the hearing, the claimant testified that she tripped because the back of her foot caught on something, possibly a cabinet. She also testified that she had to back away from the printer because the area was tight.

The ALJ noted that the issue here was whether the activity of backing away from the printer in a confined area was a hazard or risk unrelated to the employment to which the claimant would have equally been exposed outside of and unrelated to her employment in normal non-employment life. The Judge found this activity was related to her employment, therefore, the injury was compensable. The ALJ also found that the activity of walking backwards in a confined area with lab reports was not a hazard to which she would have equally been exposed to outside of her employment. The Commission affirmed the Award of the ALJ, who concluded that the claimant's accident was in the course and scope of her employment and therefore compensable.

### **Employer Gets to Choose Medical Provider**

In **Edward Burkman v. Marquand Pallet Stock, Inc.**, Injury No. 08-058245, the Commission agreed that the claimant established that he was in need of medical treatment to cure and relieve him from the effects of his work-related injury. However it found that the ALJ erred in finding that the employer waived its right to direct the claimant's medical treatment and also erred by ordering such treatment be provided by a specific doctor. The Commission found that the claimant failed to prove under the Statute that his health and recovery had been endangered by medical treatment provided by the employer. Further, even if the claimant may have met his burden, the only relief provided under the Statute is that the Division or the Commission may order a change in the physician, surgeon, hospital or other provider. The Statute does not authorize appointment of a specific doctor to provide the claimant's medical treatment. Therefore, the Commission found the ALJ erred in ordering the claimant's additional medical treatment be provided specifically by Dr. Vaught.

In **Debra Arnold v. Missouri Department of Corrections and the Second Injury Fund**, Injury No. 05-138274, the Commission found that the ALJ erred in directing that the claimant was entitled to the future medical care recommended by Dr. Volarich or future care that was recommended by a treating physician chosen by Dr. Volarich. The Commission noted that Dr. Volarich was retained by the claimant to provide an IME. The doctor was not the claimant's treating physician and had no intention of being directly involved with her

future medical care. Therefore, the Commission modified the ALJ's award and found that the Award of future medical care should be limited, simply, to what is reasonable and necessary to cure and relieve the effects of the work-related injury.

In Linda Thompson v. Lone Star S & S of S. Missouri, Injury No. 10-026132, the Commission agreed with the ALJ that the claimant met her burden of proving that she was entitled to future medical treatment from the employer, however did not agree with the ALJ's finding that medical treatment should be with a qualified surgeon other than Dr. Chabot. The ALJ quoted the section of the Statute that allows the Division or Commission to order a change in the physician, surgeon, hospital or other treatment provider. The Commission found that the employer had not furnished medical treatment in such a manner that there were grounds to plead that the claimant's life, health or recovery had been endangered. Therefore, the part of the Statute providing that the Division or Commission may order a change in the medical provider was not implicated in this matter. Therefore, the claimant was entitled to, and the employer was obligated to provide, medical treatment which may be reasonably required to cure and relieve the effects of the work injury.

#### **ALJ Erred Directing Employer to Provide Specific Course of Treatment**

In Joseph Duever v. All Outdoors, Inc. and the Second Injury Fund, Injury No. 07-134607, the Commission agreed that the claimant met his burden of proving the employer was liable for his future medical expenses. However, the Commission noted that the ALJ appeared to have awarded a specific course of treatment "as outlined by Dr. Thomas" and noted this was beyond the ALJ's power. The Commission stated that where the claimant's burden of proof is met, the Statute makes clear that the claimant is entitled to treatment which may be reasonably required to cure and relive the effects of the injury. The Commission is not called on to mandate what specific treatment or procedures might be reasonably required. The Commission also noted the transitory nature of various medical conditions, and therefore it would be impossible to predict what will "reasonably be required" in the future. Therefore, the Commission found it inappropriate to find an award of future medical treatment to include a specific course of treatment or a specific medical provider.

#### **Final Award can be Contrary to Temporary Award**

In Danny Venable v. St. Louis Bridge Construction and St. Paul Marine & Fire Insurance Company, Injury No. 03-067308, the Commission found that an ALJ can issue a Final Award contrary to a prior Temporary or Partial Award if additional significant evidence is introduced at the final hearing to support the contrary Award. The Court found that deposing two doctors a second time and introducing those depositions onto the record at the hearing was additional significant evidence.

#### **Expert's Opinion Not Credible when Relied on Another Expert's Opinion Found Not Credible**

In Clarence Thomas v. Board of Police Commissioners of Kansas City, Missouri, Injury No.

**06-069030**, the ALJ found that the claimant was not permanently and totally disabled and his primary injury combined with his pre-existing disabilities resulted in a PPD enhancement of 10% above the simple sum of his disabilities. The claimant appealed the finding that he was not permanently and totally disabled.

The Commission noted that Mr. Dreiling, the vocational expert, based his opinion regarding PTD on the claimant's problems relating to his right knee, back and left upper extremity, however, he admitted during his deposition that he did not find any restrictions regarding his right knee, back or left upper extremity in the medical records. The doctor also noted in his report that he did not perform any type of vocational testing before arriving at his conclusions. Therefore, the Commission did not find Mr. Dreiling's vocational opinion credible. Also, the Commission noted that Dr. Koprivica provided a supplemental opinion noting that the claimant is permanently and totally disabled but this opinion was based entirely on Mr. Dreiling's opinion. Therefore, since it did not find Mr. Dreiling's opinion credible, Dr. Koprivica's supplemental opinion was also not credible.

### **Heart Attack Found Compensable**

In **Eric Lichtinger v. Swiss Meats**, Injury No.: **06-134457**, the claimant had a significant history of cardiovascular disease. On October 11, 2006, the claimant was cutting meat with a knife when the knife slipped and stabbed him in the right forearm. He was hospitalized and underwent a fasciotomy. While still in the hospital, the claimant's symptoms worsened and he suffered a myocardial infarction; therefore, he underwent an angioplasty. He attempted to return to work after his release, however was unable to perform his job duties.

Dr. Schuman believed that the type of injury and procedure could have put pathological stress on the cardiovascular system, but he ultimately opined that the accident was not the prevailing factor causing the heart attack. When the Commission read Dr. Schuman's report and deposition testimony together, it noted that the doctor was of the opinion that the accident was not the prevailing factor because he could not say the work accident was the only factor at play. The Commission noted the law does not require the claimant to show the work accident was the *only* factor in causing the resulting medical condition and disability, but merely the prevailing factor, which is defined as the primary factor in relation to any other factor. The Commission determined that the accident was the prevailing factor in causing the myocardial infarction on October 17, 2006 and the subsequent deterioration of the claimant's cardiovascular condition and disability.

### **Claimant Must Present Medical Evidence to Meet Burden of Proof**

In **Robert Gentry v. Kraft Foods, Inc. and the Second Injury Fund**, Injury No.: **07-027372**, the claimant injured his right arm in a work-related accident and he went to a hearing seeking PPD from the SIF alleging that the disability from his arm injury combined with his pre-existing vision problems resulted in a greater disability than the simple sum of his

disabilities. The claimant testified that he had always had problems in his left eye and suffered from Amblyopia since a child. However, he offered no expert opinion with regard to his alleged vision problems. The ALJ found that the claimant sustained his burden of proof that his pre-existing eye disease was a substantial condition that met the requirements of the Statute, however, the Commission disagreed. The Commission found that the claimant did not meet his burden because he did not submit any medical evidence to support his claim.

### **If Employer Has Actual Notice, Claimant Does Not Have to Provide Written Notice**

In Dennis Carver v. Delta Innovative Services c/o Midwest Builders' Casualty Mutual Company and American Home Assurance Company and the Second Injury Fund, Injury No.: 07-134522, the claimant advised the supervisor/owner of his injury two days after his accident. Nine days later the claimant was on a job site when his back began to hurt and he sought medical treatment. Six days later the claimant was diagnosed with a herniated disc and informed the supervisor/owner. The owner admitted that it was normal for employees to assume routine aches and pains will get better on their own, and therefore, had no reason to believe that the claimant was lying when he said he hurt himself carrying something heavy up a ladder.

The claimant failed to provide written notice to the employer as required under the statute. Therefore, the question was whether he demonstrated that the employer was not prejudiced by his failure to provide statutory notice. The Commission noted the most common way for a claimant to establish lack of prejudice is for the claimant to show that the employer had actual knowledge of the accident when it occurred. It is well settled that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. If the claimant produces substantial evidence that the employer had actual knowledge, the claimant thereby makes a prima facie case showing a lack of prejudice and the burden then shifts to the employer. If the claimant does not supply any evidence showing the employer was not prejudiced, there is a presumption the employer was prejudiced by the lack of notice. The Commission found that the employer was not prejudiced by a lack of written notice.

### **Even if Receive Actual Notice, Employer Not Prohibited From Raising Notice as Defense**

In Dennis McBee v. WCA Waste Management Co., Injury No. 09-101617, the Commission agreed with the ALJ that the claimant's claim was not barred by his failure to provide written notice to the employer. However the ALJ found that because the employer received actual notice of the claimant's injury, it was *prohibited* from raising the defense of failure to receive written notice of the claimant's injury. The Commission noted that nothing in the Statute suggests the employer is *prohibited* from raising notice as a defense where it receives actual notice. The Commission found that under appropriate analysis, the employer is not *prohibited* from raising notice as a defense, but does have the burden of proving that it was prejudiced where it has actual notice of the claimant's injuries.

### **ALJ Has No Authority to Direct Claimant to Reimburse Second Insurer**

In Chad Uhrhan v. Drury Company, Midwest Builders' Casualty Mutual Company, Missouri Employers Mutual and the Second Injury Fund, Injury Nos. 08-123983 and 09-073962 the ALJ found that Midwest Builders' Casualty Mutual was responsible for the claimant's past medical expenses and mileage reimbursement. The ALJ went on to find that these proceeds were to be paid to the claimant who, in turn, would need to reimburse the other insurance company, Missouri Employers Mutual (MEM), relative to the amounts paid. The Commission found that the ALJ ordering the claimant to reimburse MEM was improper under the Statute. The Commission found there was no statutory authority permitting the Commission/Division to issue an order directing the claimant to reimburse an insurer in such a manner.

### **Illegal Aliens are "employees"**

In Maribel Vega-Rivera v. Hyatt Corporation, Injury No. 08-103142 the employer alleged the claimant was an illegal alien and therefore she was not an employee for purposes of the Statute. The Commission found that the claimant was covered under the Statute regardless of her alleged illegal status because the clear, plain, obvious, and natural import of the language of the Statute does not show that the Legislature intended to exclude illegal aliens from the Statute.

### **After Employee Shows Entitlement to Past Medical Costs, Burden Shifts to Employer**

In Louetta K. Elwell v. Stahl Specialty Company and the Second Injury Fund, Injury No. 06-130623, at the hearing the claimant produced bills and the related treatment records and identified them as records and bills generated in connection with treatment for her compensable injury. She further provided Dr. Koprivica's expert opinion as to the reasonableness and necessity of the treatment. Therefore the ALJ found that the claimant met her burden and was entitled to \$16,195.80 in past medical expenses.

Since the claimant met her burden, the Commission found that the burden shifts to the employer to demonstrate (1) the claimant will not be required to pay the billed amounts; (2) the claimant's obligation to reimburse the healthcare provider had been extinguished; and (3) the claimant's obligation had not been reduced to a collateral source for purposes of the Statute.

The employer's attorney did press the claimant to explain her liability and asked her what certain notations on her medical bills meant. However, the Commission was not persuaded that her testimony constituted evidence sufficient to satisfy the employer's burden of proving her liability was extinguished because she was not a qualified witness to render such opinions. Since the employer did not produce or identify evidence from a credible source that demonstrated the claimant's obligation to reimburse the healthcare providers

was extinguished, the claimant was entitled to past medical expenses.