

Court Will Not Substitute Its Judgment on the Issue of Expert Credibility, Even if It Would Have Reached a Different Conclusion than Commission

Watson-Spargo v. Treasurer of the State of Missouri, Custodian of the Second Injury Fund (Mo. App. 2013).

FACTS: The claimant sustained a work injury in 2009 and settled with the employer. Prior to that injury she held various jobs, suffered several injuries and maladies, and experienced family tragedies. It was noted the claimant had some college education and was 38 years old at the time of the hearing. The claimant's experts opined that she was totally disabled. The ALJ found that the Fund's expert, Mr. Swearingin was more credible and accurate, and thus found that the claimant was only partially disabled. The Commission affirmed the decision of the ALJ. The claimant appealed.

HOLDING: The Court noted that there was ample evidence to support a finding that the claimant was capable of working in the open labor market. The Court noted that the ALJ found that Mr. Swearingin's opinion was more credible and accurate than that of the claimant's expert, and the Commission affirmed that opinion. The Court further held that given the 'Alexander Rule', the Court was not free to disregard this credibility determination. The Court noted that according to *Alexander*, the Commission, not the Court, determines credibility of expert testimony. The Court further noted that it would not substitute its judgment on the issue of what expert is more credible, even if it would have reached a different conclusion.

Commission Cannot Commute Weekly Benefits to Lump Sum Unless It's in the Best Interests of Claimant or Claimant's Dependents

Keaney, as personal representative of the estate of Robert Keaney, Jr. v. Treasurer of the State of Missouri (Mo. App. 2013).

FACTS: In 1995 the claimant was awarded PTD benefits from the Fund. The Commission awarded an attorney fee of 25% and awarded Robert Keaney, (Editor assumes this is the claimant's prior attorney who withdrew and filed a lien) 33.75% of the attorney fees. The Fund paid the PTD benefits from 1995 - 2012. Attorney Keaney passed away on October 26, 2012. The attorney's estate filed a Motion to Commute Periodic Payments to Present Day Value Lump Sum Payment with the Commission. The Commission ordered the Fund to pay a lump sum of \$17,251.42 to the estate for the remainder of the attorney's fees due to the attorney pursuant to the 1995 Award. The Commission noted that pursuant to Statute the Commission can order that attorney fees be paid to an attorney in a lump sum or in installments. The Fund appealed.

HOLDING: The Fund argued that the Commission erred in ordering attorney fees to be paid in a lump sum because it lacked the statutory authority to amend the Award of attorney fees, and that the underlying Award became final in July 1995 and cannot be revised. The Court agreed.

Under the Statute, the Commission may allow reasonable attorney fees as a lien on compensation and order the amount thereof paid to the attorney in a lump sum *or* installments. The Court noted that in this case the attorney was awarded fees in installments. Since the attorney did not appeal the Award in 30 days, the Award was final. Therefore, the Court found that the

Commission did not have the authority to order the Fund to commute the fees to a lump sum payment to the attorney's estate. The Court noted that in some circumstances the Commission does have the authority to commute an Award, such as when it is in the best interests of the claimant or the claimant's dependents. However, that part of the Statute does not apply to this case because there is no benefit to the claimant or his dependents. Therefore, the Commission did not have the authority to commute benefits paid in installments to the attorney to a lump sum payment.

Workers' Compensation is Exclusive Remedy For Claimant Against Statutory Employer

Shaw v. Mega Industries Corp (Mo. App. 2013).

FACTS: At the time of his injuries, the claimant was the owner of RLS which was in the business of excavating and hauling materials. RLS was retained by Mega Industries as a subcontractor. The claimant was injured when a telephone booth that was being moved by a Mega Industries employee fell onto him. He filed a workers' compensation claim against RLS and Mega Industries. The Division approved a settlement between RLS and the claimant. The parties stipulated to a full and final settlement closing out all claims for the claimant's injuries which happened on the date of injury. Neither Mega Industries nor its insurer paid any compensation on the claim.

After settlement of his workers' compensation claim, the claimant filed a suit against Mega Industries and one of its employees alleging their negligence caused his injuries. The case was dismissed based on summary judgment, due to the fact that Mega Industries was the claimant's statutory employer and that his common law claims against Mega Industries were therefore barred by the exclusive remedy provisions of workers' compensation law. The claimant appealed.

HOLDING: The Court found that the issue in the case was whether the claimant's sole remedy against Mega Industries was through workers' compensation, even though Mega Industries paid no portion of the workers' compensation benefits the claimant received. The Court noted that Mega Industries was subject to liability to furnish compensation under workers compensation as a statutory employer. The Statute merely provides Mega Industries with a defense to liability in the specific circumstances of this case because the claimant's immediate employer, RLS, was insured. The immunity provided has never been interpreted to require that the injured worker actually receives workers' compensation benefits from the employer. If the injury comes within the definition of the term 'Accident' then it is included within the exclusivity provisions of the Statute. Mega Industries does qualify as an employer under the Act, even though it paid the claimant no workers' compensation benefits. Therefore, Mega Industries is immune from common law actions and the summary judgment was upheld.

At least One Disability has to Meet the Threshold for Fund Liability, however, Once Threshold is Met All Pre-existing Conditions are Considered when Determining the Amount of the Fund's Liability

Treasurer of the State of Missouri, Custodian of the Second Injury Fund v. Witte, Salviccio, Dyson and Buhlinger (Mo. S.Ct. 2013).

FACTS: These cases were all heard at the Court of Appeals level. The Court concluded that the Workers' Compensation Statute makes no allowance for combining body as a whole injuries together or combing a body as a whole injury with a major

extremity injury. In essence, the Court of Appeals found that in order for the Fund to be responsible for pre-existing disabilities, a prior disability has to meet the threshold of 12.5% of the body, or 15% of a major extremity.

HOLDING: The Supreme Court upheld the opinions of the Appeals Courts. The Court noted that the Statute has to be applied using strict construction. Therefore, considering the clear and ambiguous language of the Statute, the Court found that the Statute does not permit the combining of multiple permanent partial disabilities to meet the threshold for the Fund's liability. Therefore, the Statute requires each disability to be measured against the thresholds individually. However, once the threshold is met for Fund liability, all pre-existing disabilities are considered when determining the amount of the Fund's liability.

Therefore, in *Salvicio v. Treasurer*, the claimant had pre-existing permanent partial disabilities of 12.5% of the body referable to diabetes, 4% of the body referable to a 1999 hernia, 3.5% of the body referable to a 2005 hernia and 50% of the little finger. It was noted that the claimant's disability due to his diabetes meets the 50 week threshold to trigger the Fund's liability. Since that threshold was met, all of the claimant's disabilities should be considered in calculating the extent of the Fund's liability.

Pro Se Claimant Must Follow Evidentiary Rules of Evidence At Hearing

Burchfield v. Renard Paper Company (Mo. App. 2013).

FACTS: On September 7, 2007 the claimant was driving backwards on a pallet jack when he backed into a stack of empty pallets, one of which struck him on the back of the head. He had no immediate pain, went home and fell asleep. The next morning he had swelling on the side of his head and could not hear. He reported the injury to the employer, but was not treated by a company doctor. He filed a Claim pro se and went to a hearing before an ALJ. He requested admission of medical records, and the employer objected on the grounds that the records contained hearsay and lacked foundation. The ALJ sustained the employer's objection and denied admission of the records. The ALJ held that the claimant failed to present clear and convincing evidence of medical causation and denied the claim. The Commission affirmed the decision of the ALJ. The claimant appealed arguing that the ALJ erred in declining to admit medical records because the Statute states that all proceedings before the ALJ should be simple, informal in summary and without regard to the typical rules of evidence.

HOLDING: The Court noted that pursuant to Statute medical records in workers' compensation hearings are admissible without the strict rules of evidence regarding foundation if the proponent of the evidence, here the claimant, provides 60 days notice to the employer that he intends to admit records into evidence. Since the claimant did not provide the employer with such notice, the ALJ was correct in not admitting the medical records presented by the claimant. Therefore, the ALJ did not err in denying admission of the records.

Employee Found Not to Be Aggressor and Claim Compensable

In *Reis v. Shade Tree Service Company, Injury No. 11-062983*, the claimant was a foreman and his job duties included tree trimming and some paperwork. He was working with another employee in a park. The claimant's supervisor, Ethan Taylor, had come to the site on numerous occasions to check on the progress. He returned to the site and the claimant and the other employee had finished their work for the day and were sitting in the work truck finishing paperwork.

There were three different versions of what then took place between the claimant and Mr. Taylor. In all three versions, it was noted there was a verbal altercation about the claimant sitting in the truck outside of a customer's house, which eventually led to a physical altercation, which ended with both the claimant and his supervisor on the ground. There were inconsistencies as to how the claimant exited the truck. The claimant testified that he was getting out of the truck when Mr. Taylor grabbed him and slammed him on the ground. The witness testified that the claimant climbed over him and went quickly head first out of the truck. Mr. Taylor testified that the claimant lunged over the other employee's seat and Mr. Taylor stepped back and stumbled and the claimant was suddenly in his face. There was evidence that Mr. Taylor had a history of instigating verbal and physical altercations with subordinates. The ALJ found that the claimant was the aggressor in the altercation and pursuant to the Statute regarding assaults in the work place, the ALJ denied compensation.

The Commission reversed noting that although there was considerable conflicting testimony regarding the circumstances resulting in the claimant's injury, and although the claimant certainly could have conducted himself in a more appropriate manner, considering all of the testimony, the Commission concluded that there was no real evidence that either the claimant or his supervisor demonstrated any intent to harm each other. Therefore, the injuries to the claimant and his supervisor were the unintended consequence of a dispute that grew out of tension inherent in the nature of the performance of their work duties. The Commission found that the neutral witness's testimony was relevant in that he testified that no punches were thrown. Also both parties apparently disengaged when it became apparent that someone was injured.

The Commission further noted that because neither the claimant nor the claimant's supervisor intended any violence in the course of their physical altercation, the claimant's injuries were not caused by an assault against an employee. Therefore, the Commission found no need to apply the assault doctrine. The Commission reversed the ALJ's decision, and the claim was deemed compensable.

Claimant's Repetitive Motion Claim Denied Because Long History of Back Pain and Claimant Only had Back Intensive Job Duties for One Month Before Seeing Doctor

In *Reno v. DaimlerChrysler*, Injury No. 05-144364, the claimant alleged an occupational disease to her back. She began working at the employer in 1983. She worked in Alabama, which manufactured electrical panels for vehicles. There was no evidence that she did any work which involved heavy lifting or excessive use of her back. In 2005 the claimant moved to St. Louis and worked in the assembly plant, where she worked until October 19, 2006. The claimant's job title was a floater. Her first job involved putting rear quarter panels on a rack. There were 19 panels weighing 23 pounds, and she had to step up on a rack that was one foot off the ground and pick up a panel, back out of the rack and then set it down. She had to load 25 - 50 panels per hour. She worked 8 - 9 hours a day, with 12 minute breaks in the morning and afternoon, and 30 minutes for lunch. After just one month as an assembler she alleged that her job duties caused the condition in her back.

There was evidence that the claimant had a long history of back problems prior to moving to St. Louis. She was first seen by physicians in 2006 and reported a history of low back pain on and off for 14 years. She was diagnosed with a herniated disc in 2006, and eventually underwent surgery which was unsuccessful. The ALJ concluded that the claimant failed to meet her burden of proving that her back conditions were causally related to her work for the employer. The ALJ found that Dr. Irvine, the employer's expert, was persuasive in that the conditions to the claimant's lumbar and cervical spine were a result of degenerative changes and the aging process. The ALJ further noted that the claimant had a long standing history of back

problems that went back to the early 1990s, which was prior to when she began working in St. Louis in 2005. Furthermore, the claimant first reported her back complaints to Dr. Allen on April 28, 2005, slightly one month after she started working in St. Louis for the employer. The Commission affirmed the decision of the ALJ.

Despite Claimant's Pre-existing Conditions, Fusion Found to be Necessary to Cure and Relieve Claimant From Effects of Work Injury

In *Holeman v. Hussman Corporation*, Injury No. 09-074541, the claimant worked for the employer for over 30 years. In 1996 he sustained a work injury to his cervical spine and received authorized treatment from Dr. Kennedy, who performed a fusion at C4-5. He was given permanent restrictions and settled his claim for 20% PPD. He did have some ongoing pain. However, from 1997 until August 2009 he never missed work due to any neck or radicular pain, he passed medical evaluations in connection with his duties for the U.S. National Guard, and was able to engage in hobbies. The claimant continued to work for the employer and on August 24, 2009, he was moved to a different position, which was repetitive in nature and violated Dr. Kennedy's restrictions from the 1996 work injury. The claimant advised his supervisor that he was unable to do the job and it violated his restrictions. The supervisor's response was 'It is what it is.' The claimant thereafter felt a sudden and sharp pain in his neck and advised his supervisor of the same. He was advised to continue working. The claimant went to the nurse and was advised that he would need to see his own doctor.

He treated conservatively and eventually Dr. Kennedy performed a fusion from C4-C7. Dr. Kennedy opined that the August 2009 accident was the prevailing factor in causing the current cervical spine condition, and the surgery was reasonable and necessary to cure and relieve the effects of his injury. Dr. Kitchens testified on behalf of the employer, and found that the claimant's work activities in August 2009 caused a temporary aggravation of the claimant's pre-existing cervical and lumbar spondylosis, but it did not constitute the prevailing factor in causing the claimant's current cervical spine condition.

The ALJ found that the claimant sustained an accident arising out of and in the course of his employment, but the accident was not the prevailing factor causing both the resulting medical condition and disability. The Commission partially agreed finding that the claimant sustained an accident arising out of and in the course of his employment. However, it believed that Dr. Kennedy was more credible in that the August 2009 accident was the prevailing factor in causing a new cervical spine injury. The Commission noted that from 1997 until 2009 the claimant had an excellent work record. There was no reason to believe that the sudden, dramatic and permanent increase in the claimant's symptoms and resulting need for surgery were not directly and primarily a result of the work injury. Therefore, the Commission held that the August 2009 accident was the prevailing factor causing the resulting cervical spine injury and associated disability.

The Commission further noted that the Courts have made it clear that once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flowed from the work injury. The Commission found Dr. Kennedy's opinion that the medical care and treatment rendered to the claimant following the August 2009 accident was reasonably required to cure and relieve the effects of the claimant's work injury. Therefore, the employer was responsible for the claimant's treatment including the fusion.

Employer Responsible for PTD Benefits After Non-surgical Low Back Injury, Despite Claimant's Numerous Pre-existing Conditions Including Two Fusions

In *Leonard v. Branson Granite & Marble, LLC*, Injury No. 08-058428, the claimant sustained an injury to his lower back while lifting a piece of granite on July 9, 2008. He was diagnosed with an annular tear at the L5-S1 level, underwent injections and was placed at MMI on April 9, 2009.

The claimant did have a rather significant history of back problems. In 1993 he sustained an injury to his lower back and settled a workers' compensation claim for 9% of the body. In 1995 he was in an automobile accident which resulted in the need for two fusions. Thereafter he was off work for 11 months. However, he did return to work, but he could not work as fast as he could prior to this injury. In 2000 he received a settlement of 17.5% of the body referable to the back, 5% of the left shoulder and 5% of the left knee. In 2001 he sustained another injury and received a settlement of 15% of the left shoulder.

The claimant's parents then opened the insured and the claimant ran this business, beginning in 2001. He testified that on a day to day basis he was involved with measuring, cutting, fabricating and installing granite and marble. He did have people working under him. He did have some restrictions, but he worked 40+ hours a week. He also would go home and rest if he needed to, which he did once or twice a month. It was also noted that he was very active in extracurricular activities including golf, basketball, softball and touch football.

After he was released at MMI from his July 2008 injury, he continued to treat with his primary care physician with pain medications. His doctor opined that he needed to lie down several times a day and could only occasionally lift and carry up to 20 pounds. He attributed these limitations to the 2008 injury only. Mr. England, the claimant's expert, also believed that the claimant was PTD as a result of the July 2008 injury, as the claimant was able to work before the last accident. Mr. Eldred, the employer's expert, opined that the claimant was PTD as a result of the combination of the last injury and his prior disabilities.

The ALJ concluded that the claimant was PTD as a result of the last injury alone. The ALJ noted that although it was clear that the claimant had significant injuries and medical conditions prior to the July 9, 2008 injury, he had no work restrictions imposed as a result of any of his pre-existing conditions. The Judge did note that the claimant's previous conditions affected the speed he could work and the amount that he could lift. However, he nevertheless had been able to return to work performing at least medium level work activity. Therefore, the employer was responsible for future medical treatment to cure and relieve the effects of the work injury, and PTD benefits. The Commission affirmed the decision of the ALJ.

Claimant's Need for Another Procedure Due to Pre-existing Condition Not Work Injury

In *Cureton v. Construction Trailer Specialists, Inc.*, Injury No. 11-068793, the claimant sustained an injury to his right wrist on August 22, 2011, after he tripped and fell. The claimant had a very extensive prior history with respect to his right wrist beginning in 2007, when he was in a motor vehicle accident. He underwent an open reduction and internal fixation of a right scaphoid fracture. He underwent a second procedure in April 2008, and he continued to have symptoms, follow up with physicians, and take pain medication into 2011. He was seen just a few weeks prior to the date of injury for his right wrist, at which time it was noted that he had pain, swelling and weakness in his right arm and right hand which was continuous. The claimant's treating physician opined that he needed a third procedure and that he would not have needed this surgery if he had not had the work injury on August 22, 2011.

Dr. Strecker testified on behalf of the employer and opined that the claimant sustained an aggravation of a pre-existing non-union of the scaphoid fracture. Dr. Strecker further opined that the need for surgery was due to his pre-existing condition.

The ALJ denied the claimant's claim for additional treatment finding that the accident simply aggravated a pre-existing condition and the accident was not the prevailing factor in causing both the resulting medical condition and disability. The ALJ noted that from 2007 up through August 4, 2011, the medical records reflected that the claimant had symptoms in his right hand and wrist. Furthermore, after the accident, the treating physician prescribed the same medication and the same dosage that he had prescribed prior to the work injury. Furthermore, he noted that Dr. Strecker believed that the accident was just an aggravation of the claimant's pre-existing condition and was a mere triggering event which exacerbated or provoked his symptoms, but did not cause them. The Commission affirmed the decision of the ALJ.

Claimant's Fusion Needed to Cure and Relieve Him From Effects of Work Related Back Sprain

In *Rick Sutberry v. TransWorld Airlines, Inc.*, Injury No. 00-081375, the claimant was lifting a heavy shipping box at which time he felt a pop in his lower back. He underwent authorized care for nine days and was released from care. He did not seek medical treatment for his back for a year and a half, and then began treating with his family physician, at which time he presented with complaints of right-sided low back pain for two days. He reported that his symptoms began when he was getting out of a chair. He did report a history of frequent low back pain on an irregular basis, and reported that his symptoms seemed to be occurring more frequently than in the past. On October 23, 2006 he underwent a fusion.

Dr. Cohen testified on behalf of the claimant and found that the surgery was reasonable and necessary, and related to the July 17, 2000 work accident. Dr. Kitchens testified on behalf of the employer, who opined that the work injury resulted in a strain. He opined that the work accident was not a substantial factor in causing the claimant's spondylolisthesis or the need for the surgery. The ALJ accepted the opinion of Dr. Kitchens, and noted the claimant treated for only nine days after his work accident and did not receive any additional treatment until one and a half years after the accident. The ALJ awarded 7.5% of the body referable to the sprain.

The Commission reversed the decision of the ALJ. The Commission noted that the ALJ relied on the opinions from Dr. Kitchens, who opined that the work injury resulted in nothing more than a temporary lumbar strain that resolved with no permanent disability. However, the ALJ found the claimant sustained 7.5% PPD of the body referable to the work injury. Therefore, the Commission essentially found that because the ALJ awarded disability to the claimant when Dr. Kitchens assessed none, the ALJ also rejected Dr. Kitchens' opinion regarding causation.

The Commission did adopt the ALJ's finding that the work injury resulted in a 7.5% disability to the body. However, it found that the employer/insurer was responsible for the claimant's medical treatment including the back surgery.

Claim Denied Because Claimant's Symptoms Began After She Stopped Working For Employer

In *Compton v. Briggs & Stratton Corporation*, Injury No. 08-124131, the claimant worked for the employer from 1989 until 2008. She alleged injuries to her left elbow and left wrist as a result of her repetitive job duties for the employer, a

manufacturing company. She underwent a left ulnar nerve release and left carpal tunnel release in April 2010. She did have a prior workers' compensation claim in 2000 wherein she underwent bilateral epicondylectomies of the elbows.

At the time of the hearing the claimant was not employed. She had last worked for the employer in September 2008. She only worked 3 days after that for another employer. Dr. Tate testified on behalf of the employer and found it would be difficult to state that the ulnar neuropathy was related to the claimant's work as her symptoms began in November 2009, when she was no longer working for the insured. Dr. Woiteshek testified on behalf of the claimant, who opined that the claimant's repetitive work was the prevailing factor in causing her condition.

The ALJ found the opinion of Dr. Tate credible, and found that the claimant did not meet her burden of proof to show that her left upper extremity condition was medically causally related to the alleged occupational disease and her work was the prevailing factor in causing her symptoms. Therefore, the claim was denied. The Commission affirmed the decision and agreed with Dr. Tate's theory that the claimant's ulnar neuropathy could not be linked to any work exposure because her symptoms did not manifest until more than one year after she quit working for the employer and that opinion was not rebutted by any other expert.

Claim Dismissed Because Not Timely Filed

In *Dungan v. A Few Qua Homes, Inc.*, Injury No. 08-115832, the claimant worked for the employer for more than 20 years. On December 18, 2008 he slipped on ice and fell and hit his head. He did not receive any treatment from the employer. In November 2010 he sought treatment on his own with Dr. Kuhns and underwent steroid injections but they did not relieve his pain. The claimant testified that he thought that his treatment with Dr. Kuhns was being paid by the employer's insurer, but later learned that it was being paid by his private health insurance.

The parties stipulated that the claimant sustained an accident and that a Report of Injury was timely filed. Therefore the claimant had two years from the date the last payment was made on the claim. The last date the employer made payment on the claim was February 19, 2009. The claimant's original Claim was filed with the Division on October 31, 2011. Therefore, the employer argued that the claimant did not timely file the claim. The claimant alleged that the last date payment was made on the claim was after November 2011, when he saw Dr. Kuhns. The claimant also alleged that the Statute of Limitations applies to any medical treatment and was not restricted to medical treatment paid for by the employer. The ALJ found that the claimant or the claimant's private insurer paid for the medical expenses and had no obligation to provide medical treatment under the Statute. Therefore, the ALJ found the last payment of medical expenses paid on the claim was February 19, 2009. Therefore, the Claim was not timely filed and the claim was dismissed. The Commission affirmed the dismissal.

In *Compton v. Briggs & Stratton Corporation*, Injury No. 07-036344, the claimant sustained an injury to her lumbar spine on April 18, 2007. The employer/insurer provided treatment at a clinic which was adjacent to the employer's facility. On May 21, 2007 the employer sent a letter to the claimant advising that her condition was not work related, and therefore no additional treatment would be provided under workers' compensation. She received no additional medical treatment, and her employment with the employer ended on September 26, 2008. In 2010 she returned to the clinic requesting medical treatment for her lumbar spine. She did not inform anyone that this treatment was related to her 2007 work injury. The medical bills were

paid through her husband's group insurance. She did not file a Claim until January 27, 2012. The employer denied the claim based on the Statute of Limitations.

The ALJ noted that the record reflected that the Report of Injury was filed within 30 days of the injury. Therefore, the two year Statute of Limitations would apply. It was the employer's position that the last payment made on account of the injury was made on May 11, 2007. Therefore, under the two year Statute of Limitations, the Claim must have been filed no later than May 11, 2009. The claimant took the position that her treatment at the clinic in 2010 extended the Statute of Limitations, and her Claim was therefore filed before the Statute of Limitations had expired. However, the ALJ noted that the medical records, as well as her testimony, show that there was no indication that she was requesting treatment under workers' compensation. Therefore, the ALJ found that the last payment made by the employer on account of the injury was on May 11, 2007, and therefore the claimant's Claim for Compensation was not filed before the Statute of Limitations ran.

The Commission affirmed the Award noting that the claimant's attempt to assert a Claim more than two years after the employer stopped paying benefits is nothing more than an attempt to revive an already extinguished claim.

Commission Affirmed Decision of ALJ Denying Claim Because Witnesses Found to be More Credible than Claimant

In *Watkins v. ADM Green Company*, Injury No. 11-017103, the claimant alleged that he sustained an injury to his left shoulder while sweeping a barge. He testified that he felt a sharp pain in his left shoulder which radiated into his arm and he informed his co-worker, Mr. Butler, who offered to help him finish sweeping. After the claimant finished cleaning the barge he went to the medicine cabinet and took Ibuprofen and Icy/Hot. The next morning he reported his injury to his supervisor, Mr. Albers.

Mr. Albers and Mr. Butler testified on behalf of the employer, both noting that the claimant sustained an injury while helping his mother move. Furthermore, Mr. Butler denied saying that he would help the claimant finish sweeping. Dr. Woiteshek testified on behalf of the claimant and found that the claimant had a work-related injury, and he had permanent disability. Dr. Nogalski testified on behalf of the employer, who diagnosed possible mild instability with no clear mechanical findings. The doctor also did not identify a specific event and noted that the claimant's complaints were out of proportion to the MRI findings.

The ALJ found that the testimony of Mr. Albers and Mr. Butler was more credible than the claimant's testimony. Therefore, the ALJ found that the claimant did not meet his burden to prove he sustained an accident. The ALJ further found that the injury came from a risk or hazard unrelated to employment, specifically, helping his parents move. Therefore, the ALJ found that the claimant did not sustain a compensable injury.

Claimant PTD as Result of Wrist Fracture and RSD

In *Brown v. Massman Construction Company*, Injury No. 11-072556, the claimant sustained an injury to her right wrist when she tripped on an air hose and fell. She underwent two surgeries to her wrist. She was also diagnosed with RSD. She did have pre-existing medical conditions. However, she had worked full duty with no hindrance to her employment leading up to

her right wrist injury. She also never had requested help or accommodation at work for any pre-existing medical conditions, which included anxiety, diverticulitis, Barrett's esophagus and low back injuries.

Dr. McAllister, the claimant's treating physician, opined that the claimant was not able to work in any significant capacity because she could not use her right hand reliably due to weak grip and pain. Dr. Goldfarb testified on behalf of the employer, and found that the claimant could return to light duty work with a 10 pound lifting restriction. Ms. Gee also testified on behalf of the employer and opined that the claimant could obtain and maintain full-time gainful employment based on the restrictions of Dr. Volarich and Dr. Goldfarb. However, she acknowledged that if Dr. McAllister's statement that the claimant is unable to work is true, she may not be able to return to the work force.

Dr. Volarich testified on behalf of the claimant and assessed 40% of the forearm due to the distal radius fracture and ulnar styloid fracture, and 20% referable to the RSD. Mr. England testified on behalf of the claimant and opined that she was unemployable as a result of her work injury.

The ALJ found that the claimant was not PTD because after an FCE it was determined that she had the capability to work in the light to medium category. The ALJ found the claimant sustained 40% PPD to the right forearm and 20% of the body referable to the RSD.

The Commission modified the decision of the ALJ opining that the claimant was permanently and totally disabled. The Commission further noted that the ALJ relied on the results of the FCE which the claimant underwent on February 28, 2012, and another on March 20, 2012. The Commission noted that the ALJ did not identify which of these FCEs he was relying on. In any event, the claimant had a subsequent surgery on April 18, 2012, so the FCEs would not be particularly relevant in the issue of permanency. Furthermore, the Commission noted that the evaluators during both FCEs noted that the claimant could function at a medium level. However, this was assuming a work schedule of four hours per day, four days per week. Furthermore, the FCEs and physical therapy records noted the claimant had obvious discomfort and objective evidence of injury such as swelling and physical limitations which would almost certainly dissuade any employer from considering her for employment. Therefore, the Commission found that the employer was responsible for permanent and total disability benefits.