MISSOURI WORKERS'COMPENSATION

CASE LAW UPDATE

JANUARY 2014 – MARCH 2014

Court Defers to Commission on Credibility and Findings of Fact

Maness v. City of De Soto and Treasurer of Missouri, Case No. ED100074 (Mo. App. 2014)

FACTS: The claimant worked as a supervisor performing maintenance for the employer's water, street, sewer, and parks department. On June 14, 2007, the claimant gave his supervisor a report stating that he injured his neck moving decorative concrete stones three days prior on June 11, 2007. Each of the three doctors who evaluated the claimant stated that he reported to them that his injury occurred on or about June 11th. During the hearing, the claimant admitted that the employer's time records showed he did not actually work on June 11th, but he insisted that he must have just been mistaken as to the dates, and was in fact injured on or about June 11, 2007. The ALJ awarded compensation.

On appeal, the Commission modified the ALJ's award, but affirmed in finding for the claimant. The employer appealed arguing that the Commission erred in finding that the claimant sustained an accident on June 11, 2007 because the finding was not supported by competent and substantial evidence. Specifically, the employer alleged that the claimant's testimony was not credible because it conflicted with statements the claimant made to doctors about the incident and because time records of the employer showed that he did not work on June 11th.

HOLDING: On appeal, the court affirmed and ruled in favor of the claimant, finding that the employer's argument was merely a challenge to the weight of evidence and the claimant's credibility as a witness. The court stated that because it defers to the Commission on findings of fact, credibility of witnesses, and weight to be given to conflicting evidence, it must affirm the Commission's decision.

If Claimant is Placed at MMI and Continues to Treat the Issue of When Claimant Actually was or is at MMI can be Disputed

Hoven v. Treasurer of State of Missouri, Case No. ED98842 (Mo. App. 2014)

FACTS: In 2004, the claimant filed a claim for carpal tunnel syndrome. He had a subsequent work-related right knee injury in September 2007. With respect to the 2004 claim, the claimant was evaluated by Dr. Crandall in November 2007, at which time the doctor placed him at MMI and assessed 5% disability to the right wrist. The claimant settled his claim with the employer and then proceeded to a hearing against the Second Injury Fund (ASIF'). After he was released by

Dr. Crandall at MMI in November 2007 he underwent two additional surgeries in 2009 with Dr. Schlafly, who believed that the claimant had not yet reached MMI.

At a hearing, the claimant argued that he was entitled to compensation from the SIF with respect to his wrists because Dr. Crandall opined that he had reached MMI, and his settlement with the employer stated he was at MMI. The ALJ determined the claimant was at MMI, and therefore was entitled to recover from the SIF. However, the Commission reversed and found for the SIF. The claimant appealed.

HOLDING: The court affirmed the Commission's decision, finding that in order to receive compensation from the SIF, the claimant must first prove that he had a compensable injury that resulted in PPD. The Commission determined that the claimant did not have PPD because he was not at MMI. The court also found that the settlement agreement between the employer and the claimant did not establish that the claimant was MMI for purposes of this case because the SIF was not a party to the settlement agreement. Finally, the Court noted that Dr. Schlafly opined that the claimant had not yet reached MMI following the surgeries in 2009. In essence, the Court held that if a claimant is placed at MMI for a particular injury but then has subsequent medical procedures on that same body part, the issue of whether the claimant has reached MMI may again become an open question.

Claimant Not PTD Prior to Last Injury Because Could Compete in Open Labor Market Without Any Accommodation

Stewart v. Treasurer of the State of Missouri, Case No. SD32827 (Mo. App. 2014)

FACTS: The claimant sustained an injury while working for the employer in early 2009. After a hearing, and a subsequent appeal, the Commission found that the claimant was PTD following the work injury. The SIF appealed arguing that the claimant was PTD even before the work injury and therefore, the SIF should not be liable. The claimant's medical history included arthritis, reflex sympathetic dystrophy, degenerative joint and bone disease, carpal tunnel syndrome, and a host of other maladies. The claimant qualified for SSD in 1997. Thereafter, the claimant worked sporadically, a total of 29 months over 11 years, at five different part-time jobs. The claimant was able to perform all of her occupational duties without accommodation until the injury in 2009. The Commission found that the claimant's ability to compete on the open job market prior to her 2009 injury precluded a finding of PTD before working for the employer.

HOLDING: The Court affirmed the Commission's finding that the claimant was not PTD prior to her work injury. The Court was particularly persuaded by the fact that the claimant had competed for and won all of her jobs in the open labor market prior to her work injury. Additionally, the Court noted that the claimant worked these jobs without any accommodation. Thus, the Court found that the Commission did not err in finding the claimant was not PTD prior to her work injury because she was able to compete on the open labor market without any accommodation.

Claim Compensable When Claimant Tripped and Fell While Walking Across Street

Dorris v. Stoddard County, Case No. SD32830 (Mo. App. 2014)

FACTS: The claimant worked in the employer's collector's office. While a new office building was being built, the claimant's supervisor asked her to go over to the new building and inspect the counter tops that were being installed. As she was crossing the street to reach the new building, she tripped and fell causing a torn rotator cuff. She was on the clock at the time of her injury. The employer denied the claim arguing that the injury did not occur in the course and scope of her employment. The ALJ found the injury compensable and the Commission affirmed the decision. The employer appealed.

HOLDING: The Court affirmed the Commission's ruling, finding that the claimant was within the scope of her employment when she was injured. The Court noted that in order to demonstrate the injury arose out of employment, the claimant must show a causal connection between the injury and her work activity. In this case, the Court noted that because she was crossing the street at her supervisor's behest and because she was on the clock when the accident occurred, she was within the scope of her employment.

Claimant PTD Because Credibly Testified That Needed to Recline Frequently Throughout Day to Relieve Pain

Ballard v. Woods Supermarkets, Inc., Case No. SD32590 (Mo. App. 2014)

FACTS: While working for her employer, the claimant slipped and fell on grease causing her to land on her back and left arm. As a result of the accident, the claimant was diagnosed with a comminuted distal left radius fracture, disc herniations at L4-5 and L5-S1, and strain/sprain of her cervical and thoracic spine. The employer sent the claimant to Dr. Woodward for an IME. The claimant's attorney obtained a report from Dr. Koprivica. Dr. Koprivica diagnosed failed laminectomy syndrome and stated that the claimant needed to recline frequently in order to reduce and cope with the pain.

At a hearing, the ALJ found the testimony of Dr. Koprivica and the claimant credible. Consequently, the ALJ found that the claimant needed to recline for at least 30 minutes several times a day to cope with the pain. Based on this restriction, the ALJ determined that the claimant was unable to compete in the open labor market and found her PTD. The employer appealed to the Commission, which affirmed. The employer again appealed, arguing that the ALJ erroneously concluded that the claimant needed to recline throughout the day because that

conclusion was based on Dr. Koprivica's subjective medical findings and not based on objective medical findings.

HOLDING: The court noted that there is no objective test for pain and that the extent to which a claimant experiences pain is a credibility determination for the Commission to decide. Thus, the Court found that assessing pain is inherently subjective, and therefore, Dr. Koprivica's opinion qualified as competent and substantial evidence that the Commission may justifiably base their decision on.

Employer Responsible for All Past Medical Expenses Reasonably Required to Cure and Relieve Effects of Work Injury

Downing v. McDonald's Sirloin Stockade, Case No. SD32683 (Mo. App. 2014)

FACTS: The claimant worked as a waitress for the employer from 1985 until 2007. She first began to experience back pain in 2005 and sought treatment from her own chiropractor. The claimant's chiropractor eventually determined that an MRI was needed. The claimant then spoke with the employer, at which time the employer suggested that she seek treatment through workers' compensation. However, a claims representative at the insurer spoke with the employer and advised that they would be denying the claim because they did not feel that the claimant suffered a compensable injury. Nonetheless, the employer referred the claimant to Dr. Ipsen, who ordered an MRI to determine if surgery was necessary. The claims representative authorized the MRI, which revealed disc degeneration at L5-S1, as well as a large extrusion causing impingement on the right S1 nerve root. Dr. Ipsen subsequently scheduled surgery. However, the claims representative told the claimant that the surgery was not authorized because more information was needed. Nevertheless, the claimant took out a loan and underwent surgery as scheduled.

Following surgery, the claimant filed a Claim and at a hearing the ALJ found in favor of claimant and awarded her unpaid medical expenses, TTD, and PPD. However, the ALJ did not award the claimant the cost of the two surgeries she had paid for with the loan. The claimant appealed and the Commission modified the Award to include past medical benefits for the two surgeries. The employer then appealed arguing that the Commission should not have awarded past medical benefits for the surgeries because the medical expenses were not authorized and the treatment was not needed on an emergency basis.

HOLDING: The Court first noted that the statute requires an employer to provide medical treatment that may be reasonably required to Acure and relieve' the effects of the injury. The Court went on to say that the statute has been interpreted to mean that if an employer wrongly refuses requested treatment, the employer will be liable for medical treatment obtained at the claimant's own expense. Therefore, the Court affirmed the Commission's ruling, holding that the employer was responsible for reasonable and necessary medical expenses regardless of whether or not they were authorized by the insurer.

Claimant Not PTD Prior to Work Injury

Scott v. Treasurer of the State of Missouri, Case No. WD76602 (Mo. App. 2014)

FACTS: The claimant worked operating heavy equipment and doing excavation work on a contract basis. Eventually, the claimant incorporated his business under the name Gary Scott Excavating, and was an employee of this business. Due to the claimant's troubles with reading, a hearing problem, and a ninth grade education, most of the administrative bookkeeping and paperwork of the company was handled by his brother, wife, or other employees. The claimant had numerous injuries throughout his career. In 1998, he had right rotator cuff repair. In 2001, he fell from a grain bin fracturing his right leg, right foot, and left foot. In 2004, he had bilateral carpal tunnel releases. In 2006, he had colon surgery, and in 2007, he was diagnosed with arthritis. On January 11, 2008, the claimant had this work related injury, at which time he injured his back while operating a bulldozer. Due to the back injury, the claimant saw Dr. Reintjes who performed back surgery. On October 29, 2008, Dr. Reintjes found that the claimant had reached MMI and gave him a 50 pound lifting restriction. The claimant also received treatment for his back from Dr. Scott. While treating for his back condition, Dr. Scott diagnosed two hernias, which were surgically repaired.

The claimant returned to work operating machinery and supervising his employees, but limited how much lifting and vehicle maintenance work he did. On December 3, 2009, he was attempting to install a battery in a piece of equipment when he injured his chest and right shoulder. He was eventually released to return to work with restrictions of no lifting over 50 pounds and no repetitive lifting or reaching above the shoulder. Fearful of re-injuring his shoulder, he stopped working after the 2009 injury.

He filed claims against his employer and the SIF for the hernias, the back injury, and the chest and shoulder injuries. He settled all claims with the employer. He went to a hearing against the SIF for the 2008 back injury and the 2009 shoulder injury. At the hearing, the ALJ found that the claimant was PTD prior to both injuries, and therefore, the SIF was not liable for any benefits. The ALJ was persuaded by claimant's testimony that Dr. Scott had told him to stop working in 2007. The ALJ also cited vocational expert, Mr. Dreiling's testimony, that although the claimant was able to return to work after his 2008 and 2009 injuries, he was only able to do so because he self-accommodated by only supervising employees and such accommodation would not be made elsewhere. Therefore, the claimant was unable to compete on the open labor market. The claimant appealed to the Commission who adopted and affirmed the decision of the ALJ. The claimant appealed.

HOLDING: The Court reversed the Commission's decision and remanded for further findings. The Court held that the Commission's decision was not supported by substantial and competent evidence and was against the overwhelming weight of the evidence. The Court noted that after his injuries, the claimant resumed lifting, loading, and vehicle maintenance duties, and would operate pieces of heavy equipment for as much as 8 to 12 hours a day. Thus, the Commission erred in determining that the claimant's sole function was overseeing the work of other employees. Additionally, the Court noted that there were no doctors' opinions stating that the claimant needed to stop working prior to the 2008 and 2009 injuries. More specifically, the Court noted that the Commission erred in determining that Dr. Scott advised the claimant to stop his workload in 2007 because he did not see Dr. Scott until after his 2008 back injury. Finally, the Court noted that the vocational expert, Mr. Dreiling, testified that it was only after the claimant's back surgery in 2008 that he stopped performing the heavier physical lifting activities at work and needed to be accommodated.

Claimants are Not Entitled to Pre-Judgment Interest

Harrah v. Tour St. Louis, Case No. ED100185 (Mo. App. 2014)

FACTS: The claimant was injured in a motor vehicle accident while working as a bus driver. At the time of the injury, the employer did not carry workers' compensation liability insurance. Consequently, the claimant sought medical treatment on her own, and as a result of that treatment, incurred over $150,000.00 in past medical expenses. Following a hearing, the ALJ found the employer and the SIF liable for the claimant's past medical expenses. Additionally, the ALJ declined to award prejudgment interest on medical expenses to the claimant. The Commission affirmed the ALJ's decision. The claimant appealed from the Commission, arguing that she was entitled to prejudgment interest on her medical expenses.

HOLDING: The court upheld the decision of the Commission and found that prejudgment interest on medical expenses is not recoverable based on the new strict construction standard.

Must First Look to Last Injury Alone to Determine Whether SIF or Employer is Responsible for PTD Benefits

Blackshear v. Adecco, Case No. ED100251 (Mo. App. 2014)

FACTS: The claimant sustained injuries to her back and legs and brought a claim against the employer and the SIF. Both the employer and the SIF agreed that the claimant was PTD, but they disagreed about who was responsible for the PTD benefits. The ALJ concluded that the claimant's last injury alone rendered him PTD. Therefore, the employer was responsible for benefits, not the SIF. The employer appealed. The Commission modified the ALJ's Award finding that the claimant's disability was a combination of a pre-existing psychiatric condition and the primary injury. Specifically, the Commission found that the primary injury caused 85% of the claimant's PPD, and that the claimant also had a pre-existing disability resulting from her

psychiatric conditions. The Commission determined that the claimant was entitled to recover PTD benefits from the SIF because her disability resulted from a combination of her pre-existing conditions and the primary injury. The SIF appealed, arguing that the Commission erred in allocating PTD liability to the SIF because the Commission did not first determine whether the primary injury alone resulted in PTD.

HOLDING: The Court agreed with the SIF's assertion that the first inquiry is the degree of disability incurred from the last injury. Additionally, the Court agreed that if the claimant's last injury in and of itself rendered the claimant PTD, then the SIF has no liability and the employer is responsible for the entire amount. However, the Court noted that the Commission found that the last injury had caused 85% PPD and that the claimant was not PTD as a result of the primary injury alone. Thus, the Commission correctly followed procedure by first evaluating the amount of disability resulting from the last injury alone and therefore, the SIF's liability for PTD benefits is affirmed.

Credibility is Determination of Commission

Payne v. Treasurer of the State of Missouri, Case No. SD3254174 (Mo. App. 2014)

FACTS: The claimant worked as a truck driver for employer. On December 24, 2004, the claimant tripped and fell on ice while at a truck stop, injuring his back and both of his shoulders. He was diagnosed with bilateral rotator cuff injuries. The claimant also had several pre-existing conditions including heart problems, diabetes, and sleep apnea. Following the 2004 work injury, the claimant saw Dr. Bennoch who issued a report in May 2010 finding him PTD due to the effects of the 2004 work injury alone. At Dr. Bennoch's deposition, he opined that the claimant was PTD as a result of both his work related injury and his pre-existing medical issues. The claimant was also evaluated by a vocational rehabilitation counselor, Ms. Titterington, who opined that the claimant had transferrable job skills and therefore, was not PTD.

A hearing was held, at which time both Dr. Bennoch and Ms. Titterington testified live. During the hearing, Dr. Bennoch testified that the claimant's work injury alone was enough to make him PTD. Ms. Titterington's testimony was consistent with her prior statements, asserting that the claimant was not PTD. The ALJ ruled in favor of claimant finding that he was PTD as result of the 2004 work injury and his pre-existing conditions. The SIF appealed arguing that the ALJ's finding that the claimant was PTD did not comport with his pursuit of full time, regular employment. The Commission amended the ALJ's ruling, finding that although the claimant did have pre-existing disabilities, he was PTD as a result of the work injury alone. The claimant appealed arguing that the SIF was prevented from arguing that the claimant was PTD as a result of the last injury alone because the SIF had previously argued at the hearing and in its Application for Review that the claimant was not PTD. The claimant also argued that the Commission's finding was against the weight of the evidence because it found Dr. Bennoch's testimony to be most credible.

HOLDING: The Court began by noting that when the SIF appealed the ALJ's finding that it was liable for PTD benefits, it triggered the Commission's duty to first determine the degree of disability resulting from the last injury alone. Thus, the Commission was allowed to find that the claimant was PTD as a result of the work injury alone, regardless of whether the SIF requested or argued for such a finding. The Court then focused on the claimant's next argument B that the Commission's finding was not supported by substantial and competent evidence. The Court stated that when the evidence before the Commission would warrant either of two findings, the Court is bound by the Commission's determination. Thus, the Court affirmed the Commission's decision, noting that the credibility of experts is to be determined by the Commission.

Claim Compensable When Claimant Walking Across Parking Lot to Take Trash Out and Smoke Cigarette

In **Glenda Hunter v. Benchmark Healthcare of Harrisonville**, Injury No. 13-021747, the claimant, a housekeeper, was walking across the employer's parking lot when she slipped and fell, sustaining an injury on February 28, 2013. The claimant testified that she fell when she walked out the door of the facility while carrying trash. She was walking with another co-employee and they were planning on taking a smoke break. The dumpster was located in close proximity to the shed, which was built for employees to smoke cigarettes. Employees were allowed to smoke in the shed without clocking out and on a scheduled break. The claimant planned to clock out for her lunch break shortly after returning from the smoking shed. There were some inconsistencies with respect to the claimant's testimony and the other employee's testimony as the co-employee was not sure when the claimant fell and whether he was carrying the trash or the claimant actually had the trash in her hand.

In any event, the ALJ found the claimant credible and the claim compensable. He noted that the employer required employees to smoke in a designated shed and did not require the employees to clock out. Also, the employer had ownership and control of the parking lot. Furthermore, the claimant was exposed to the risk due to the placement of the dumpster and the instructions of her employer to smoke in a designated area, which required her to cross an icy lot. The ALJ further noted that whether or not the claimant was injured going to the dumpster or coming back from a smoke break is not material. The fact that she smoked a cigarette in the shed by the dumpster does not impact the analysis as she would be required to cross the same parking lot to return to work. The Commission affirmed the Award of the ALJ.

Claimant Gave Proper Notice When Filed Claim Prior to Diagnostician Connecting Condition to Job Duties

In **Tamara Lynn v. McClelland Marketing, Inc.**, Injury No. 10-111727, the claimant worked for the employer as an office assistant and her job duties included data entry, filing and customer service. She estimated that she typed on the computer for about 5 - 6 hours per day, but acknowledged that this task was interrupted by other duties such as answering phones and handling boxes of files. In 2008 or 2009 she began developing symptoms of carpal tunnel

syndrome and in December 2010 she sought treatment on her own. She underwent carpal tunnel releases with Dr. Schlafly in April and May 2011. She filed a Claim for Compensation on May 31, 2011. Thereafter she saw Dr. Berkin, who connected her symptoms to her job duties. The employer sent the claimant to Dr. Rende, who also connected the claimant's symptoms to her job duties. The ALJ, of course, found that the claimant's condition was work-related. However, he found that the claim was barred as the claimant did not provide the employer with proper notice.

The Commission reversed the decision of the ALJ finding that the employer was given proper notice. The Commission noted that a person cannot be diagnosed with an occupational disease or repetitive trauma until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure. The Commission noted that in this case, the claimant's condition was not connected to her job duties until she saw Dr. Berkin on August 31, 2011. In light of the fact that she filed her Claim on May 31, 2011, prior to a diagnostician connecting her condition to work, the claimant gave timely notice and her claim was not barred.

Claim Denied Because Claimant's Testimony Was Inconsistent With Medical Records and Claimant Had History of Prior and Subsequent Injuries

In **David Luka v. FedEx Ground**, Injury No. 10-101154, the claimant worked for the employer as a tech specialist. On July 14, 2010 he was working with a co-worker repairing a conveyor belt, at which time he heard a snap and felt a sharp pain in his lower back. He did not report his accident to the employer because he was concerned about his job. He testified that the next day he went to his family physician and advised that he possibly hurt his back at work but asked the doctor not to mention his low back pain in his chart, as he was not sure whether he wanted to pursue workers' compensation benefits. He continued to undergo conservative treatment. He was off work and received short-term disability benefits. When he returned to work on December 3, 2010, he sustained another injury and he testified that his low back condition permanently worsened. The first mention of the July 14, 2010 work injury was in the medical records of Dr. O'Boynick, dated December 6, 2010, five months after the date of injury. Dr. Hopkins, the claimant's expert, testified that the work injury on July 14, 2010 was the prevailing factor in causing his condition. Dr. Bailey, the employer's expert, diagnosed degenerative disc disease and opined that the accident of July 14, 2010 was not the prevailing factor in causing the claimant's diagnosis. The claimant did have a prior history of back injuries, the first being in 1986 for which he underwent a lumbar discectomy. A few years later he suffered from an acute episode of low back pain for which he underwent injections. The ALJ found the claimant sustained an accident on July 14, 2010, which was the prevailing factor in causing his back condition and need for treatment.

The Commission disagreed, noting that they were not persuaded by the claimant's evidence on the issue of medical causation. The Commission noted that there were multiple potential causes for the claimant's current low back and lower extremity problems, including the 1986 surgery, the work accident on July 14, 2010, a subsequent incident which lead the claimant to the emergency room on September 2, 2010, and another incident at work on December 3, 2010. The

Commission also noted they were not convinced that they could reasonably rely on the claimant's history of events since it conflicted with the medical records. Therefore, the Commission found that the accident of July 14, 2010 was not the prevailing factor in causing any medical condition in the claimant's lumbar spine, or any disability. Therefore, the claim was denied.

Claimant PTD Because Vocational Expert Not Credible Because Did Not Use Correct Standard

In **Grace Ketchum v. Missouri Department of Corrections**, Injury No. 07-109955, the claimant was working for the employer and her job duties included supervising inmates, providing food and maintaining supplies. The claimant was a passenger in a food supply truck and the driver backed into a loading dock, at which time she sustained whiplash. Dr. Coyle performed an arthrodesis and the claimant was placed at MMI. The claimant then worked for a month and applied for extended medical leave and long term disability. After the claimant was released from Dr. Coyle, she treated with Dr. Guarino for pain management. Dr. Volarich assessed 65% disability and opined the claimant would need additional treatment as a result of her work injury. Mr. Eldred, the claimant's expert, opined that she was permanently and totally disabled as a result of her injury. Mr. England testified on behalf of the employer, and opined that the claimant Awould still be physically able to perform some types of entry level service employment such as some cashiering positions, security positions such as working in an office building or as an alarm monitor for a security company. She would be a logical person for some home health positions with ambulatory patients or working as a companion.' The ALJ found that the employer would be responsible for additional medical treatment to cure and relieve her from the effects of the work injury, as the ALJ found Dr. Volarich's opinion credible. The ALJ also found that the claimant was not permanently and totally disabled as he believed that Mr. England's opinions were more credible. The ALJ did assess 50% disability to the body.

The Commission modified the Award opining that the claimant was permanently and totally disabled as a result of the work injury. The Commission noted that Mr. England stated that the claimant would be Aphysically able' to perform some limited jobs, and that the claimant could perform Asome' positions. The Commission noted that Athe test for permanent total disability is whether the worker is able to compete in the open labor market, and the critical question is whether in the ordinary course of the business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.' The Commission noted that they were left to speculate as to whether such positions actually exist in significant numbers in the open labor market and whether the claimant could reasonably compete for such positions. Therefore, they found the opinion of Mr. Eldred credible, and that the claimant was permanently totally disabled.

Claimant Found PTD Despite the Fact That He Worked For Employer For Over Two Years after Injury

In **Rusty Archer v. City of Cameron**, Injury Nos. 08-011470 and 10-075527, the claimant, a

concrete layer, sustained an injury on January 16, 2008, when he struck a manhole while driving a skid loader. He underwent conservative care for cervical and thoracic strains, including physical therapy and epidural injections. The claimant was given permanent restrictions by two treating physicians, Dr. Zarr and Dr. Wheeler. Dr. Zarr provided a rating of 3% and Dr. Wheeler assessed 8%. Dr. Wheeler, the claimant's last treating physician, advised that he would need ongoing medication to cure and relieve him from the effects of the January 2008 accident. The claimant continued to receive conservative care and continued to work from the fall of 2008 until September 16, 2010, when he sustained another work-related injury.

While the claimant was working up until his second injury, he received assistance from co-workers if he was unable to perform certain activities, and was accommodated by his employer due to his work restrictions. The claimant was permitted to take frequent breaks throughout the day.

On September 16, 2010 the claimant sustained another injury while bending over to shape a newly formed curb of concrete. He was diagnosed with a chronic and acute thoracic strain, myofascial syndrome, chronic lumbar strain and muscle spasms. He was released from care three weeks later, at which time the doctors indicated that his pain had returned to baseline. He was given the same restrictions.

The claimant actually alleged that he was permanently and totally disabled as a result of the January 16, 2008 accident, and had expert testimony supporting that allegation. However, the ALJ found that the claimant was not permanently and totally disabled as a result of the 2008 injury because he worked in the open labor market laying concrete from 2008 up through his September 16, 2010 injury. The ALJ did not find that the claimant's work with the employer between that time period so accommodating to render him unemployable, especially when he received a raise and medical records reveal he was laying concrete every day in June 2010. The ALJ did assess 35% disability referable to the January 2008 accident. The ALJ also assessed 7.5% disability to his body as a whole due to the September 16, 2010 accident.

With respect to the January 16, 2008 injury, the Commission modified the decision of the ALJ, and found that the claimant was in fact permanently and totally disabled as a result of this injury. The Commission found that two experts opined that the claimant was PTD as a result of the 2008 injury. The Commission noted that the ALJ disregarded both opinions because the claimant worked in the open labor market laying concrete from 2008 up until September 16, 2010. The Commission disagreed noting the position was not in the open labor market, and the claimant simply went back to the job he already had. The Commission found that the claimant's return to his job after his injury is not proof that he could compete in the open labor market. The Commission noted that since the claimant was not performing the usual duties of his employment in the manner that such duties were customarily performed by the average person engaged in his line of work, concrete laying, the claimant's return to work did not constitute proof that he could compete in the open labor market.

With respect to the September 16, 2010 injury, the Commission noted that the Judge assessed 7.5% of the body. The Court reversed this decision opining that the claimant did not sustain any disability as a result of this injury. The Commission noted that none of the medical experts believed the claimant sustained any permanent disability and noted that an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. Since the accident did not cause any disability the claim was not compensable.

Motor Vehicle Accident Found to be In Course and Scope of Employment

In **Anne Poole v. Preferred Hospice of Missouri, S.W., LLC**, Injury No. 10-049134, the claimant was employed as an admissions coordinator and 80% of her job duties required travel away from the principal office to off site locations to perform in-person interviews with patients who are being admitted to hospice care. The claimant was required to maintain reliable transportation and was reimbursed for her mileage. She was provided a stipend for a cell phone, and she carried medical equipment with her at all times. On the day of her injury she had traveled to various patients' houses, and her last appointment was in Seymour, Missouri. There was information that she needed to fax to a physician, and therefore she went back to the employer's place of business. On the way there she was in a motor vehicle accident. The employer's witness did indicate that the claimant's decision to return to the office would have been highly unusual, particularly since the doctor's office would have been closed. It was noted that the accident occurred at a location where the claimant reasonably would have been irrespective of whether she was traveling directly home or back to the office.

The main issue in this case is whether the claimant's injuries were caused by an accident arising out of and in the course of her employment. The ALJ found that the claimant was credible and that her testimony showed that she was on the way back to the employer's office to fax something to a physician's office, which was benefitting the employer. The ALJ further noted that whether the claimant intended to return to the office or was going home, was not relevant since the accident occurred in close geographic proximity and time to the last appointment on the exact same route the claimant would have taken for either destination. The Judge did note that an accident occurring while an employee is going to and from work generally is not compensable. However, there is an exception for employees whose job duties entail travel. The ALJ did note that the legislature eliminated benefits for injuries sustained while traveling between home and an employer's principal place of business. However, the claimant was not doing so in this case. The ALJ noted that the claimant was traveling from a facility in Seymour, Missouri, and therefore her claim was compensable.

The Commission affirmed the decision of the ALJ, however, came to the conclusion using a different analysis. The Commission did point out that the ALJ concluded that it did not matter whether the claimant had intended to return to the office or was going home. The Commission noted that the claimant's actual destination at the time of the motor vehicle accident was dispositive of the issue in favor of the claimant. The Commission concluded that the claimant's

injuries arose out of and in the course and scope of employment because her injuries did 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 employer in normal unemployment life. Basically, the Commission is saying that the claimant testified that she was going back to the employer's office, and since the ALJ found the claimant credible, it was presumed the claimant was returning to work and not to her home. Therefore, this is the only fact scenario the Commission found relevant.

Editor's Note: It appears as if the Commission is saying that it is possible that if the claimant was going home, the claim may not be compensable. However, they do not go into any discussion regarding this issue.

Claimant's Fusion Related to Work Injury Despite Prior Herniations and Symptoms On and Off For Two Years Prior to Injury

In **Elizabeth Lake v. Best Buy**, Injury No.: 08-123984, the claimant was moving microwave ovens from department overhead storage to floor level on September 5, 2008, when she developed pain at the base of her neck. She did not report her injury to the employer until 2 weeks later. She continued to experience neck pain and went to her primary physician and treated conservatively. She was taken off work by her primary care physician and underwent MRIs. The claimant was then seen by Dr. Doll, the claimant's cousin (this was not authorized care), who recommended that she see Dr. Raskas, a spinal surgeon. Dr. Raskas performed a two level fusion. Both Dr. Doll and Dr. Raskas believed that the claimant's work activities in September 2008 were the prevailing factor in causing her medical condition and symptoms. This is significant in that the claimant did have a prior injury in 2006 for which she underwent physical therapy, chiropractic care and acupuncture for a disc herniation to the left at C4-5, the same level the claimant underwent the fusion after the work injury.

Dr. Volarich testified on behalf of the claimant, noting that although the C4-5 disc herniation was present in 2006, it was essentially asymptomatic prior to the 2008 injury, and the right disc bulge at C5-6, which was also present in 2006, had caused no radicular symptoms other than occasional finger tip tingling, prior to the 2008 injury. On cross examination, Dr. Volarich acknowledged that the claimant's 2009 MRI and 2006 MRI were essentially the same. He also acknowledged that the claimant's medical records demonstrated that the claimant had some cervical spine symptoms on and off between 2006 and 2008.

Dr. Kitchens testified on behalf of the employer and believed that the claimant had cervical degenerative disc disease which was not related to the work injury. The ALJ concluded that Dr. Kitchens' opinion was credible and that the claimant's work was not the prevailing factor in causing her medical condition and disability.

The Commission reversed the decision of the ALJ, noting that Dr. Kitchens based his premise on the fact that a specific incident or injury did not occur at work and he opined that overhead lifting

activities cannot cause neck pain. Basically, the Commission did not find Dr. Kitchens' opinions credible, and found the opinion of Dr. Volarich and the claimant's testimony credible. Therefore, the employer was responsible for PPD, TTD, past medical expenses and future medical treatment.