Claim Denied Because Claimant Did Not Prove Fall Came From Hazard Related To Employment

Jackie Porter v. RPCS, Inc., Case No. SD32492 (Mo. App. 2013)

FACTS: The claimant fell at approximately 4:00 P.M. in the restroom, at which time she fractured her hip. At a hearing before an ALJ, she testified that she had no memory of falling or what caused her fall. She recalled washing her hands and then waking up on the floor. No one witnessed her fall, and there was no testimony that anything was on the floor that caused the claimant to fall, or that when witnesses found her that her clothes were wet or had any substance on them. The ALJ denied the claim because the claimant failed to meet her burden of proof to establish why she fell, there were no witnesses and the claimant was an unreliable historian. The Commission affirmed the ALJ's Award noting that they were unable to determine the *specific* risk or hazard that caused her to fall.

HOLDING: The Court noted that an injury shall be deemed to arise out of and in the course of the employment only if it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside and unrelated to the employment, in normal non-employment life. The Court noted that the claimant must show a causal connection between her injury and her work activity in order for the injury to arise out of and in the course of her employment. In order to do so, the claimant must identify the cause of the injury. The Court noted that in this case the claimant was in the bathroom and fell, but there was no evidence that something about her work caused her to fall. Therefore, she failed to prove that she fell due to some condition of her employment or due to an unsafe location due to her employment. The Court found that the only causal connection of the work activity to her injury was the fact that it occurred while she was at work. Therefore, the Court affirmed the denial of benefits. The Court did note that this opinion should not be read to automatically restrict or exclude benefits for injuries of relatively sedentary professional employees such as the claimant based on the risk or hazard of being unrelated to employment.

Claimant Entitled to PPD Benefits not PTD Benefits

Clark v. Second Injury Fund, Case No. SD31644 (Mo. App. 2013)

FACTS: The claimant sustained an injury to his low back, right leg, neck and left shoulder on February 22, 2013, and settled this claim against the employer for 20% of the body. The claimant went to a hearing against the SIF for PTD benefits. Before the claimant's February 2013 work injury, he had two other documented work-related injuries and had developed diabetes. He had received prior settlements for 30% of the right shoulder, 25% of the left shoulder, 5% of the wrist and 3.25% of the body. After his February 2013 work injury, the claimant returned to work and sustained another injury on May 14, 2013, and again on June 10, 2013, to his neck and low back. The ALJ awarded the claimant PPD benefits, not PTD benefits. The claimant appealed to the Commission who agreed with the decision of the ALJ. The claimant again appealed.

HOLDING: The Court of Appeals again affirmed, noting that the Commission's determination that the claimant was not permanently and totally disabled by a combination of his prior injuries and his last injury was not against the overwhelming weight of the evidence. The Court noted that both the claimant's rating physician and vocational expert opined that he was permanently and totally disabled as a result of a combination of his injuries. However, neither of them addressed the two subsequent injuries. As a result, the Commission found that their testimony was lacking in credibility. The Court further noted that since the claimant returned to work after both of these subsequent injuries, the Commission concluded he could not have been permanently and totally disabled as a result of the earlier May 2013 injury.

Claimant PTD Because No Employer Could Reasonably Be Expected to Hire Him

Larry Underwood v. High Road Industries, LLC, Case No. SD31731 (Mo. App. 2012)

FACTS: On November 28, 2005, while standing on a ladder to install a radiator in a truck, the ladder broke and the claimant fell to a concrete surface, landing on his right side and right hip. He underwent surgery and was initially released in September 2006, but returned to the doctor. Eventually Dr. Olive implanted a permanent spinal cord stimulator. He was again released from care in 2008, and the doctor noted that he did not believe the claimant could work. The claimant testified that he continued to have complaints, noting he could only sit for 30 minutes, stand for 30 minutes, and could only walk about a block and then would need to sit down. He also reported that he was on prescription pain medication and could drive no more than 10 miles at a time. The claimant then underwent an FCE which showed that he could work in the light to medium category. Therefore, Dr. Olive concluded that the claimant could return to the open labor market in some capacity, with restrictions. The ALJ found that the claimant was totally and permanently disabled. The Commission affirmed the decision of the ALJ. The employer appealed.

HOLDING: The Court stated that the test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. The Court found that there was competent and substantial evidence supporting the Commission's determination that the claimant was unable to compete in the open labor market based on his physical restrictions, his limited transferable job skills, his below average intelligence and his concentration problems, and that no employer would reasonably be expected to hire him.

Claimant's Job Duties Were A Substantial Factor in Causing His Heart Attack Which Caused His Death

William Riley (Deceased); Vicki Riley and Landon Riley v. City of Liberty, Case No. WD75879 (Mo. App. 2013)

FACTS: On October 6, 2004, the claimant died of a heart attack while at home. The claimant's widow filed a claim for death and funeral benefits. An ALJ denied the claim. The relevant facts are as follows. The claimant was the Deputy Fire Chief and his duties were primarily administrative, but essentially kept him on call at all times. On October 5, 2004 the claimant had

a heated discussion with a Captain while at work regarding a police dispatcher. After the conversation, the claimant appeared angry, was red faced and it took another Captain 45 minutes to calm him down. Later that day he responded to a medical emergency call. He assisted another fireman loading a man onto a stretcher, and removed him from the building and into the ambulance. Witnesses testified that the claimant did not appear well. The claimant then went back to the station and was using the treadmill at which time he looked pale, ashen and sweaty. There was also testimony that the claimant was having bad indigestion. A paramedic for the fire department testified that looking grey and having indigestion are signs of undergoing a heart attack. The claimant arrived home at 7:00 P.M., and at around 4:00 A.M. he went into cardiac arrest and was pronounced dead soon thereafter. The Commission found that the events of October 5, 2004 resulted in an increased demand on the claimant's heart, which culminated in ischemia, which deteriorated to heart failure in the hours leading up to his death. Therefore, the claimant's widow was entitled to benefits as the claimant did sustain an accident arising out of and in the course of his employment.

HOLDING: The Court noted that in this case the claimant only had to prove that his work was a substantial factor in causing the heart attack. The Court noted that Dr. Schuman testified on behalf of the claimant, and opined that the claimant's work activities on October 5, 2004 were the prevailing factor in his cardiac arrest. Dr. Thompson, the employer's medical expert, testified that the claimant's job duties were not a substantial contributing factor in causing his death. The doctor noted that according to studies, heart attacks are only related to a firefighter's work activities if they occur within one hour of extreme exertion. The Court noted that the Commission chose to rely on Dr. Schuman's opinions and the evidence supports the Commission's conclusion that the claimant suffered an accident in the course of his employment and his employment was the substantial factor in his cardiac arrest. Therefore, the Court affirmed the Commission's Award of benefits.

[Editor's Note: Please note that this is an old law case and therefore the claimant only had to prove that his job duties were a substantial factor in causing the heart attack. However, please note Dr. Schuman did testify that the claimant's job duties were the prevailing factor in causing his heart attack. Therefore, it is possible this case would come out the same way under the 2005 Amendments.]

To Win a Retaliation Suit Claimant Has to Prove that Exercising His Rights Under Workers' Compensation Was the SOLE Reason for His Termination

Templemire v. W&M Welding, Inc., Case No. WD74681 (Mo. App. 2012)

FACTS: On October 10, 2005 the claimant began working for the employer and on January 9, 2006 he sustained an injury to his foot and received benefits. During his employment the claimant only had one disciplinary write-up which occurred after his injury. On November 26, 2006 Gary McMullin, the owner of the company, received a request from a customer to have a railing painted and ready to pick up by 4:30 that afternoon. Before the railing could be painted it had to be washed. Therefore, the claimant's supervisor assigned him to make various deliveries and he returned at 1:50 P.M. Before reaching the wash bay he stopped to rest his foot, at which time he was approached by the employer, Mr. McMullin and fired because the rail had not been completed. The claimant asked why he was fired and he was told that he wanted the railing done

and he hadn't washed it. The claimant called the insurance company who then called the employer to discuss the claimant's termination. Mr. McMullin advised that he told the claimant to wash some parts, he refused and therefore he was fired. They discussed the claimant's need for breaks and Mr. McMullin advised that the claimant was milking his injury. The claimant then filed a lawsuit against his employer alleging retaliation.

HOLDING: At a trial, Mr. McMullin testified that he fired the claimant for insubordination. The claimant put on evidence showing that Mr. McMullin had previously referred to injured employees as whiners, and there was a witness that had previously been an employee of Mr. McMullin, who filed a work comp claim and was later terminated. He also pointed to an employee who had multiple disciplinary write-ups and a drug problem; however, he had not been terminated. Furthermore, the type of disciplinary write-up the claimant received after his injury was not a type of violation for which other employees had received write-ups. At the trial the jury found in favor of the employer and the claimant appealed. The Court of Appeals confirmed the decision of the trial court, noting that the jury instruction was in line with the law. The jury instruction read that the exclusive cause of the claimant's discharge was his filing of a workers' compensation claim. The Court looked to prior cases and confirmed that the claimant has to prove that the sole reason he was fired was because of exercising his rights under the Act.

Employer Not Insurer Has Right to Direct Treatment

Demore v. Demore Enterprises, Inc. and America First Insurance Company, Case Nos. SD32350 and SD32362 consolidated (Mo. App. 2013)

FACTS: Herschel and Doris Demore, and their daughter Delores, worked for the family business, Demore Enterprises. Delores got a call at the employer's office during business hours reporting vandalism of one of their nearby properties. All three of the Demores left the office and headed to the property, all in Herschel's personal vehicle. In route they were injured in a car accident. Doris Demore filed for workers' compensation after the insurer refused benefits and medical treatment, and the ALJ awarded temporary and permanent total disability benefits, past medical expenses and future medical treatment. The ALJ also opined that the "employer/insurer" waived its rights to select the claimant's medical providers for future medical care. The Commission affirmed the Award in part. The Commission reversed the ALJ's decision that the "employer/insurer" waived its right to control future treatment. The Commission noted that the general rule still applies and the "employer/insurer" maintains control over the selection of the claimant's future medical providers.

HOLDING: The Court, in essence, agreed with the Commission's award noting that the "employer/insurer" did not waive its right to direct treatment. However, it did note that pursuant to Statute it is actually employers alone, not insurers, that have the right to direct medical treatment. Therefore, the result in this case was that the claimant, who was the employer, was able to direct her own treatment.

Claimant Has to Prove Employer Not Prejudiced By Lack of Notice Before Burden Shifts To Employer to Prove Prejudice

Aramark Educational Services, Inc. et. al. v. Leotha Faulkner, Case No. ED99439 (Mo. App. 2013)

FACTS: On January 29, 2010 the claimant slipped and fell on black ice while walking between two buildings on Washington University's campus, where she was working. She did not immediately report the incident to the employer, as she did not believe she was hurt. Ten days later she noticed swelling and sought treatment on her own. At this time, she again did not report an injury to her employer. She underwent unauthorized surgery on April 8, 2010. Prior to her surgery, she did report her injury to her employer on March 31, 2010, two months after her injury at which time the employer offered medical treatment. However, she denied the offer since she already had scheduled surgery. The claimant then filed a Claim and at a hearing the ALJ denied the claimant benefits on the grounds that she failed to provide proper notice of the injury. On appeal, the Commission reversed the ALJ's decision, and awarded benefits. The employer appealed, alleging the claimant should be denied all benefits because she failed to give the employer timely notice.

HOLDING: The Court noted that the employer has the burden of establishing any affirmative defense which includes statutory notice. Once the employer establishes a lack of timely written notice, the burden shifts back to the claimant. The claimant must then establish that her failure to give timely written notice did not prejudice the employer. A claimant can prove lack of prejudice in one of two ways. First, if the claimant offers substantial evidence that the employer had "actual knowledge" of the injury, there is no need for written notice. If this is the case, it is assumed that the employer was not prejudiced and the burden then again shifts to the employer, who has to show prejudice.

The second way a claimant can prove lack of prejudice is presenting actual facts showing that the employer was not prejudiced. The Court noted that in light of the fact that it was undisputed that the claimant failed to provide employer with proper notice, it is her burden to prove lack of prejudice. The Court found that the claimant did not provide any evidence supporting that the employer was not prejudiced. The Court noted that the Commission equated the employer's admission that the claimant's injury occurred in the scope of her employment with admission that it was not prejudiced. The Court noted that admission of a claimant's injury did not relieve the claimant of her duty to establish a lack of prejudice. The Court noted that, basically, the Commission shifted and placed the burden on the employer prematurely, as the claimant did not meet her burden. The Court further noted that all cases which have shifted the burden to an employer to prove prejudice, where there was untimely notice, have required the claimant to first provide evidence of no prejudice to both the employer's investigation and the employer's need to provide medical treatment to the claimant to minimize disability. The Court found the claimant did not prove any evidence of lack of prejudice. Therefore, the Court reversed and remanded the decision of the Commission.

Widow Entitled to Entire Benefit Amount For Two Years When Remarry

Ash v. Millennium Restoration and Construction, Case. No. SD32381 (Mo. App. 2013)

FACTS: The claimant was fatally injured when he fell down an elevator shaft while working for the employer. He was survived by his spouse and their two young children. On January 21, 2009 the Commission awarded weekly benefits in the amount of $742.72. The Award allocated $495.15 per week to the children and $247.57 per week to the spouse. The spouse remarried on December 9, 2011. On October 3, 2012 the Commission issued a decision modifying its previous Award based on the Statute, which grants a spouse a remarriage benefit equal to the entire death benefit for two years. Therefore, the spouse was awarded $77,242.88, which represented the weekly benefit of $742.72 x 104 weeks. The employer appealed, arguing that the remarriage benefit should have been calculated only using the portion of the weekly benefits that was allocated to her, in this case, $247.57.

HOLDING: The Court noted that the issue in this case was whether a spouse that remarries receives the entire death benefit or only the portion of the death benefit that was initially awarded to the widow as the surviving spouse. The Court noted that strict construction is used to interpret the Statute and that §287.240 does not contain any language which expressly indicates that the remarriage benefits should be calculated based on only the amount of the weekly death benefit initially given to the remarrying spouse. The Court noted that if the legislature intended for the spouse to only receive the part of the benefits that was initially awarded to her, specific language would have been added to the Statute. Therefore, the Court affirmed the Commission's decision that the widow was entitled to a lump sum of $77,242.88.

Claimant Assaulted and Killed By Boyfriend at Work Found Not Compensable and Parents Could Pursue Wrongful Death Suit against Employer

Flowers v. City of Campbell, Missouri and William Riley, and Dolgen Corp. d/b/a/ Dollar General Stores, and Billie Gage, Case No. SD31440 (Mo. App. 2012)

FACTS: The parents of the employee shot to death by her boyfriend while she was at work at the employer's store brought a wrongful death action against the employer, store manager, city and police officer. The employer filed for summary judgment arguing that workers' compensation was the exclusive remedy because the death arose out of and in the course of the employment because the employee was a victim of unprovoked violence or an assault while at work. The trial court granted summary judgment and the employee's parents appealed.

HOLDING: The Court of Appeals reversed the summary judgment stating that the employee's assault was not compensable. The Court noted that although the assault on the employee was unprovoked and unjustified, her injuries did not arise out of her employment because the assault was directed at her for purely personal reasons. Therefore, the employee's parents could proceed with the wrongful death suit.

Commission Has Statutory Authority to Approve Settlement

Nance v. Max & Electric, Inc., Case No. WD74942 (Mo. App. 2012)

FACTS: An ALJ found that the claimant was permanently and totally disabled as a result of an occupational disease he sustained at work and was awarded lifetime benefits. Thereafter, the parties entered into an agreement to commute the claimant's PTD benefits into a lump sum settlement of $181,434.24. The agreement was executed by the parties and the attorney for the employer sent the agreement to the Commission for approval on October 27, 2011. Later that afternoon the claimant died of causes unrelated to the work injury. When the employer learned of the claimant's death, it filed a Motion to Withdraw the agreement. However, the claimant's surviving wife moved to have the agreement approved. The Commission entered an Order denying the request to commute and denying the claimant's spouse's request to approve the settlement agreement, finding that it did not have the authority to approve the agreement because the value of the claim, once the claimant had died, was zero.

HOLDING: The Court of Appeals held that the Commission did have the statutory authority to consider the settlement agreement and under the Statute, the Commission was required to approve the settlement unless it was procured by fraud or undue influence, or was against the rights of the parties. The Court reversed and remanded the case to the Commission with instructions to approve the agreement.

Attorney's Fee Lien Has Priority Over Department of Social Services Lien

Lake v. Department of Social Services, Case No. WD74306 (Mo. App. 2013)

FACTS: Attorney Lake represented the claimant in a workers' compensation claim. The claim was tried before an ALJ on stipulated facts between the claimant and his employer. They agreed to 38% PPD to the body, and that the claimant had incurred medical expenses in the amount of $45,001.73. The Missouri Department of Social Services had filed a lien in that amount to recover funds that Medicaid had paid for the claimant's treatment for the work injury. The employer stipulated that they would issue payment in that amount directly to the Missouri HealthNet Division to resolve the lien.

HOLDING: The Commission entered an Award which included a 25% attorney's fee specifically on the medical expenses. The Commission noted that this 25% fee applied to the amount the employer paid to the Department of Social Services (Department). Since the employer paid the entire amount of the lien to the Department, Lake was to recover the portion of his lien directly from the Department. Lake then demanded payment from the Department which rejected his claim. Lake brought a civil suit against the Department for his attorney's fees, and the Circuit Court entered judgment in favor of the Department. The Court of Appeals reversed, holding that an attorney's fee lien, by Statute, has priority over the Department of Social Services liens for Medicaid reimbursement.

Employer Not Responsible For Unauthorized Treatment Because Claimant Did Not Ask For Treatment

In **Rainbolt v. Audrain Medical Center**, **Injury No. 09-002662**, an ALJ determined that the claimant sustained a compensable injury. The ALJ awarded past medical expenses incurred in the course of her treatment with Dr. Brockman, a physician that she chose to go see on her own. The Commission reversed this aspect of the ALJ's Award in that it found that the claimant did not ask the employer to furnish her with any psychiatric treatment prior to seeing Dr. Brockman, and there was no evidence that the employer had notice of the claimant's need to see a psychiatrist and thereafter failed to furnish treatment. The Commission noted that this was not a case wherein the claimant was forced to see her own provider after the employer denied the claim. Therefore, the employer was not liable for the charges incurred for treatment with Dr. Brockman because the claimant sought treatment on her own and it was at her own expense.

Fall on Stairs Found To Be Compensable Because Had to Use Stairs to Access Tower

In **Morris v. Curators of the University of Missouri**, **Injury No. 11-021524**, the claimant had retrieved a patient's cell phone from the ground floor of the hospital and was taking it to the 5th floor of the ICU tower, when she was walking up the stairs at which time she fell forward on the stairs and injured her low back. It was noted that in order to get to the ICU tower she had to use the stairs. In its Answer, the employer admitted the claimant sustained an accidental injury. There was no request to file an amended Answer denying the accident until approximately one hour into the hearing. Therefore, the ALJ found at the hearing that the employer had admitted that the claimant sustained a compensable accident and injury.

The ALJ went on to note that assuming that the issue had been properly and timely raised, it was clear that the claimant did indeed sustain a compensable accident and injury arising out of and in the course of her employment with the employer. The ALJ noted there was an unexpected traumatic event, as the claimant fell on the staircase. The event was identifiable by a specific time and place on the date listed, and in the location noted. The claimant had immediate symptoms of the injury, and the hazard or risk of falling on the stairs was a risk or hazard related to the employment as claimant could not access the 5th floor of the ICU tower without using the stairs. This was a temporary ward, and therefore the Judge found that the matter was in fact compensable, and the employer/insurer was to provide medical treatment.

Rotator Cuff Tear Related to Prior Injury Not Work Injuries

In **McAndrew v. Metro Materials Inc., Injury No. 09-073619**, the claimant, a teamster driving a cement truck, exited his truck and while walking into the plant he fell and hit his right arm and shoulder on a concrete slab on September 15, 2009. He felt massive pain throughout his right side. Three months prior to his injury, on June 1, 2009, he fell off a bicycle in his yard at home and landed on his right side. Thereafter, he began treating with a chiropractor and was diagnosed with a rotator cuff strain. He continued to treat for his shoulder, and on September 8, 2009, a week prior to his injury, he was seen by his family physician at which time he reported continued shoulder pain and weakness, along with difficulty lifting anything. It was noted in the records

that the claimant believed that his rotator cuff was torn because he was having so much trouble when he lifted his arm. The claimant denied telling his doctor this. In any event, prior to his injury an MRI was ordered and scheduled for a day after the claimant's work injury. The MRI showed a complete rotator cuff tear involving the entire supraspinatus tendon and superior fibers of the subscapularis tendon, with significant retraction.

On September 22, 2009, a week after the first work injury, the claimant had another work accident when he stepped out of the cab of his truck, he lost strength in his right arm and fell hitting his right shoulder on the ground. After this injury he was unable to move his arm. He underwent surgery with Dr. Fagan who opined that the cause of the rotator cuff tear was most likely the claimant's September 22, 2009 injury. Dr. Wayne, the employer's expert, opined that the claimant's shoulder pathology and symptoms were due to the June 2009 fall which was prior to both of the work accidents. The ALJ found that the claimant failed to meet his burden of proving that the work accidents were the prevailing factors in causing his rotator cuff tear. The ALJ found Dr. Wayne more credible. The ALJ also did not find the claimant credible in that he testified that he only had one visit to the chiropractor and his shoulder was fine, and the medical records did not corroborate his testimony. The Commission affirmed the ALJ's decision.

Carpal Tunnel Compensable Because No Evidence that Condition Was Caused By Anything Other Than Job Duties

In **Lane v. City of Independence, Injury No. 11-014662**, the claimant was a records clerk at the Independence Police Department and alleged carpal tunnel syndrome as a result of her job duties. The claimant was referred out for evaluation, prescribed splints and provided an ergonomic layout of her work station. Her symptoms continued and she was referred to Dr. Rosenthal, who believed that she had carpal tunnel but it was not work-related. Dr. Stuckmeyer, the claimant's expert, opined that the carpal tunnel was a result of her job duties. The ALJ noted that claimants seeking benefits for an occupational disease must present "substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life." An occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The ALJ further noted the claimant must also establish the probability that the occupational disease was caused by work place conditions. The ALJ noted that there was no evidence introduced that anything but repetitive typing all day long for 5 years at the police department caused the claimant's carpal tunnel syndrome. The ALJ determined that the competent evidence supported a determination that the claimant's work for the police department was the prevailing factor that caused her carpal tunnel syndrome, and the employer shall provide medical treatment to cure and relieve the effects of the injury. The Commission affirmed the ALJ's Award.

Horseplay Found Compensable and Claimant Awarded Medical Treatment and Disfigurement Equal To Cost of Medical Treatment

In **Johnson v. City of Carthage, Injury No. 11-054387**, the claimant, a lifeguard, was injured while engaging in an incident in which another employee was shooting him with a squirt gun filled with soda. The claimant was keeping the other employee at bay by holding a chair with its legs in the air facing the other employee. The other employee grabbed the chair and pushed it towards the claimant, at which time his teeth were chipped. The employer alleged horseplay,

which would not be compensable. The claimant testified that earlier he had used a squirt gun filled with water to shoot the other employee, and that this type of activity was a regular occurrence for the 7 weeks of his employment with the City of Carthage. The manager of the pool and supervisor of the lifeguards would tell the participants who were using the squirt guns to knock it off. However, the activity continued. No one was disciplined for using squirt guns.

The ALJ looked to *Wisely v. Sysco Foods*, 972 S.W.2d 313, wherein the Court held that if an injury was sustained during horseplay, which had become an incident or risk of employment, then that accidental injury was compensable even if the party was the aggressor or voluntary participant in the activity. Here, the ALJ found that the activities which resulted in the ultimate accidental injury to claimant in this case were prevalent at the City of Carthage pool, where the claimant worked as a lifeguard and were an incident or risk of his employment. Therefore, the ALJ concluded that the claimant was injured through activities which arose out of and in the course of his employment, and were the prevailing factor in causing both his condition and his disability.

The ALJ awarded both past and future medical treatment for his tooth, as well as the loss of one tooth or 1.25 weeks of disability, which was agreed on by the parties. The claimant also sought disfigurement for loss of a tooth. The ALJ noted that Missouri Regulations provide that disfigurement shall be allowed for the loss of a front tooth, which was the injury in this case, in an amount sufficient to cover the reasonable costs of the artificial teeth. The ALJ found that the claimant was entitled to disfigurement in the amount of $770.00, the cost of the treatment and artificial tooth. The claimant did argue that he would be entitled to additional disfigurement in the event that replacement dental devices were required as future medical benefits. However, the claimant provided no basis for that assertion, and the ALJ only ordered disfigurement to the extent of the past medical provided. The Commission affirmed the decision of the ALJ.

Commission Reversed Decision of ALJ Denying Benefits for Carpal Tunnel Syndrome

In **Harris v. Bi-State Development Agency, Injury No. 10-021927**, the claimant was 63 years old at the time of the hearing. She had worked for the employer for ten years as a van driver and alleged carpal tunnel syndrome as the result of her job duties. Prior to working for the employer she was diagnosed with diabetes, and was initially able to control the diabetes by diet, but eventually began taking oral medication. About the same time she started working for the employer she was also diagnosed with hypertension. She also struggled with obesity. The claimant drove up to 100 miles a day throughout the St. Louis metropolitan area. She noted that there was power steering in the van, but it was more difficult to steer than her car. She also had to assist passengers in wheelchairs, which required her to strap wheelchairs into the van. The claimant was sent to BarnesCare and the doctor concluded that the claimant's condition was not work-related. She sought treatment on her own with a hand surgeon and underwent bilateral carpal tunnel releases. Dr. Schlafly and Dr. Margolis testified on behalf of the claimant, noting that the claimant's work was the prevailing factor in causing her condition. Dr. Kaoo and Dr. Crandall testified on behalf of the employer, finding that the claimant's job duties did not cause her carpal tunnel syndrome. An ALJ found Drs. Kaoo and Crandall's opinions more credible than the opinions of Dr. Schlafly and Dr. Margolis, and that the claimant did not meet her burden to show that the carpal tunnel syndrome arose out of the repetitive work activities. The claimant appealed alleging that the ALJ erred in crediting the employers' experts over her experts.

The Commission reversed the decision of the ALJ, noting that the claimant's job duties did require firm repetitive grasping and repetitive stress to the flexor tendons and muscles of the claimant's forearms. The Commission adopted the opinions of Dr. Schlafly and Dr. Margolis, and found that the claimant's work was the prevailing factor in causing her bilateral carpal tunnel syndrome, as it appeared that the claimant's occupational disease had its origin in a risk connected with the employment, and appeared to have flowed from that source as a rational consequence. Therefore, the Commission found that the claimant sustained an occupational disease arising out of and in the course of her employment and the employer was liable for past medical expenses, TTD and PPD.

Commission Reversed ALJ's Award Denying That Rotator Cuff Was Due To Occupational Disease

In **Bowyer v. Mineral Area Community College/MACC, Injury No. 10-034774**, the claimant testified that he had worked for the employer for approximately thirty years, mostly as a maintenance supervisor, half supervising and half performing general maintenance tasks. The employer's witness disagreed and estimated that the claimant spent 75% of his time on supervisory or administrative duties. The claimant first noticed pain in his shoulder in early 2010 when plowing snow. He testified that in May 2010 he was very busy performing maintenance as they were getting the campus ready for graduation. On May 6, 2010 the claimant reported to his supervisor that he felt he hurt his shoulder. Dr. Milne opined that the claimant's job duties likely aggravated his condition, but were not the primary or prevailing factor in causing his condition, and therefore, the employer denied treatment. The claimant treated on his own with Dr. Ralph, who opined the claimant's job duties were the prevailing factor in causing a right rotator cuff tear for which the claimant underwent surgery. The ALJ denied the claim, concluding that the claimant failed to offer credible evidence that he sustained an occupational disease arising out of and in the course of his employment.

The Commission reversed the decision of the ALJ finding that Dr. Ralph's opinion was the most persuasive. The Commission noted that Dr. Ralph's credible findings demonstrate that the claimant sustained an occupational disease that appears to have had its origin in a risk connected with the employment and appears to have flowed from that source as a rational consequence. Therefore, the claimant sustained an occupational disease to his shoulder arising out of and in the course of his employment.

Personal Assault on Employer's Parking Lot Not Compensable

In **Brown v. George's Processing, Inc., Injury No.: 09-063503**, the claimant was going on a break to smoke when he was attacked by two aggressors. He was hit by a baseball bat swung by one of the aggressors, was placed in a choke hold and knocked out. The claimant admitted at a hearing that there was a personal disagreement between the aggressor and the claimant regarding his former girlfriend. There had been an earlier fight between the two which resulted in charges being filed against the claimant. The claimant admitted that the assault had nothing to do with his work at the employer. (Editor's note: It is not noted whether the aggressor was also an employee of the employer).

The ALJ looked to former case law, noting that an injury sustained by an injured worker is not compensable if an assault arose out of a personal matter unconnected with the claimant's work duties, and that private personal quarrels are not compensable. The ALJ noted that the changes to the Statute in 2005 did not in any way change the application of the assault doctrine. The ALJ noted that the claimant appeared to assert that there was some special hazard from the claimant's work location through testimony elicited that there were no cameras, nor was there any security, a fence or windows from which other workers could observe the parking lot where the claimant was assaulted. However, the ALJ noted that testimony also showed that there were numerous workers at the location who would transport materials at the mill using trucks and trains at various times. The ALJ noted that there was nothing inherent in the testimony that showed the claimant was exposed to a greater risk than that which he would have been exposed to outside of his work. The ALJ finally noted that the record as a whole proved only that the work place provided a locale for the personal assault, rather than exposing the claimant to any greater hazard at that location. Therefore, the claimant had not met his burden of proof and the claim was denied. The Commission affirmed the decision of the ALJ.

Claimant PTD Because Surveillance Was Not Persuasive Since Only Showed Limited Activity

In **Mark Dannenmueller v. Noranda Aluminum, Inc., Injury No. 03-001980**, the claimant injured himself while lifting a 90 pound block in 2003, sustaining a herniated disc at L5-S1, for which he underwent surgery. In 2004, the authorized physicians believed that the claimant was permanently and totally disabled. However, years later, the employer's experts, Dr. Cantrell and Dr. Coyle, viewed surveillance footage from 2006 and 2007 as well as 2009 and determined that the claimant was not permanently and totally disabled. The claimant's experts, Mr. England and Dr. Volarich, never reviewed the surveillance but on cross admitted that if the surveillance showed that the claimant was capable of repetitive activity their opinions could change. The ALJ viewed the surveillance and found that there was no evidence that the claimant needed to avoid any repetitive bending or operation of heavy equipment or needed limitations regarding squatting, walking, carrying, kneeling, lifting, or climbing. The ALJ determined that the claimant was not permanently and totally disabled.

The Commission disagreed, noting that the surveillance covered August 2006 - March 2007, and July 2009 - October 2009. From approximately 310 hours of surveillance the investigators only gathered 48 hours of video footage. The Commission viewed the surveillance footage which showed the claimant engaged in about 15 or 16 individual incidences of activities such as bending to pick up a garden hose, pulling weeds, riding an ATV, operating equipment such as lawn mowers and leaf blowers, and running to catch a dog. The Commission noted that during the entire period that the investigators followed the claimant, only about 5 days demonstrated him engaging in any activities spanning a time period over an hour. The longest period of activity was approximately two hours on October 1, 2006, when the claimant was mowing the lawn. The Commission further noted that the investigators did not capture any significant activity by the claimant 9 days after that date, which supported the claimant's testimony that he was "laid up" with back pain after engaging in activities such as those depicted on the videos. Therefore, the Commission found that the videos depicted only isolated moments over a lengthy period of time rather than anything approaching the demands of full-time employment. Despite the surveillance, the Commission found that the claimant was permanently and totally disabled.

Claimant's Live Testimony More Credible Than Employer's Affidavit

In **Ricky Blanchard v. Staples, Inc., Injury No. 10-051990**, the claimant alleged carpal tunnel syndrome as a result of his job duties. The claimant worked for the employer for 23 years and last worked as a shipping supervisor for 5 - 7 years. The claimant testified that his job duties as shipping supervisor involved both supervisory tasks and manual labor. The claimant testified at length with respect to his job duties at the hearing. The employer prepared an Affidavit describing his job duties and submitted it at the hearing. The ALJ found that the claimant failed to establish that his work was the prevailing factor in causing his carpal tunnel syndrome, and denied the claim.

The Commission reversed the decision of the ALJ, noting that the claimant testified that the list of the job duties prepared by the employer were incomplete, because they did not include all of the physical tasks that he performed on a daily basis. The Commission further noted that the employer did not present any live witnesses to rebut the claimant's testimony as to his job duties or to show that the employer's written description of his duties were more accurate than the claimant's testimony. The Commission found that the claimant's testimony was more persuasive than the Affidavit from the employer describing the claimant's job duties. The Commission also believed that the claimant's expert, Dr. Beatty, was more credible because he took into account all of the claimant's job duties and the employer's expert, Dr. Goldfarb relied on the employer's description of the claimant's job duties which was incomplete.

Claimant's Date of Injury Determines Whether Dependents Are Entitled to Benefits

In **Donald Busick v. Wilson Plumbing Company, Injury No. 06-110636**, a living claimant went to a hearing before an ALJ arguing that *Schoemehl* will apply to his claim and therefore his wife is entitled to permanent total disability benefits if he dies of a cause unrelated to the work injury.

[Editor's note: *Schoemehl v. Treasurer of State*, 217 S.W. 3d 900 (Mo. App. 2007), found that if a claimant dies from causes unrelated to the work injury, the claimant's dependants are entitled to continuing PTD benefits. *Schoemehl* was abrogated by an Amendment on June 26, 2008. The Courts have held that for *Schoemehl* to apply the Claim had to be pending between January 9, 2007 when *Schoemehl* was decided and when the Amendment abrogating *Schoemehl* took effect, June 26, 2008.]

The ALJ found that *Schoemehl* applied because his date of injury was September 26, 2006 and therefore his claim was pending in between January 9, 2007 and June 26, 2008. Therefore, the claimant's wife was entitled to PTD benefits in the event he dies of causes unrelated to the work injury. The employer appealed arguing that because the claimant did not file his claim until January 19, 2009, which was after *Schoemehl* was abrogated, the claimant did not have a claim for PTD benefits that was pending during the *Schoemehl* window. The claimant again argued that because his date of injury was November 26, 2006 *Schoemehl* applied. The Commission agreed with the claimant noting that the Court previously focused on the date of injury to determine whether the claimant's dependents may recover under *Schoemehl*. Therefore, the Commission affirmed the decision of the ALJ noting that *Schoemehl* did apply. However, in light

of the fact that the claimant was still living, the claimant's wife's right to receive benefits pursuant to *Schoemehl* remained contingent and could not be adjudicated at this time.

Plantar Fasciitis After 13 Hour Shift Found To Be Compensable Accident

In **Ricky Bisch v. St. Louis Area Insurance Trust, Injury No. 09-065775**, the claimant was a janitor and on June 27, 2009 he had to work an overnight shift stripping and refinishing floors in preparation for an important event on the employer's premises. No one was available to help the claimant perform this task, and he worked 13 hours on his feet. After he finished his job duties, he sat down for about 5 minutes and when he stood back up, he felt excruciating pain in the center of his right foot towards the heel. He hadn't noticed any pain in his foot over the course of his shift, and testified that he had been focused on completing the job and wasn't thinking about anything else. He reported his injury on Monday, since none of the supervisors were available over the weekend. The claimant requested treatment; however, he was advised that there was no response from workers' compensation. He began treating on his own and was diagnosed with plantar fasciitis. The claimant was eventually sent to Dr. Byler by the employer, who opined that the plantar fasciitis was not work-related. He underwent an unauthorized endoscopic surgery to correct the plantar fasciitis. Dr. Berkin testified on behalf of the claimant opining that the plantar fasciitis was work-related. The ALJ found that the claimant failed to meet his burden to demonstrate that an injury by accident occurred. The claimant appealed.

The Commission found that the facts satisfied the criteria in the Statute regarding an accident. The claimant suffered an unexpected traumatic event or unusual strain (working on his feet for 13 hours). The accident was identifiable by time and place (June 27, 2009, at the employer's premises). The claimant had objective symptoms (pain in the right foot) of any injury (plantar fasciitis) which was caused by a specific event (working on one's feet for 13 hours) during a single work shift. Therefore, the claim was compensable.

The employer also argued that the claimant did not prove that his injuries arose out of and in the course of his employment because the hazard or risk that resulted in the claimant's injuries was standing up after sitting down for 5 minutes, which was not a risk related to his employment. The Commission noted that it cannot view work place injuries in a vacuum so microscopically focused to ignore the reality of what actually happened to the claimant. The Commission found that the claimant's injuries resulted from the risk of working a 13 hour shift on his feet. Furthermore, the Commission found no evidence that would support a finding that workers would have been equally exposed to that hazard or risk outside the employment in normal unemployment life. Therefore, the claimant's injuries arose out of and in the course of his employment.

Claimant's Job Duties as EMT Caused Injury to His Back and Shoulder By Occupational Disease

In **Richard Yarbrough v. Rural Metro Ambulance, Injury No. 10-060138**, the claimant worked as an EMT from 1992 until 2011. His job duties included responding to the scene of a medical emergency, assessing the patient, providing emergency assistance and transporting patients. The claimant averaged 3 - 4 emergency calls per day, and he and his partner would have to pull a stretcher weighing 81 - 87 pounds out of the ambulance and carry or roll the stretcher to

the patient, and get the patient on the stretcher which involved significant physical strain. In 2002 the claimant underwent a lumbar laminectomy at L4-5 and L5-S1. He was released from care and returned to his normal job duties without restriction. In July 2010 he began to experience more severe pain in his right shoulder, right leg, right hip and low back. The claimant underwent authorized treatment for his right shoulder involving surgery and physical therapy for his low back. He was then sent to Dr. Colle for his back complaints. The doctor concluded the claimant's back problems were not work-related.

The claimant had a report from Dr. Woiteshek, who diagnosed traumatic internal derangement of the right shoulder and traumatic right sciatica with an L4-5 herniation, which was related to the claimant's job duties. The employer then obtained a report from Dr. Randolph, who opined that the claimant's pre-existing degenerative conditions were the prevailing factor in his condition, not his job duties. The Commission found the opinion of Dr. Woiteshek more pervasive and concluded that the claimant's conditions were work related and he was in need of additional treatment. However, the Commission did not agree with Dr. Woiteshek's testimony that the claimant was unable to work after July 1, 2010. The Commission noted that even on cross-examination the doctor admitted that the evidence showed that the claimant continued to work for the employer up through March 2011. Therefore, the claimant was not entitled to TTD back to July 1, 2010.

Claimant's Deposition Testimony Could Not Be Used In Lieu of His Live Testimony

In **Ruben Walker v. Bon Appetit Management**, **Injury No. 02-144836**, the claimant's case was set for numerous pre-hearings and mediations between 2005 and 2013. Notices were sent to the claimant but returned to the Division as "unable to forward." The claimant's case was set on the show cause docket on December 6, 2011, and the notice was again returned as "unable to forward." The claimant's attorney and the employer's attorney appeared and since the claimant did not appear, the Judge dismissed the case with prejudice for failure to prosecute. The claimant's attorney filed an Application for Review alleging the case was dismissed in error. The Commission set aside the Order of Dismissal and reinstated the claim finding no record was made at the show cause hearing, and the Commission did not have any evidence to review.

The case was set for a hearing on February 6, 2013, and the claimant did not appear. The claimant was deposed in 2007 and his deposition testimony was admitted into evidence without objection. The claimant's attorney contended that his deposition testimony in lieu of his live testimony was sufficient to establish the elements of his case. The ALJ looked to Chapter 492 which allows a deposition to be admitted into evidence instead of live testimony if: the deponent is dead, if he is unable to give testimony by reason of mental incapacity, he was rendered incompetent, or if he was removed from the hearing. The ALJ noted that in the claimant's case none of these instances were present; therefore the deposition could not be used instead of the claimant's live testimony. Furthermore, the ALJ noted that the claimant's deposition was taken in August 2007; therefore it was outdated and could not be relied on to establish the claimant's current condition. Therefore, the deposition was not sufficient to establish any elements of his case and the case was dismissed for failure to prosecute.

Fall Down Step Not Compensable Because Not Hazard or Risk Related to Employment, Claimant Simply Missed Step

In **Cathy Werner v. Madison Warehouse Corp., Injury No. 08-122998**, the claimant fell down stairs at a restaurant while out of town. She testified that she was meeting co-workers at a restaurant to discuss the work to be done the next day because she and her co-workers were busy during the day. The dinner meeting was the only time available to discuss what needed to be done the next day. She explained dinner meetings were a frequent and regular aspect of her duties when she was working out of town for the employer. The ALJ denied the claim finding that the claimant did not sustain an accident during a single work shift.

The Commission agreed that the claim should be denied. However, it found that the claimant did in fact sustain an accident pursuant to Statute, but the claimant's fall did not come from a hazard or risk unrelated to the employment. The Commission noted that the Courts have stated that a claimant must prove a causal connection to the work activity in order to prove that the injury arose out of and in the course of her employment. Here the claimant's injuries resulted from the risk of descending a single step at a restaurant, while the claimant was out of town traveling for work. The claimant testified that she simply didn't see the step and she fell. She did not identify any abnormally hazardous aspect of the step as contributing to her fall. The Commission noted she was certainly engaged in activities related to her work in that she was exiting a restaurant where she had gone for a business dinner. However, it is not enough that a claimant's injury occurs while doing something related to or incidental to the claimant's work. The Commission noted that absent any evidence suggesting that the step at the restaurant was an abnormal hazard or posed some particular danger to the claimant, there was no basis for a conclusion that the claimant's work exposed her to a greater risk or hazard than she would otherwise face while descending a step in her normal non-employment life. Therefore the claimant's injuries did not arise out of and in the course of her employment and the claim was denied.