SUPREME COURT OF MISSOURI

No. S.C. 93640

DORIS DEMORE
Appellant/Respondent

v.

AMERICA FIRST INSURANCE COMPANY
Respondent/Cross-Appellant
and
DEMORE ENTERPRISES
Respondent

Appeal from a final award of the Labor and Industrial Relations Commission of Missouri

---

SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT AMERICA FIRST

James K. Blickhan #38435
Law Offices of S. Warmund
9200 Ward Parkway – Suite 300
Kansas City, Missouri 64114
Phone: 816/361-7917
Fax: 603/334-7445
ATTORNEY FOR RESPONDENT/CROSS-APPELLANT

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

JURISDICTIONAL STATEMENT

This is an appeal from an Order of the Labor and Industrial Relations Commission of the State of Missouri finding that Doris Demore had an automobile accident in the course and scope of her employment and they awarded workers compensation benefits due to said accident. The award of the Labor and Industrial Relations Commission was issued following an appeal to the Labor and Industrial Relations Commission from an award from the Honorable Tim Wilson in the Springfield, Missouri office of the Division of Workers Compensation. The Labor and Industrial Relations Commission's award operated as a final adjudication of the matter. Thus, pursuant to R.S. Mo. §287.495 jurisdiction was proper in the Court of Appeals.

This Court sustained Doris Demore's application for review following the opinion from the Missouri Court of Appeals Southern District of July 15, 2013.

STATEMENT OF FACTS

The Respondent/Cross-Appellant America First Insurance Company notes the statement of facts given by Appellant and offers the additional statement of facts as follows.

This is an appeal from an order of the Labor and Industrial Relations Commission dated September 28, 2012. The Labor and Industrial Relations Commission heard an appeal from an award issued by the Honorable Timothy Wilson on January 30, 2012.

This case involves a workers compensation claim which revolves around an automobile accident which occurred on June 29, 2009. On June 29, 2009 an automobile accident took place in which Doris Demore was a passenger in a vehicle being driven by her husband when the accident occurred.

Dolores Demore testified that on the morning of June 29, 2001 she received a call from Mr. Cox. Both Hershel Demore and Dolores Demore acknowledged that Mr. Cox was a tenant in rental property owned personally by Herschel and Doris Demore and not owned by Demore Enterprises. (ROA p. 73)

Dolores Demore testified that Mr. Cox had contacted her and told her that was a cut in a fence. She did not know and was not told what specific part of the fence was cut nor did she ask Mr. Cox for any more information. (ROA p. 73)

Later in the afternoon on January 29, 2009 Mr. Demore got into his personal vehicle owned by him. This vehicle is not owned by Demore Enterprises. (ROA p. 74) It was his intent to go view the cut in the fence as reported to Dolores

by Mr. Cox who rents property owned personally by Mr. and Mrs. Demore and not Demore Enterprises. (ROA 73)

Dolores Demore decided she wanted to go with her father and got into the passenger seat. Doris Demore, who was in the office with them, also got in the vehicle as an unrestrained passenger in the back seat.

Doris Demore testified as did Mr. Demore and Delores Demore that Doris Demore was a part-time bookkeeper for Demore Enterprises and had no other job duties or responsibilities. (ROA p. 2431) Doris Demore got in the car to look at the cut in the fence but never did repairs or maintenance on the property. (ROA p.2435)

The testimony for Hershel and Dolores Demore is that Robert Demore does all the repair work for the property and they also hire independent contractor to work on and fix any type of damage to the rental property. Mr. Demore acknowledged that he had no tools in his car when he left to go look at the property.

The 3 employees never made it to the rental property because of the accident.

Doris Demore was seen at the request of her counsel by Bernard Abrams M.D. Dr. Abrams gave no deposition or live testimony in this matter however his report was in evidence (ROA 2270). Dr. Abrams acknowledged the claimant did have pre-existing problems regarding cognitive skills and it was no more than 10%. He did not comment on any past medical bills. Dr. Abrams stated the

employee was at maximum medical improvement. While Dr. Abrams did discuss future medical in the form of medications, he did not state that they were needed due to the accident. Dr. Abrams gave no opinion that the employee needed or would need some form of assistance in her home (nursing services).

Doris Demore was also seen at the request of the Insurer by Dr. Allen Parmet. Dr. Parmet did give a deposition in this matter. (ROA 2345) Dr. Parmet acknowledged that he had provided expert opinion in the past at the request of claimant's counsel, Pat Platter, on other cases. Dr. Parmet stated that Doris Demore clearly had a pre-existing cognitive issues for which she sought medical treatment. Dr. Parmet assigned a 15-20% permanent partial disability to the body as a whole for the physical injuries and said she did have some disability for cognitive issues but because of the preexisting conditions, he could say what was related to the accident opposed to the preexisting condition. Dr. Parmet testified that the claimant could return to work in some capacity.

POINTS RELIED ON

POINT I

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION PROPERLY RULED THE EMPLOYER MAINTAINS CONTROL OVER THE SELECTION OF EMPLOYEE'S FUTURE MEDICAL PROVIDERS TO TREAT THE WORK INJURIES OF THE EMPLOYEE AND THE LABOR AND INDUSTRIAL RELATIONS COMMISSION DID NOT ACT IN EXCESS OF THEIR POWERS IN MAKING SUCH A FINDING.

Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81 (Mo. App. 1985)

Klasing v. Fred Schmitt Contracting Co., 73 S.W.2d 1011 (Mo. 1934)

Robinson v. Hooker, 323 S.W.3d 418, 424 (Mo. App. 2010)

State ex rel. KCP of Greater Mo. Operations Co. v. Cook, 353 S.W.3d 14, 20 (Mo. App. 2011)

POINT II

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION PROPERLY RULED IN DENYING COSTS TO APPELLANTAND THEY DID NOT FAIL TO PREPARE AND FILE A WRITTEN STATEMENT SETTING FORTH THEIR FINDINGS IN DENYING AWARDING COSTS UNDER SECTION 287.560 AND THE LABOR AND INDUSTRIAL RELATIONS COMMISSION DID NOT ACT IN EXCESS OF THEIR POWERS IN DENYING AWARDING COSTS UNDER SECTION 287.560.

Clark v. Harts Auto Repair, 274 S.W.3d 612 (Mo. App. 2009)

Delong v. Hampton Envelope Company, 149 S.W.3d 549 (Mo. App. 2004)

Landman v. Ice Cream Specialties, Inc, 107 S.W.3d 240 (Mo. 2003)

Nolan v. Degussa Admixtures, Inc., 276 S.W.3d 332 (Mo. App. 2009)

POINT III

THE INSURER'S DEFENSE OF THIS CLAIM WAS JUSTIFIED BECAUSE DORIS DEMORE'S AUTOMOBILE ACCIDENT DID NOT OCCUR IN THE COURSE AND SCOPE OF HER EMPLOYMENT WITH DEMORE ENTERPRISES. AS A MATTER OF LAW SHE WAS NOT PERFORMING ANY OF HER JOB DUTIES AT THE TIME OF THE ACCIDENT AND THUS IT WAS NOT A COMPENSABLE ACCIDENT UNDER THE MISSOURI WORKERS COMPENSATION LAW.

Anderson v. Veracity Research Co., 299 S.W.3d 720 (Mo. App. 2009)

Doerr v. Teton Transportation, Inc., 258 S.W. 3d 514 (Mo. App. 2008)

Harness v. Southern Copyroll, Inc, 291 S.W.3d 299 (Mo. App. 2009)

Miles v. Lear Corporation, 259 S.W.3d 64 (Mo. App. 2008).

POINT IV

THE INSURER'S DEFENSE OF THIS CLAIM WAS JUSTIFIED BECAUSE THE AWARDING OF PAST MEDICAL BILLS TO DORIS DEMORE LACKED SUFFICIENT COMPETENT EVIDENCE THAT THE

BILLS WERE REASONABLE, NECESSARY AND RELATED TO THE ACCIDENT.

Farmer-Cummings v. Personnel Pool of Plate County, 110 S.W.3d 818 (Mo. Banc 2003)

Martin v. Mid-American, 769 S.W.2d 105 (Mo banc 1989)

POINT V

THE INSURER'S DEFENSE OF THIS CLAIM WAS JUSTIFIED BECAUSE THERE WAS NOT SUBSTANTIAL AND COMPETENT EVIDENCE TO SUPPPORT AWARDING FUTURE MEDICAL BENEFITS TO DORIS DEMORE RELATED TO THE ACCIDENT.

Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W3d 234 (Mo. App. 2008)

POINT VI

THE INSURER'S DEFENSE OF THIS CLAIM WAS JUSTIFIED BECAUSE THERE WAS NOT SUBSTANTIAL AND COMPETENT EVIDENCE TO SUPPORT AWARDING PAST TEMPORARY TOTAL DISABILITY BENEFITS AND PERMANENT TOTAL DISABILITY BENEFITS TO DORIS DEMORE RELATED TO THE ACCIDENT.

Molder v. Missouri State Treasurer, 342 S.W.3d 406 (Mo. App. 2011)

Plaster v. Dayco, 760 S.W.2d 911 (Mo. App. 1988)

Rector v. Gary's Heating and Cooling, 293 S.W.3d 143 (Mo. App. 2009)

Watson-Spargo v. Treasurer of State, Custodian of Second Injury Fund, 370 S.W.3d 292 (Mo. App. 2012)

ARGUMENT AND AUTHORITIES

Decisions of the Labor and Industrial Relations Commission that are interpretations or applications of law, rather than determinations of fact, are reviewed *de novo* without deference to the Commission's judgment. *Benne v. ABB Power T & D Co.,* 106 S.W.3d 595, (Mo. App. W.D. 2003) (citing *Maxon v. Leggett & Platt,* 9 S.W.3d 725, 729 (Mo. App. 2000); *Putnam-Heisler v. Columbia Foods*, 989 S.W.2d 257, 259 (Mo. App. 1999).

The Court of Appeals can reverse an administrative award of the Commission if (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to warrant the making of the award. *Phelan v. Treasurer*, 249 S.W.3d 260 (Mo. App. W.D. 2008) (citing *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)).

POINT I

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION PROPERLY RULED THE EMPLOYER MAINTAINS CONTROL OVER THE SELECTION OF EMPLOYEE'S FUTURE MEDICAL PROVIDERS

TO TREAT THE WORK INJURIES OF THE EMPLOYEE AND THE LABOR AND INDUSTRIAL RELATIONS COMMISSION DID NOT ACT IN EXCESS OF THEIR POWERS IN MAKING SUCH A FINDING.

Response to Appellant's Points Relied on I, II and III

The Appellant in points I, II and III of her brief contend that the Labor and Industrial Relations Commission erred in allowing the Employer/Insurer to choose the providers for future medical care. While this is addressed in three separate points relied on by Appellant, they all relate to the same issue thus the Respondent/ Cross-Appellant responds to all three points relied on in this section.

The Labor and Industrial Relations Commission found that the Employer/Insurer did not waive their right to control future medical.

The Labor and Industrial Relations Commission relied on a clear reading of section 287.430 RSMo.

Section 287.430.10 RsMo. States as follows:

10. The employer shall have the right to select the licensed treating physician, surgeon, chiropractic physician, or other health care provider; provided, however, that such physicians, surgeons or other health care providers shall offer only those services authorized within the scope of their licenses. For the purpose of this subsection, subsection 2 of section 287.030 shall not apply.

During oral argument before the Missouri Court of Appeals Southern District the issue which was raised was whether or not the insurer maintains the right to

control medical treatment. It was conceded by counsel for the insurer that the statute indicates medical is controlled by the employer and not the insurer. Based on this the Southern District properly found that the employer had not waived the right to select medical care for the employee regarding future care.

The Missouri Court of Appeals Southern District was correct in finding that the Employer in this case has not waived the right to select and control future medical.

In fact there is nothing in the statute that states that an employer ever waives the right to control the medical treatment. It is case law which has interpreted the statute for the proposition that the employee can select their own treating physician and attempt to hold the employer liable for such costs. A strict reading of the statute reveals that there is no provision that the employer waives or losses the right to direct and control the future medical.

The Labor and Industrial Relations Commission was correct on its interpretation of this statute which is clear on its face. There is nothing in the statute which states that the employer waives the right to control future medical care. When a statute is clear and unambiguous on its face it must be given a clear reading. In this case the statute upon which the Appellant relies says nothing about waiving or forfeiting the right to control future medical care which has not yet taken place. As such the Labor and Industrial Relations Commission did not err in determining that the Employer has not waived the right to direct and control future medical.

The overwhelming principle of law in workers' compensation is that the Employer is given the control over the selection of the employee's medical providers. *Blackwell v. Puritan-Bennett Corp.,* 901 S.W.2d 81 (Mo. App. 1985).

The Appellant argues that as it was the insurer who appealed the issue and not the employer that this is not an appealable issue by the insurer. However there is a symbiotic relationship between an employer and their insurer in a workers compensation matter. The Employer purchases workers compensation coverage with an insurer and both are parties to a workers compensation claim. While the insurer has a contractual obligation to pay for benefits for covered employees, the employer has a duty under the same policy to work with the insurer and help defend claims.

Appellant cites no case law which supports the proposition that if the employer does not appeal an aspect of a workers compensation claim that the Insurer has no standing. The fact is the Insurer does have standing as they have to pay for any benefits and they are a party to this matter.

The only effect of failure of employer to provide medical treatment for an injured employee and the denial of liability therefor was to authorize employee to employ his own physician and recover expenses of medical treatment in the compensation proceeding. *Klasing v. Fred Schmitt Contracting Co*., 73 S.W.2d 1011 (Mo. 1934)

In 2005, the Legislature substantially revised the Worker's Compensation Act ("the Act"). Under the amended Act, Section 287.800.1 provides that

reviewing courts shall construe the provisions of the Act strictly, meaning that the statute can be given no broader an application than is warranted by its plain and unambiguous terms. *State ex rel. KCP of Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 20 (Mo. App. 2011). This strict application applies to definitions included within the Act. *Robinson v. Hooker*, 323 S.W.3d 418, 424 (Mo. App. 2010)

Based on a strict reading of 287.430 R.S.Mo., the employer does not waive the right to direct future medical treatment. The Labor and Industrial Relations Commission and the Court of Appeals were correct in their interpretation of this statute and their decision on this issue.

POINT II

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION PROPERLY RULED IN DENYING COSTS TO APPELLANTAND THEY DID NOT FAIL TO PREPARE AND FILE A WRITTEN STATEMENT SETTING FORTH THEIR FINDINGS IN DENYING AWARDING COSTS UNDER SECTION 287.560 AND THE LABOR AND INDUSTRIAL RELATIONS COMMISSION DID NOT ACT IN EXCESS OF THEIR POWERS IN DENYING AWARDING COSTS UNDER SECTION 287.560.

Response to Appellant's Points Relied on IV and V

The Appellant in points IV and V of her brief contends that the Labor and Industrial Relations Commission erred in not awarding costs to the employee.

While this is addressed in two separate points relied on by appellant, they both relate to the same issues thus the Respondent Cross Appellant responds to both points relied on in this section.

Mo. Rev. Stat. § 287.560 in pertinent part states: *All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. The division or the commission may permit a claimant to prosecute a claim as a poor person as provided by law in civil cases.*

An employer's defense against a workers' compensation claim is "unreasonable" where the employer offers absolutely no ground, for refusing benefits clearly owed to a claimant because his injury was indisputably work-related. *Clark v. Harts Auto Repair*, 274 S.W.3d 612 (Mo. App. 2009)

Nolan v. Degussa Admixtures, Inc., 276 S.W.3d 332 (Mo. App. 209) made clear that given the Commission's discretion, the proper review is for abuse of discretion, which generally means a decision so clearly against the logic of the circumstances, and so unreasonable and arbitrary, that it shocks one's sense of justice and indicates a lack of careful deliberate consideration

The Appellant cites the case of *Landman v. Ice Cream Specialties, Inc*, 107 S.W.3d 240 (Mo. 2003) for the proposition that the facts in Landman or similar to the fact sin this appeal. However that case involved a hardship setting for medical treatment. In *Landman* the employer had an expert report which was in agreement with the employee's expert. The court in *Landman* found no basis to deny benefits and thus the defense was unreasonable.

The facts in *Landman* are wholly different from this matter. This matter does not involve a hardship setting but a final award. In addition in *Landman*, course and scope of employment was not an issue as it is here. In this matter compensability under the act is a major issue and focus of this appeal.

There are numerous issues on appeal as shown by the issues and arguments listed above. The awarding of costs in this matter would clearly be inappropriate.

As the Court of Appeals noted, costs should only be awarded when the issue is clear and the offense is egregious. *Delong v. Hampton Envelope Company*, 149 S.W.3d 549 (Mo. App. 2004).

The Appellant argues that the Labor and Industrial Relations Commission did not provide findings of fact and conclusions of law to support their decision. But the Labor and Industrial Relations Commission did state its finding in that they reviewed all the facts in this matter and considered all the arguments and found that the Insurer did not defend this matter on unreasonable grounds and they went on to note that the issue of course and scope is a highly contested and litigated issue. Thus by implication an area of the law that it not clear and these

cases are decided on a case by case basis. That is the finding of fact and the conclusion of law.

In this case there are clear reasonable grounds to defend this matter. There is nothing egregious about the defense of this claim. The awarding of costs is completely unwarranted under the facts of this case and the law and it was not an abuse of discretion by the Labor and Industrial Relations Commission to deny costs to the Appellant.

As noted by the case law, costs are only awarded when the defense is egregious. In this case it is important for the Court to look at the transcript of the proceedings before the Administrative Law Judge.

A review of the trial transcript will reveal that the only issue involving requested costs and fees related to Appellant defending a possible safety violation for failure to use a seatbelt. The Administrative Law Judge noted all the issues for trial and the only issue regarding the awarding of costs and attorney fees revolved around the employee having to defend a possible safety violation. (R.O.A. p. 15) A review of the record will indicate that Appellant had to offer no evidence or testimony in regard to the seatbelt as it became a non-issue.

The awarding of attorney fees on the entire case by the Administrative Law Judge was baseless and against the well-recognized case law in this area.

The Court of Appeals Southern District was correct in upholding the Commission's decision to not award fees. Their rational was clear based on the numerous issues to be decided.

As stated there were numerous disputed issues in this claim.

POINT III

THE INSURER'S DEFENSE OF THIS CLAIM WAS JUSTIFIED BECAUSE DORIS DEMORE'S AUTOMOBILE ACCIDENT DID NOT OCCUR IN THE COURSE AND SCOPE OF HER EMPLOYMENT WITH DEMORE ENTERPRISES. AS A MATTER OF LAW SHE WAS NOT PERFORMING ANY OF HER JOB DUTIES AT THE TIME OF THE ACCIDENT AND THUS IT WAS NOT A COMPENSABLE ACCIDENT UNDER THE MISSOURI WORKERS COMPENSATION LAW.

The insurer properly raised the issue of course and scope of employment as a defense. It was the position of the insurer that the Administrative Law Judge as well as The Labor and Industrial Relations Commission erred in finding that the accident was compensable under Missouri Law and that Doris Demore was injured in the course and scope of her employment.

Mrs. Demore was a part time bookkeeper for Demore Enterprises at the time of the accident. She had nothing to do with repairing or maintaining rental property.

Demore Enterprises is a family-owned business. Dolores Demore received a call from Mr. Cox who rents property, which is personally owned by Herschel and Doris Demore but not owed by Demore Enterprises. In addition Delores Demore presented no evidence that she has anything to do with repair, inspection

or maintenance of the rental property or the fence in question. There was no testimony or evidence to indicate that she had ever repaired or maintained the property.

There was no evidence presented that traveling to, inspecting or repairing rental properties was part of any of her job duties.

The terms "out of" and "in the course of" the employment are not synonymous but are separate tests for compensability and both must be satisfied before a workers compensation claimant may prevail in a workers compensation preceding. *Anderson v. Veracity Research Co.*, 299 S.W.3d 720 (Mo. App. 2009)

To receive benefits for injuries sustained while a claimant is away from the employer's place of business in a traveling capacity, the claimant must show that at the time of the accident, he was not exercising a personal privilege for his own benefit, wholly apart from his employment or his employer's interests. *Anderson v. Veracity Research Co.*, 299 S.W.3d 720 (Mo. App. 2009)

An injury arises out of employment, for purposes of determining whether it is compensable, if it is a natural and reasonable incident thereof, or in other words, when there is a causal connection between the nature of the employee's duties or conditions under which he is required to perform them and the resulting injury. *Miles v. Lear Corporation*, 259 S.W.3d 64 (Mo. App. 2008)

The general rule is that an injury is one that arises out of employment if it is a natural and reasonable incident thereof and is in the course of employment, for workers compensation purposes, if the action occurs within a period of

employment at a place for the employee may reasonably be for filling the duties of employment. *Doerr v. Teton Transportation, Inc.*, 258 S.W. 3d 514 (Mo. App. 2008)

Generally injuries sustained by an employee while going to or coming from work could not arise out of and the course of employment for workers compensation purposes. *Doerr v. Teton Transportation, Inc.*, 258 S.W. 3d 514 (Mo. App. 2008)

While the Administrative Law Judge and The Labor and Industrial Relations Commission cite the case of *Harness v. Southern Copyroll, Inc*, 291 S.W.3d 299 (Mo. App. 2009) for the proposition that the Mrs. Demore's accident in this matter occurred during the course and scope of her employment. However the facts in *Harness* are different from the facts in this appeal. In *Harness*, the Court of Appeals found an automobile accident compensable but in that case, travel was a regular part of the job of Mr. Harness. The Court in *Harness* also pointed out that at the time of the accident, Mr. Harness was being compensated for the trip by the payment of mileage. This is in sharp contrast to the facts of this appeal. There was no testimony that travel was a part of Mrs. Demore's job. In fact the contrary is true. Mrs. Demore testified about her job duties and travel was not mentioned. In addition at the time of the accident, Mrs. Demore was riding in the backseat of a vehicle that was the personal car of her husband and there was no evidence that she was being paid mileage or was compensated for travel by the

Employer. Therefore the holding in *Harness* actually cuts against the award of the Labor and Industrial Relations Commission.

There was no evidence presented that Mrs. Demore was going to the rental property to do any function of her job duties as a bookkeeper. There was nothing about her employment, which would have been fulfilled by going to visit the property.

In fact, at the time Mrs. Demore left to go to the rental property, all she knew was that the person reporting an unspecified cut in a fence to her was a tenant of property not owned by Demore Enterprises but personally owned by Herschel and Doris Demore. There is nothing in traveling to the rental property to indicate that Delores Demore was performing any function or duty of her employment with Demore Enterprises.

POINT IV

THE INSURER'S DEFENSE OF THIS CLAIM WAS JUSTIFIED BECAUSE THE AWARDING OF PAST MEDICAL BILLS TO DORIS DEMORE LACKED SUFFICIENT COMPETENT EVIDENCE THAT THE BILLS WERE REASONABLE, NECESSARY AND RELATED TO THE ACCIDENT.

The insurer also raised the issue of past medical bills. Certain medical bills were offered into evidence at the time of the hearing, an objection was made and the Administrative Law Judge did not rule on the admissibility of the bills at the

time of the hearing. However in their award the Labor and Industrial Relations Commission did award the bills in the amount of $133,341.14.

However, the record is devoid of and there has been no testimony from any physician or even from the claimant herself that the individual specific bills were incurred in connection with the automobile accident. There must be at least a prima fascia showing from the claimant that the bills were incurred because of and solely related to the accident. There has been none. *Martin v. Mid-American,* 769 S.W.2d 105 (Mo banc 1989)

The Labor and Industrial Relations Commission cited the case of *Farmer-Cummings v. Personnel Pool of Plate County,* 110 S.W.3d 818 (Mo. Banc 2003). However in *Farmer* there was specific testimony regarding the actual medical bills incurred by the employee. In this case there was no testimony from the claimant about the actual specific bills. Such testimony is essential in order for the Labor and Industrial Relations Commission to award the bills and in this case, it was non-existent.

The employee did not meet her burden of proof that the bills were reasonable, necessary and related to the accident. There was not sufficient competent evidence in the record to warrant the awarding of the medical bills.

POINT V

THE INSURER'S DEFENSE OF THIS CLAIM WAS JUSTIFIED BECAUSE THERE WAS NOT SUBSTANTIAL AND COMPETENT

EVIDENCE TO SUPPPORT AWARDING FUTURE MEDICAL BENEFITS TO DORIS DEMORE RELATED TO THE ACCIDENT.

It was also the position of the insurer that the Administrative Law Judge and The Labor and Industrial Relations Commission erred in awarding future medical treatment as there was not substantial competent evidence to support such a finding. Employee's expert Dr. Abram's report was in evidence (ROA 2270). Dr. Abrams stated the employee was at maximum medical improvement. While Dr. Abrams did discuss future medical in the form of medications, he did not state that they were needed due to the accident. Dr. Abrams noted that the employee had pre-existing cognitive issues. Dr. Abrams gave no opinion that the employee needed or would need some form of assistance in her home (nursing services). As there was no medical opinion directly relating future medical to the accident the Labor and Industrial Relations Commission erred in awarding same.

To receive future medical care, an employee must show such care flows from the accident, via evidence of a medical causal relationship between the condition and the injury. *Stevens v. Citizens Memorial Healthcare Foundation*, 244 S.W3d 234 (Mo. App. 2008). There is no such evidence in this case.

POINT VI

THE INSURER'S DEFENSE OF THIS CLAIM WAS JUSTIFIED BECAUSE THERE WAS NOT SUBSTANTIAL AND COMPETENT EVIDENCE TO SUPPORT AWARDING PAST TEMPORARY TOTAL

DISABILITY BENEFITS AND PERMANENT TOTAL DISABILITY BENEFITS TO DORIS DEMORE RELATED TO THE ACCIDENT.

It was also the position of the insurer that the Administrative Law Judge and The Labor and Industrial Relations Commission erred in awarding past temporary total disability benefits and permanent total disability benefits to Appellant. Claimant's medical expert, Dr. Abrams, in his report, gives no opinion on the dates or time frame the employee would have been restricted from her work duties because of the accident which would make her entitled to temporary total disability payments. Dr. Parmet in his deposition did not comment on this issue either. Therefore there is a complete lack of medical evidence on this issue, and thus no basis for such an award.

It was also the position of the insurer that the Administrative Law Judge and The Labor and Industrial Relations Commission erred in finding that the employee Doris Demore was permanently and totally disabled. No vocational expert provided any testimony regarding the employee's ability to work. Dr. Abrams, employee's expert, through his report expressed his opinion that the employee had permanent total disability. Dr. Abrams also noted that Doris Demore had preexisting cognitive issues. Dr. Abrams did not state in his report if he thought the permanent total disability he found was due to the accident in isolation or a combination of the accident and the preexisting conditions or some other reason. There was no testimony from Dr. Abrams on the employee's employability. As there was no such foundation, for any opinion on the

employees' ability to work by Dr. Abrams, relying on Dr. Abram's opinion was error. Dr. Parmet did testify that the employee could work in some capacity and he did establish a foundation to give such an opinion.

The term "total disability" means the "inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. *Watson-Spargo v. Treasurer of State, Custodian of Second Injury Fund*, 370 S.W.3d 292 (Mo. App. 2012)

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. *Molder v. Missouri State Treasurer*, 342 S.W.3d 406 (Mo. App. 2011).

In this case there is no medical or vocational opinion in relation to the accident in question that the employee could not compete in the open labor market of if any employer would hire the employee. In fact, Dr. Parmet testified that the employee could work.

The Employee in a workers compensation case has the burden to show what condition(s) flow from the accident in question. The Employee has the burden to separate out the pre-existing condition from the accident. *Plaster v. Dayco*, 760 S.W.2d 911 (Mo. App. 1988)

The Employee has the burden to show that they are permanently and totally disabled and its causal relation to an accident or preexisting conditions. *Rector v. Gary's Heating and Cooling,* 293 S.W.3d 143 (Mo. App. 2009)

In this case there is no testimony that the Appellant is permanently and totally disabled as a result of the accident alone and as such, Appellant fails in her burden of proof and to award these benefits was error on the part of the Labor and Industrial Relations Commission as there was not substantial and competent evidence in the record to support this finding.

CONCLUSION

The Labor and Industrial Relations Commission did not err in their ruling that the Employer did not waive the right to control future medical and the Labor Industrial Relations Commission did not err in denying fees be assessed as they found that the defenses raised by the insurer, after reviewing the arguments and record as a whole, were not egregious.

There were legitimate defenses, issues and arguments that no benefits should have been awarded to Doris Demore as the accident did not occur in the course and scope of her employment, the awarding of medical bills should not have been awarded because the employee did not meet her burden of proof that the bills were reasonable, necessary and related to the accident and
the record did not support an award of permanent total disability benefits be awarded to Doris Demore.

/s/James K. Blickhan
James K. Blickhan #38435
Law Offices of S. Warmund
9200 Ward Parkway - Suite 300
Kansas City, MO 64114
Telephone: (816) 361-7917
Facsimile: (603) 334-7445
ATTORNEY FOR
RESPONDENT/CROSS-APPELLANT

SUPREME COURT OF MISSOURI

DORIS DEMORE, Appellant/ Respondent, vs. AMERICA FIRST INSURANCE COMPANY, Respondent/ Cross-Appellant, and DEMORE ENTERPRISES, Respondent.	)	Case No: S.C. 93640

CERTIFICATE OF COMPLIANCE

James Blickhan, counsel for Respondent/Cross-Appellant pursuant to Missouri Rules of Civil Procedure 84.04, 84.05, 84.06, hereby certifies to the Court as follows:

1. That both the Respondent/Cross-Appellant's Brief filed and this Certificate of Compliance contains the information required by Missouri Rule of Civil Procedure 55.03.

2. That pursuant to Missouri Rule of Procedure 84.05 Respondent/Cross-Appellant's Brief was served electronically this 9th day of December, 2013 to Patrick Platter, Attorney for Appellant Doris Demore and Kip Kubin, Attorney for Respondent Demore Enterprises.

3. That the Respondent/Cross-Appellant's Brief complies with the limitations contained in Rule 84.06(b) and contains 6,888 words.

4. That Microsoft Word was used in preparing the Brief for Respondent/Cross-Appellant.

5. The Respondent/Cross-Appellant's Brief was served and filed using a searchable PDF format as required by Missouri Rule of Civil Procedure 103.04.

Respectfully submitted,

/s/James K. Blickhan
James K. Blickhan #38435
Law Offices of S. Warmund
9200 Ward Parkway – Suite 300
Kansas City, MO 64114
Phone (816) 361-7917 Fax: (603)334-7445
ATTORNEY FOR RESPONDENT/CROSS-APPELLANT AMERICA FIRST