Percentage of Disability Alleged in Claim Not Deemed Admitted if Employer Does Not File Answer Timely

Ray Taylor v. Labor Pros, LLC, Case No. WD75174 (Mo. App. 2013).

FACTS: The claimant was striking a wooden block with a sledge hammer when a piece of wood broke off and struck him in his left eye. The claimant was seen by Dr. Becker at the request of the employer, who opined he had 30% PPD to his left eye. The claimant offered no medical testimony regarding the percentage of disability he sustained to his eye. He filed a Claim for Compensation and in the box titled "parts of body injured," he put 75% disability to the left eye. At the hearing, the claimant objected to the admission of any evidence regarding the percentage of disability to his eye based on the fact that the employer failed to file a timely Answer, and therefore, all factual issues alleged in the Claim were deemed admitted, specifically, that he sustained 75% disability to his left eye. The Commission rejected this argument and a warded the claimant 30% PPD to his left eye consistent with medical evidence. The claimant appealed.

HOLDING: The Court noted that the issue in this matter was whether a percentage of disability added to a Claim should be considered a "statement of fact" subject to being deemed admitted when an employer fails to timely file an Answer. The Court noted the failure to timely answer results in the factual statements in the claim being admitted, but does not result in the admission of a legal conclusion such as whether the injury arose out of or in the course of the employment. The Court further noted that it was well established that "the determination of a specific amount or percentage of disability awarded to a claimant is a finding of fact within a special province of the Commission." Furthermore, the Commission may consider all evidence including the testimony of a claimant and draw reasonable inferences in arriving at a percentage of disability, and in fact, Appellate Courts have affirmed disability ratings made by the Commission which exceeded the highest of the percentages expressed in medical opinions. Therefore, the Court noted that a disability determination alleged within the Claim is not to be deemed admitted, nor is the Commission bound by it. The Court, therefore, affirmed the Award of 30% disability.

Commission Has Authority to Review Temporary Award of ALJ and Issue Final Award if Employer Initially Denied ALL Liability

David Johnson v. Land Air Express, Inc., and Franklin Trucking Company, Case No. WD74821 (Mo. App. 2012).

FACTS: The claimant sustained an injury to his lower back on December 1, 2008, while working for Land Air Express. On January 1, 2009, Land Air Express sold its operation to Franklin Trucking Company, and the two companies had common ownership and were both covered by the same workers' compensation insurer. The claimant continued to perform his job duties, however, eventually was diagnosed with a disc herniation and underwent a discectomy at L5-S1.

The claimant filed two Claims for Compensation. The first was for a specific injury on December 1, 2008 and the second was for an occupational disease occurring on December 1, 2008, and every day he worked before and after that time. Both employers denied **all** liability. The claimant requested a hardship hearing and the ALJ found that he sustained a work injury on December 1, 2008, but did not suffer from an occupational disease. The ALJ issued a Final Award finding that Land Air Express was liable for the claimant's medical treatment and TTD benefits. Land Air Express provided medical treatment and TTD benefits, but appealed the ALJ's Decision to the Commission. The Commission overturned the ALJ's Decision, and issued a Final Award denying all compensation and medical treatment to the claimant. The claimant appealed the Commission's reversal.

The issues before the Court were whether the Commission had authority to render a Final Award on an appeal from the ALJ's Temporary Award and if the Commission did have that authority, was the Commission's Award actually a Final Award since there was still the question of who was responsible for the claimant's medical expenses that Land Air Express was ordered to pay pursuant to the ALJ's Temporary Award.

HOLDING: The Court found that the Commission had authority to enter a Final Award. The Court noted that nothing in the Statute indicates that the Commission does not have the authority to issue a Final Award after an appeal from a Temporary Award by an ALJ, or that another hearing after the hardship hearing is required to enter a Final Award. The Court did note that the Commission will not review an ALJ's Temporary Award unless the employer has denied **all** liability, and has asked for a review as to whether there is liability under the Statute. There was no dispute that Land Air Express denied all liability, and therefore, the Commission had authority to review the award even though the ALJ issued a Temporary Award.

Furthermore, the Commission had the statutory authority to issue a Final Award. The claimant argued that the Commission's Award was not final because the Commission did not determine whether the claimant or the employer/insurer was responsible for payment of medical services provided pursuant to the ALJ's Temporary Award. The claimant argued that the issue of who is responsible for paying the already-incurred medical expenses prevents the Commission from issuing a final award. The Court disagreed.

The Court noted that the Statute and Regulations allow a final award to be issued by the Commission even if medical providers might still be owed money for the services provided to the claimant. Medical providers have a separate avenue to collect, which is through Medical Fee Disputes.

The Court further found that it is not relevant that the employer/insurer authorized treatment between the ALJ's Temporary Award and the Commission's Final Award. The Court found that Land Air Express simply complied with the Temporary Award. The Court noted that if Land Air Express would have failed to provide the treatment and the Commission would have issued an

awarding affirming the ALJ's Temporary Award, its liability would have doubled for the unpaid portions of the awarded compensation. The claimant equates the making of payments as establishing that Land Air Express authorized the treatment. However, the Court did not agree. After the ALJ entered his award they continued to deny liability for the ordered medical treatment by seeking the Commission's review of the award.

The Court also noted that it understood that the Regulations allow for medical providers to pursue either the employer/insurer or employee for fees for Amedical treatment that is found by award or settlement not to be compensable." The Court did understand the difficult position that the claimant was in, which was that medical providers that remained uncompensated could come after him for payment of medical services. However, the Commission found no clear legal basis to say the Commission's Award was not final. Therefore, the Court affirmed the Final Award of the Commission.

SIF Cannot Be Compelled to Pay a Claimant Benefits Because the SIF is Insolvent

Skirvin v. Treasurer of the State of Missouri et. al., Case No. WD75541 (Mo. App. 2013).

FACTS: On May 11, 2011, the Commission awarded PTD benefits to the claimant against the SIF. On July 8, 2011, the SIF wrote the claimant acknowledging his Award, but advised that it was unable to make a payment due to its current balance and projections for the remainder of the fiscal year. It further advised that he would be notified in the event the SIF is able to make a payment in the future. On September 27, 2011, the claimant filed a Petition in the Circuit Court, seeking to compel payment of the Award. A hearing was held before the Court who ruled that the SIF must pay the claimant his benefits. The SIF filed a Motion to Reconsider for a New Trial arguing that the judgement would wreak havoc on the SIF by promoting a "run on the bank," making it impossible to attempt to orderly pay claimants out of the SIF's limited funds. The Motion was denied. The SIF filed an appeal.

HOLDING: The Court noted that the question in this case is can the SIF be compelled to pay PTD Awards on a first come first served basis when the SIF is admittedly unable to pay all present and future PTD awards. The Court found that because the SIF is legally insolvent, it cannot be compelled to make full payment to the claimant. The Court did transfer this case to the Missouri Supreme Court because of the general interests or importance of the question involved.

Injury in Parking Lot Compensable because Employer Owned, Maintained and Controlled Lot

In **Jackie Maize v. Preferred Family Healthcare, Inc., Injury No. 11-006324**, the claimant was a residential care technician whose job duties included cleaning rooms, checking on residents and doing the laundry. He had completed his work shift and prepared to go home. He walked outside to his pick-up truck, which was parked in the employer's parking lot under an overhead light that was surrounded by a circular concrete curb and filled with river gravel. He

stepped up onto the curb and his right foot slipped on the gravel that was on top of the curb, at which time he fell sustaining an injury to his right knee. The claimant testified that the employer owned the lot and controlled and maintained it, and employees were allowed and encouraged by the employer to park their vehicles in this area. There was no evidence to the contrary. The ALJ found that the claimant's injury did arise out of and in the course of his employment because it occurred on the parking lot which the employer owned, and the employer controlled and maintained the area. The Commission affirmed the Award of the ALJ.

Fall on Employer's Parking Lot Curb Not Compensable

In **Hemenway v. North American Montessori Child Care**, **Injury No. 10-107564**, the claimant, a teacher, slipped and fell on an icy curb in the employer's parking lot. The ALJ denied the claim finding that the claimant sustained an injury but concluded it did not arise out of and in the course of her employment. The Commission agreed and found that the claimant's injury occurred on the edge of the employer's parking lot while she was "off the clock" and returning from her smoke break. The claimant had to smoke in the parking lot next door because smoking was not allowed on school property. The Commission noted that the claimant was not in the icy parking lot as a direct function of her employment, and was there due to the fact that she was taking an unpaid smoke break. The Commission further noted that the claimant's injuries did not arise out of and in the course of her employment because the fall did not occur at a place where she was reasonably fulfilling the duties of her employment or engaging in something incidental to her employment.

Doctor Not Credible because Changed Opinion on Cross-examination

In **John Shelton v. Missouri Department of Public Safety/Missouri Veterans Home**, **Injury No. 09-065061**, the claimant was a CNA and sustained an injury to his lower back while lifting a patient. The claimant presented the medical testimony of Dr. Musich, who in both his report and on direct-examination failed to rate any permanency resulting from the work injury. On cross-examination, Dr. Musich changed his testimony and opined that the claimant had 35% disability referable to the injury, as well as two subsequent injuries. The employer presented expert testimony of Dr. Randolph, who did not rate any permanency resulting from the injury. The ALJ found Dr. Randolph to be credible and found that the claimant did not sustain any permanent disability as a result of the injury. The Commission agreed and noted that Dr. Musich's testimony was little help in this matter as he waited until he was prompted on cross-examination to correct an apparent error in his opinions which demonstrated that he paid little attention to detail. Therefore, his opinion was found to lack credibility.

Costs Awarded Against Employer Because Employer Denied Claim Without Any Investigation

In **Patricia Nouraie v. Missouri Baptist Medical Center**, **Injury No. 10-111746**, the claimant reported to her employer that she was having back problems on February 4, 2010. She also

advised that she believed that it was because of her work duties. The employer's occupational health nurse told the claimant to apply ice and take Ibuprofen.

The next day, February 5, 2010, the employer acknowledged that the claimant reported a work injury. That same day the manager of the employer's Workers' Compensation Administration sent the claimant a letter noting that she reviewed "the claimant's report of injury of 12/22/09 and multiple unknown dates of injury and the records of Occupational Health" and based on review of those records the claimant was denied workers' compensation benefits.

The Commission reviewed the records that the employer's Workers' Compensation Administration relied on to deny benefits and found no "report of injury" but simply an "Employee Report of Work-Related Injury, Illness or Exposure" from BJC Healthcare signed by the claimant on February 4, 2010, the day she reported her back pain to the employer. In this report, it is noted that the claimant had back pain for about a month which began after moving a heavy resident. However, the Commission noted that there was no date of 12/22/09 in the record or any other record. There was also a handwritten note from the claimant noting that she had back pain for about a month after helping move a large resident. Then she had two other incidents at work when she felt a strain in her back. In light of this information, the claim was denied by the employer's Workers' Compensation Administration.

The claimant was seen by her own doctor on February 19, 2010, and she was taken off work until March 8, 2010. The claimant called the employer on numerous occasions asking to be taken off the schedule. Eventually, the claimant obtained an attorney and demanded medical care. Two weeks later she was fired for not timely returning an Application for Personal Leave. The employer did not have the claimant examined until April 2011, more than a year after learning of her injury. The ALJ concluded that the employee sustained a work-related injury by occupational disease. The ALJ also found that the employer did not act unreasonably in denying the claim.

The Commission agreed that the claimant had an occupational disease. However, the Commission found that the employer acted unreasonably in denying the claim. The employer argued that its denial of benefits before sending the claimant for examination was appropriate conduct because the Statute imposes no obligation on an employer to provide medical treatment to a claimant until the claimant proves her claim is compensable. The Commission rejected the employer's suggestion that an injured worker must prove her injury is compensable before the employer has any obligation to provide medical examination or treatment. The Commission noted that the employer should provide medical treatment to cure and relieve the effects of the injury, and the Statute does not make the employer's obligation to provide such medical treatment contingent upon a medical opinion finding the injury compensable. The Commission noted that it is clear that employers have an obligation to investigate alleged work injuries before denying benefits.

Furthermore, where the claimant is available to discuss the injury, the Commission believes that any reasonable employer conducting an investigation regarding an injury would discuss the

alleged injury with the worker, which was not done in this case. The Commission found that the employer's act of denying workers' compensation benefits to the claimant before even discussing the alleged injury constituted an egregious offense. Therefore, the employer denied this claim at the outset without reasonable ground and costs were awarded.

If Doctor Doesn't Address Future Medical Treatment Cannot Assume that Doctor Does Not Believe Future Treatment is Needed

In **Carol Herrington v. Cedar Ridge Manor**, **Injury No. 08-051320**, the ALJ found that the employer was liable for future medical treatment. Dr. Volarich, the claimant's expert, opined that it was reasonable and probable that the claimant would need future medical care for her pain syndrome. Dr. Mirkin, the employer's expert, was silent on the issue of future medical treatment. The ALJ found that Dr. Volarich was credible, and therefore, the employer was liable for future treatment. On appeal, the employer/insurer argued that Dr. Mirkin's silence regarding future medical care should be treated as if the doctor did not recommend any future treatment. The Commission did not agree, and noted that the ALJ found Dr. Volarich's opinion credible and so did they. Furthermore, Dr. Mirkin's silence had no probative value in the face of a credible affirmative expert opinion on the issue of future medical care. The Commission agreed that the claimant was entitled to future medical treatment.

Claimant Found Not Credible Therefore Examining Doctors Not Credible

In **Tammy Stroud v. Poplar Bluff Regional Medical Center**, **Injury No. 06-022475,** the claimant alleged she was PTD due to a combination of her primary injury and her pre-existing conditions. All of the experts except Dr. Bassett, the psychiatrist for the employer, rendered the opinion that the claimant was PTD due to a combination of her pre-existing conditions and her work injury. The ALJ, however, found these opinions lacked credibility on the rationale that the claimant was not credible with respect to her own limitations and abilities. Therefore, the experts who relied on the claimant's subjective reports of her limitations and abilities did not have an accurate factual basis from which to form their opinions on the issue of PTD.

The Commission agreed and noted that the claimant changed her testimony about activities before and after her injuries. Specifically, she initially described doing jumping jacks, step aerobics, tight rope balancing and going from a squatting to a standing position quickly all while playing the Nintendo Wii Fit before her work injury. However, on cross-examination she did admit that this game did not come out prior to her injury, and therefore, she must have played it after her work injury. The Commission noted that the claimant's testimony was not reliable about her present abilities and limitations, and although the evaluating doctors found the claimant's subjective complaints to be inconsistent with their objective findings, none of the experts diagnosed any conscious or deliberate symptom magnification on the claimant's part. The Commission found that the claimant's inconsistent testimony regarding her physical abilities was due to her psychiatric difficulties rather than a deliberate attempt to misrepresent the nature or

extent of her disability. In any event, the Commission found that the claimant's testimony as to her post-injury abilities and limitations was demonstratively unreliable, and therefore, the Commission questioned the true nature and extent of her disability and agreed with the ALJ that she was not PTD despite the doctors' opinions.

Employer Not Entitled to Reduction for Safety Violation Because Did Not Make Effort to Insure Rule was Followed

In **Dennis Carver v. Delta Innovative Services, Inc., Injury No. 07-134522**, the claimant was a roofer who sustained an injury carrying an item up a ladder. The ALJ awarded the claimant compensation, however, reduced his award by 50% because he willfully violated a safety rule. The ALJ noted that the claimant was the foreman, was aware of the rule and was responsible for making sure that the rules were followed. However, he went to work and specifically violated a rule which resulted in his injury. Therefore, in this instance the employer was entitled to a 50% reduction in benefits, which is the maximum allowed by Statute. The Commission affirmed the decision of the ALJ. The claimant appealed and the Court found that the Commission's findings were insufficient for the Court of Appeals to determine whether there was sufficient evidence that the employer was entitled to a reduction in benefits. Therefore, the Court of Appeals remanded the case to the Commission to make that determination.

Before remanding this matter back to the Commission the Court identified four elements that must be proven by the employer to take a reduction: 1) Employer adopted a reasonable rule for the safety of employees; 2) Employee's injury was caused by the failure of the employee to obey the safety rule; 3) Employee had actual knowledge of the rule; 4) Prior to the injury, the employer made a reasonable effort to cause employees to obey the rule.

The relevant facts follow: the employer required employees to watch safety videos and also required them to attend an initial safety orientation and ongoing periodic "toolbox talks." The employees who testified were aware of the "three point contact" rule, which precluded employees from carrying anything up the ladder. There was testimony that this rule was well known throughout the roofing industry, and although the record lacked evidence of the specific content of the safety video, orientation or toolbox talks, the Commission believed there was sufficient evidence to find that the employer made its employees aware of the existence of the "three point contact" rule. The record also revealed that the employees misunderstood and routinely violated the rule.

There was also evidence that the owner knew the employees broke the rules all the time. An employee did testify that employees violating the rule would be reprimanded by a foreman. However, this employee was found to be not credible, and therefore, the Commission found no credible evidence that the employer ever warned, sanctioned or took any disciplinary steps against employees who broke the rule. Therefore, the Commission found that although the employer took steps to make its employees aware of the three point contact rule, the employer did not take any steps or make any effort to insure that the rule was actually followed. Thus, the

employer was not entitled to a reduction in benefits.

Claim Denied Because Claimant Found Not Credible

In **Kristine Gibbons v. St. Louis University Hospital**, **Injury No. 07-130590,** the claimant alleged that she sustained an injury to her low back on May 15, 2007, when she was helping restrain a combative patient. She testified that she twisted and turned to the left, and she heard a pop. She also admitted that she did not report the alleged injury that same day. The claimant also testified that at one point she told her supervisor that her back was hurting. However, she admitted she did not say it was work-related. The claimant did have prior back problems. The claimant also testified that she left work early the day of her injury. However, the records showed she left for a "family emergency."

The ALJ found that the claimant failed to meet her burden of proving she had an accident. The ALJ noted that he did not believe the claimant was credible. He noted that her testimony at the hearing with respect to how she was injured differed from the descriptions she provided to evaluating physicians. The ALJ further noted that the symptoms she reported to various physicians also differed. Also, the experts for both the employer and the claimant noted that her physical complaints were magnified. The ALJ further found that she attempted to minimize her pre-existing issues and problems, and that she testified inconsistently with the medical records which pre-existed her injury.

Therefore, the Judge found that he could not rely on the claimant's testimony or statements, and also could not rely on the physicians' opinions, due to the fact that they relied heavily on the claimant's statements, descriptions and complaints in reaching their conclusions. Therefore, their opinions and conclusions were also flawed. The ALJ concluded that the claimant failed to meet her burden of proof that she sustained an accident arising out of and in the course of her employment, and that any disability was medically causally connected to that alleged accident. The Commission affirmed the decision of the ALJ.

Claimant Found to Be Employee Not Independent Contractor Because Employer Had Right to Control Work

In **John Cutsinger v. Area 151 Nightclub, Injury No. 10-082553,** the claimant worked for the employer, a nightclub, on five occasions in 2010 customizing lighting for MMA fights. The last time he worked he sustained an injury to his ankle. The issue in this case was whether he was an employee or independent contractor. The ALJ noted that the Court has considered the following factors to determine whether a claimant is an employee or independent contractor: 1) is the work part of the regular business of the employer; 2) is the job a distinct occupation requiring special skills; 3) could the alleged employee hire assistants or must the work be performed by the individual personally; 4) is there supervision; 5) whose tools were used; 6) the existence of a contract for a specific piece of work at a fixed price; 7) the length of time the person is employed; 8) the method of payment, whether by time or by the job; and 9) who controls the

details of the work.
The ALJ found that the claimant was an employee. She noted that although the MMA fights only occurred a few times a year, the evidence indicated that the employer regularly conducted special events. The Judge did note that while the claimant was called to work because he possessed knowledge necessary to customize lighting, she found that this was not an occupation that required special skills. The Judge also found there was no evidence that the employer would have allowed the claimant to hire assistants or substitutes. Furthermore, the employer had the right to hire, discharge and determine the claimant's pay. The employer also owned all of the equipment including the lights, microphones and computers. The Judge also noted that the claimant was paid by the hour, which was indicative of an employment relationship. The ALJ also found that there was a continued relationship since the employer regularly called the claimant to perform these services, despite the fact that he only worked five separate occasions. The Judge did note that the details of the work were controlled by the claimant suggesting independent contractor status. The Judge also noted that the claimant was paid by a 1099 which would also suggest independent contractor status. However, after reviewing all of the evidence in the record, the Judge noted that the weight of the evidence supported that the claimant was an employee. The Commission affirmed.

No Evidence for ALJ's Award of TTD and ALJ May Order a Change in Provider But Cannot Direct Employer to Use Specific Provider

In **Lisa Bush v. West Chester House, Injury No. 10-109482,** the ALJ issued a Temporary or Partial Award in which he opined that the claimant was entitled to 6 weeks of TTD benefits as a result of a carpal tunnel release which was performed on November 12, 2010. The ALJ based his Award on Dr. Crandall's testimony that a surgery such as the one performed on the claimant generally requires 6 weeks of recovery. The Commission noted that there was no testimony in the record regarding the claimant's ability to compete in the open labor market or the total amount of time she missed from work due to her surgery. Therefore, the claimant failed to meet her burden of proving her entitlement to 6 weeks of TTD benefits awarded by the ALJ.

The Commission also addressed the ALJ's decision to award treatment with a specific physician. The ALJ ordered a change in provider to Dr. Glogovac. The Commission first noted that the claimant did not prove that the employer waived its right to direct her medical treatment, and the ALJ did not even make that finding in his Award. Second, the claimant failed to prove that her health and recovery had been endangered by the medical treatment provided by the employer. Furthermore, the Commission noted that even if the claimant met this burden, the only relief provided under the statute was that the Division or Commission may order a **change** in physician, surgeon, hospital or other requirement. The statute does not authorize the Division or Commission to appoint a specific doctor to provide the claimant's medical treatment. Therefore, the Commission found that the ALJ erred in ordering the claimant's medical treatment to be provided specifically by Dr. Glogovac.