Supreme Court of Missouri

No. SC 93640

DORIS DEMORE,

Appellant,

v.

AMERICA FIRST INSURANCE COMPANY,

Respondent.

APPEAL FROM A FINAL AWARD OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI

SUBSTITUTE BRIEF OF THE APPELLANT DORIS DEMORE

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Jurisdictional Statement

This is a workers' compensation claim. Doris Demore was an employee of Demore Enterprises, Inc., in Springfield, Missouri. She filed a claim for compensation seeking benefits under the Missouri Workers' Compensation Law concerning injuries she suffered as a result of a car accident that occurred while she was travelling from her employer's principal place of business to another business location.

There were nine (9) disputed issues before the Division of Workers' Compensation: (1) whether the accident arose out of and in the course of employment, (2) medical causation, (3) past medical expenses, (4) future medical treatment, (5) compensation rates, (6) temporary disability compensation, (7) permanent disability compensation, (8) whether Employer and Insurer were entitled to subrogation credits, and (9) whether Doris was entitled to costs and expenses for an unreasonable defense.

The Division of Workers' Compensation issued its Final Award January 30, 2012 that awarded benefits and found in favor of Doris on all nine (9) issues. The Insurer filed its Application for Review before the Labor and Industrial Relations Commission on February 16, 2012, and Doris filed her Response to Application for Review on March 1, 2012. The Labor Commission issued its Final Award on September 28, 2012. It affirmed the Division's Final Award on all issues except two: who selects future medical treatment providers and whether Doris was entitled to costs and expenses for an unreasonable defense. The Insurer and Doris both filed Notices of Appeal.

This Court sustained Doris' Application for Review after the Missouri Court of Appeals – Southern District issued its opinion on July 15th, 2013.

Statement of Facts[1]

A. The Businesses

Hershel, Doris, Robert and Delores Demore are the father, mother, son and daughter, respectively, of the Demore family. (Tr. 29:3-30:6). They reside in Springfield, Missouri. (Tr. 26:15-27:1). Hershel Demore started a ThermoKing dealership in Springfield, Missouri in 1946. (Tr. 27:17-24, 122:13-21). The Demore family operated this dealership until the end of the calendar year 2008. (Tr. 124:3-12, 125:2-10). ThermoKing is in the business of selling and servicing transport temperature control systems for trucks, trailers, busses and similar equipment. (Tr. 27:20-24, 122:22-123:10). Hershel gradually grew his business and he eventually purchased a ThermoKing dealership in Tulsa, Oklahoma. (Tr. 124:3-12). All of the family members worked in the business. (Tr. 28:2-6, 29:3-19, 30:1-6, 86:8-13).

The parent corporation of ThermoKing eventually required the Demore family to sell the dealerships at the end of the calendar year 2008. (Tr. 28:10-18, 125:2-10). The family stopped operating ThermoKing of Springfield and then commenced operation as Demore Enterprises, Inc. in January 2009. (Tr. 28:10-29:2, 86:4-7, 125:22-126:21). The primary purpose of Demore Enterprises, Inc. is to own, rent and manage both commercial and residential properties. (Tr. 28:19-29:2, 30:1-6, 86:4-7).

[1] Citations in the transcript shall refer to the page and line numbers (e.g., TR. 28:2-6) or merely to page numbers only (e.g., TR. 231-237).

The Demores reorganized their business in an office and warehouse located at the southeast corner of the intersection of Division Street and West Bypass in Springfield in January 2009. (Tr. 30:13-31:5).

This case focuses upon the southwest corner of this intersection. It is shown in an aerial photograph admitted into evidence as Claimants' Exhibit "B". (Tr. 34:5-13, 225). This aerial photograph depicts the southeast and southwest corners of this intersection. (Tr. 34:5-23, 225). It particularly depicts the southwest corner. (Tr. 34:5-23, 225). Demore Enterprises owns several lots within this corner. (Tr. 34:9-36:15). It rents lots to various businesses. (Tr. 34:9-36:15). These include a used car lot, Great Dane Trucking and ThermoKing. (Tr. 30:7-30:24. 34:9-36:15). These lots face West Bypass and run deeply westward. (Tr. 34:20-35:6, 225). There are four (4) residential lots. (Tr. 225). They face north toward Division Street. (Tr. 225). A renter named Jim Cox rents the residence that is third from the corner. (Tr. 37:12-38:5, 225). A wire fence separates the southern edge of the residential lots from the business lots. (Tr. 39:10-40:16). Demore Enterprises owns three (3) of the four (4) residential lots. (Tr. 231-237). Hershel and Doris own the fourth lot, which Jim Cox rents. (Tr. 37:3-7). It is important to remember that Demore Enterprises owns the fence and maintains the security wiring within the fence. (Tr. 130:18-131:19).

Information from the Greene County Assessor also shows this intersection. (Exhibit "E," Tr. 30:7-12, 231-237). The southwest quadrant indicates that Demore Enterprises, Inc. is the owner of the commercial properties. (Tr. 231-237). It also

indicates a number of different buildings located in this quadrant. (Tr. 231-237). These include garages for Great Dane, ThermoKing and the AutoCare Group. (Tr. 231-237). They set out buildings and parking lots built between 1948 and 1996. (Tr. 231-237). They also include two sheds built in 1920. (Tr. 231-237). Exhibit "E" also lists three (3) residences that Demore Enterprises owns. (Tr. 231-237). Demore Enterprises owns the two (2) residences located at 3616 and 3628 West Division. (Tr. 231-237). Hershel and Doris Demore own the residence located at 3559 West Division. (Tr. 231-237).

B. Vandalism and Burglaries

The Demore family suffered three (3) incidents of either vandalism or burglaries in the spring of 2009 before the accident. (Tr. 31:23-34:4, 127:7-23). Claimants' Exhibit "A" admitted into evidence at the hearing before the Division is a compilation of reports prepared by the Springfield Police Department that describes these crimes. (Tr. 32:2-8).

The first happened on March 14, 2009. (Tr. 32:5-8, 211). The Demores found a hole gouged in the roof of the warehouse. (Tr. 32:5-14, 212). The roof included fiberglass panels. (Tr. 212). One panel was broken. (Tr. 212). It appeared as if someone had walked on it, but did not fall through the panel into the warehouse. (Tr. 212-13).

The Demores reported the next crime, which occurred on April 18, 2009. (Tr. 32:15-19, 214). The Demores reported that the glass door to their office was broken that date. (Tr. 32:20-24, 215). Delores Demore had left the building at 5:00 p.m. the previous day. (Tr. 215).

The Demores next reported a crime that happened on May 24, 2009. (Tr. 32:25-33:5, 216). Burglars stole one of their tractors. (Tr. 32:25-33:5, 217-18). The tractor was a Kubota L4200 four by four tractor with a full cab mower and front loader. (Tr. 217-18). Robert Demore and the investigating police officer could see mud tracks from the Kubota where it was operated by the burglar along the railroad tracks. (Tr. 217-18). The mud tracks disappeared shortly before Division Street. (Tr. 217-18). The burglar had used a bow cutter to cut the chain and damaged the gate so that the burglar could drive through the gate. (Tr. 217-18). America First Insurance wrote the premises liability insurance policy and paid this claim. (Tr. 33:15-18). America First is also the workers' compensation insurance carrier here. (Tr. 7:17-21).

On Monday, June 29, 2009, at approximately 10:00 a.m., while at the Demore Enterprises building, Delores Demore received a telephone call from Jim Cox, an individual who rented property from Hershel and Doris. (Tr. 42:11-16, 127:24-129:13). Mr. Cox called to alert the Demores that a vandal had destroyed part of a fence owned by Demore Enterprises. (Tr. 130:23-131:19).

Demore Enterprises owned this fence. (Tr. 130:23-131:19). This was the fence to which the Demores were travelling at the time when the accident happened. (Tr. 131:8-132:14). Demore Enterprises paid to repair the fence. (Tr. 41:5-42:10).

Mr. Cox reported that he had been mowing and noticed that someone vandalized the fence. (Tr. 37:12-38:20). Knowing that Mr. Cox mowed both his yard and the vacant lot next door owned by the business and that the business owned the fence separating the

properties, the Demores knew that there was a high probability that business property had been vandalized. (Tr. 39:3-40:16.). That knowledge was confirmed; Demore Enterprises owned the fence and the land where the fence was cut. (Tr. 40:17-41:4). The business was billed for the fence repair, and the business paid the repair bill. (Tr. 41:5-42:10).

After Mr. Cox reported the vandalized fence, Doris and Delores rode with Hershel to assess the damage at the site of the reported vandalism. (Tr. 131:20-132:3). Doris accompanied Delores and Hershel because she knew that, pursuant to her job duties, she planned to call the fence company to have the fence repaired and, therefore, needed to see the location of the fence cut. (Tr. 43:12-22).

C. The Accident

Hershel, Doris, and Delores entered Hershel's car in the parking lot of the Demore Enterprises building. (Tr. 43:23-44:7). Hershel was seated in the driver's seat, Delores was seated in the passenger seat, and Doris was seated in the rear seat behind Delores. (Tr. 45:8-11, 86:20-87:3). They proceeded north on West Bypass toward Division Street. (Tr. 44:8-13). At the intersection, Hershel attempted a left-hand turn onto Division Street against an unprotected green light. (Tr. 44:14-45:7, 132:15-133:9). Hershel's vehicle struck a southbound vehicle as the Demores entered the intersection and landed upside down. (Tr. 45:12-46:22).

The other vehicle hit the Demores' vehicle so hard that it left Hershel's vehicle upside down; it took approximately thirty (30) to forty-five (45) minutes before

emergency personnel were able to extract the Demores from Hershel's vehicle.. (Tr. 45:12-46:22, 48:7-49:21).

D. Doris' Injuries

Doris was transported and admitted to Cox Medical Center in Springfield as soon as she was extracted from the vehicle. (Tr. 135:22-136:4). There, Doris received a CAT scan of her head, neck, chest, abdomen, pelvis, and right leg, as well as extensive X-rays. (Tr. 136:5-10). Among her injuries, Doris had several broken bones and a severe head injury with blood on the brain. (Tr. 67:6-14, 87:4-18). The physicians at Cox determined that it was necessary to operate, and Doris underwent surgery the first night of her hospitalization. (Tr. 136:5-16).

Although Doris was eventually released from Cox Medical Center, she transferred to a full-time nursing care facility thereafter. (Tr. 136:17-23). There, Doris developed a kidney infection and noticeable confusion. (Tr. 136:24-137:5). Doris was readmitted to Cox Medical Center after twelve (12) days in nursing care and submitted to neurosurgery to address the issues she had developed since the accident. (Tr. 137:6-8). She then returned to nursing care. (Tr. 137:12-17). Doris' condition was too severe to receive any type of therapy during her first stay in nursing care, but she did receive limited therapy during her second stay, as well as further outpatient physical therapy upon her release. (Tr. 137:22-138:16, 138:19-139:9). Doris was discharged from nursing care around Thanksgiving 2009 after one hundred (100) days of care. (Tr. 137:12-21). She was never able to return to work. (Tr. 29:14-25).

Doris returned home to live with Hershel, but her physical condition had deteriorated severely. She was initially unable to walk and after a year regained that ability, with significant assistance and limitations. (Tr. 69:15-21, 139:10-17). Unfortunately, Doris' mental impairments did not improve. Doris now has severely limited short-term memory to such an extent that it interferes with such everyday tasks as ordering meals at restaurants, remembering appointments, driving (she has not been able to drive at all since the accident), maintaining conversations, and knowing her way around town. (Tr. 68:15-21, 69:2-7, 69:22-70:3, 140:8-141:7, 142:16-21, 143:12-17). Hershel provided nursing and domestic care for Doris ever since she returned home. (Tr. 143:19-144:1). Hershel worked eight hours per day before the accident. (Tr. 88:10-15, 144:2-6). Since the accident and since Doris returned home to live, Hershel has been unable to leave Doris alone at home for any measurable length of time. (Tr. 70:21-71:1, 88:16-21).

Carol Combs, a medical social worker, testified about Doris' injuries. (Tr. 92:17-25; 93:12-95:4; 95:10-97:20). Ms. Combs earned a Bachelor's Degree in Sociology and Psychology from Otterbein College and a Master's Degree in Social Work from The Ohio State University. (Tr. 93:22-94:10). Ms. Combs has experience evaluating and coordinating long-term care for patients dealing with conditions and illnesses that interfere with the ability to care for themselves independently. (Tr. 97:21-98:9). One of the goals of Ms. Combs' job duties, as well as medical social work in general, is to

arrange for sufficient long-term care to keep patients in their homes and defer nursing home care for as long as possible. (Tr. 98:23-101:4).

Ms. Combs is trained to identify what types of medical and social services are required to allow a patient to maximize their potential to live independently. (Tr. 102:9-103:2). Such home health care services typically include reminding patients to take medication, bathing, meal preparation and nutrition, and relief for care-givers. (Tr. 102:3-106:9). If necessary, medical social workers will recommend occupational, speech and physical therapy for patients. (Tr. 106:10-107:13).

Ms. Combs conducted a home visit for Doris. (Tr. 107:22-108:4). She testified that she spent enough time evaluating Doris and Hershel that she could make an assessment as to whether they would need the services of a medical social worker. (Tr. 108:7-11). The report from her visit with the Demores was admitted into evidence at the hearing before the Division. (Tr. 108:12-109:4). Ms. Combs testified that Doris experienced difficulty with balance and with getting up out of a seated position. (Tr. 109:5-22). She also confirmed Hershel and Delores' testimony that Hershel cannot leave Doris alone for Hershel's justified fear that Doris cannot care for herself, even for short periods of time. (Tr. 109:23-110:4).

Ms. Combs also testified about Doris' memory problems. (Tr. 110:5-9). She learned that, since the accident, Doris cannot "remember things like she used to," and that she has forgotten how to do simple tasks. (Tr. 110:10-19). For example, Doris forgets the time of day, the year, how to cook, and how to carry on social conversations. (Tr.

110:10-23). Doris has lost interest in hobbies that she enjoyed before the accident, and demonstrates signs of depression. (Tr. 112:15-113:1). Ms. Combs found that Doris also needs assistance taking her medication. (Tr. 110:24-111:6).

Ms. Combs recommended that Doris needed a personal care assistant to assist Doris with her care for a period of time every day. (Tr. 113:18-114:2). Ms. Combs recommended a home health aide to come to Doris and Hershel's home for about four hours per day. (Tr. 116:14-21). In addition, this would provide Hershel some relief from the virtual "24/7" nursing care and supervision role that he was forced to take after the accident. (Tr. 109:23-25; 113:18-114:8). It would also allow Hershel to resume his business role at Demore Enterprises. (Tr. 114:9-14). Ms. Combs also recommended a Life Line emergency pendant system for Doris. (Tr. 114:15-20).

E. Division Award

Doris, through legal counsel, submitted a written claim to the Insurer on July 31st, 2009. (Tr. 263). The Insurer denied the claim in writing on March 29th, 2010. (Tr. 268). Doris filed a Claim for Compensation on April 14, 2010. (LF 2-3). The Employer filed its Answer on April 28, 2010. (LF 4-5). The Insurer filed its Answer on April 30, 2010. The Insurer denied the claim again. (LF 6-7). The Division heard the claim on November 9, 2011. (Tr. 1). The Insurer did not pay Doris' medical bills, which were Exhibit AA. (Tr. 1476). The Insurer presented no evidence that it offered or provided medical treatment.

There were nine (9) disputed issues before the Division: (1) whether the accident arose out of and in the course of employment, (2) medical causation, (3) past medical expenses, (4) future medical treatment, (5) compensation rates, (6) temporary disability compensation, (7) permanent disability compensation, (8) whether Employer and Insurer were entitled to subrogation credits, and (9) whether Doris was entitled to costs and expenses for an unreasonable defense. (LF 10-29). The Division issued its Final Award on January 30, 2012. (LF 10-29). In its Final Award, the Division found in favor of Doris on all disputed issues. (LF 10-29).

The Division ruled the following upon the fourth issue, which was future medical treatment:

"Accordingly, after consideration and review of the evidence, I find and conclude that the accident of June 29, 2009, caused the employee, Doris Demore, to sustain an injury that required and continues to require additional medical care in order to cure and relieve her from the effects of the work injury. I further find and conclude that the employer and insurer have sufficiently failed or neglected to provide Doris Demore with medical care for her work injury of June 29, 2009.

Therefore, it is ordered that the employer and insurer shall provide the employee, Doris Demore, with medical care in order to cure and relieve her from the effects of the June 29, 2009, work injury. It is further ordered as follows:

1. The employer and insurer shall provide and pay for all medical care prescribed by the physician selected by the employee, Doris Demore,

and which is reasonable, necessary and causally related to the accident of June 29, 2009.

2. The employer and insurer shall tender immediate payment to the health care provider for the above-referenced treatment upon receipt of each medical invoice, subject to the employer and insurer's right to challenge the reasonableness of the medical expenses under Chapter 287, RSMo." (LF. 25-26).

The Division then awarded costs against the Employer and Insurer according to *Section 287.560.* It noted the following. The Insurer presented no evidence that the employees were on a personal errand. The Insurer unreasonably questioned the business judgment of the Employer in sending three employees to check the fence and that it unreasonably questioned the veracity of the employees. The Division then noted seven fundamental and undisputed facts (which lead to the conclusion that Doris' injuries arose out of and in the course of employment). The Division stated that the damage to the fence owned by Demore Enterprises prompted the trip and that there was no evidence that the three employees were driving to check upon the separate property owned by Hershel and Doris. It noted that the Insurer presented no evidence to reasonably question the veracity of the three employees. It also noted that the Insurer had two and one-half (2 ½) years before the hearing to acknowledge the state of the evidence and case law and that it had unreasonably forced Doris to retain legal counsel. It also found that the Insurer impermissibly attempted to shift the cost of the medical expenses to the Medicare

program. It awarded costs representing fees of twenty-five (25) percent of the medical expense and temporary disability that it should have paid without forcing Doris to retain legal counsel to recover those benefits on her behalf. (LF 27-29).

F. Labor Commission Award

The Insurer filed an Application for Review with the Labor and Industrial Relations Commission. (LF 30-33). The Employer did not. The Commission issued its Final Award on September 28, 2012. (LF 39-60). In its Final Award, the Commission adopted the findings, conclusions, decision, and award of the Division except that it reversed the part of the Division's award that granted Doris the right to select her own medical providers and awarded Doris costs and expenses for an unreasonable defense. (LF 39-40).

The Labor Commission stated this about who should select medical providers:

> "In the ordinary case of an employer/insurer waiving its right to select employee's medical provider, the employee will request medical treatment and the employer/insurer will refuse said treatment because it does not believe that the treatment is reasonably required to cure and relieve the employee from the effects of the injury. In accordance with the provisions listed above, employee is then free to select his/her own medical provider and attempt to hold employer/insurer liable for the costs of that specific treatment. In essence, employer/insurer waives it right to select employee's medical provider as to that specific treatment. However, going forward, employer/insurer maintains its right to select employee's future

medical providers. Section 287.140 RSMo does not provide for, nor does any case interpreting § 287.140 RSMo, a circumstance in which employer/insurer permanently waives its right to select employee's medical providers.

Based upon the aforementioned, we reverse the ALJ's finding that employer/insurer waived its right to select employee's medical providers for employee's future medical care. We find that the general rule still applies and employer/insurer maintains its control over the selection of employee's future medical providers." (LF 39-40).

The Labor Commission then ruled the following upon the issue of whether the Insurer submitted an unreasonable defense and should be liable for costs under *Section 287.560*:

"The primary issue in this case concerns whether employee's June 29, 2009 injury arose out of and in the course of her employment. Following the 2005 amendments to Missouri Workers' Compensation Law and introduction of strict construction to Chapter 287 of the Revised Statutes of Missouri, this issue of whether an injury 'arises out of' and 'in the course of' employment has been hotly contested. Based on the facts of this case and arguments proferred by the insurer, we do not find that its defense of this claim was egregious or without unreasonable grounds. See Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240,250 (Mo. 2003), overruled on other grounds, Hampton v. Big Boy Steel Erection, 121

S.W.3d 220 (Mo. banc 2003). Therefore, we reverse the ALJ's award of § 287.560 RSMo costs against insurer." (LF 40).

The Labor Commission then approved and affirmed the allowance of the attorney's fee as being fair and reasonable. (LF 40).

G. Opinion by the Southern District.

The Missouri Court of Appeals – Southern District issued opinions in the appeals concerning Doris and Delores Demore on July 15th, 2013. The opinions affirm the Labor Commission awards, except they reverse the ability of the Insurer to select medical providers. The opinion in Doris' appeal addresses the issues. The opinion in Delores' appeal merely refers to the opinion concerning Doris' appeal. *Delores Demore v. America First Insurance Co.*, Appeal Nos. 32351 and 32361 at p. 4.

The Southern District stated this when holding the Employer was entitled to choose medical providers:

> "However, we reject Doris' complaint about the commission overruling the ALJ as to waiver. We refer and defer to the commission's decision in this instance, not that of the ALJ [citing authority]. Whether waiver occurred as a factual determination on which we defer to the commission [citing authority]. Ours is not to second guess, even if evidence would support a contrary finding [citing authority]. If Doris seriously questions the medical care offered by her family-owned business, § *287.140.2* allows her to seek

relief from the Commission. Point denied." *Doris Demore v. America First Insurance Co.*, Appeal Nos. SD32350 and SD32362 at pp. 2-3.

The Southern District also affirmed the denial of attorneys' fees. It quoted *Nolan v. Degussa Admixtures, Inc.*, 276 S.W. 3d 332, 335 (Mo.App. 2009) and then stated:

> "Given this high bar, our review of the record does not persuade us that the commission abused its discretion on this issue. Points denied." *Doris Demore v. America First Insurance Co.*, Appeal Nos. SD32350 and SD32362 at p. 4.

Points Relied On

Point I

The Labor Commission erred in ruling that the "employer/insurer maintains its control over the selection of employee's future medical providers," because the Insurer has no right to select the medical providers to treat Doris Demore's work-related injuries, and by ruling otherwise the Commission acted in excess of its powers, an issue reviewable under Section 287.495.1(1), in that Section 287.140.10 grants only an employer, not also an insurer, the right to select those medical providers.

Teale v. American Mfrs. Mut. Ins. Co., 687 S.W.2d 218 (Mo. App. W.D. 1984).

Phelps v. Jeff Wolk Constr. Co., 803 S.W.2d 641 (Mo. App. E.D. 1991), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

Meyers v. Wildcat Materials, Inc., 258 S.W.3d 77 (Mo. App. S.D. 2008).

Point II

The Labor Commission erred in ruling that the "employer/insurer maintains its control over the selection of employee's future medical providers" and, by so doing, acted in excess of its powers, an issue reviewable under Section 287.495.1(1), because:

(a) the Employer, which has always been a separate party in this case, waived its right to maintain such control, in that the Final Award of the Division of Workers' Compensation was final against the Employer, but the Employer did not file an application for review; and

(b) as discussed in Point I above, the Insurer has no right to select the medical providers to treat Doris Demores' work-related injuries, in that Section 287.140.10 grants only an Employer, not also an Insurer, the right to select those medical providers.

Curtin v. Zerbst Pharmacol Co., 72 S.W.2d 152 (Mo.App. KC.D. 1934).

Simpson v. Saunchegrow Construction, 965 S.W.2d 899 (Mo.App. S.D. 1998).

Davis v. McKinney, 303 S.W.2d 189 (Mo.App. SPR.D. 1957).

Adams v. Cont'l Life Ins. Co., 101 S.W.2d 75 (Mo. 1936).

Point III

The Labor Commission erred in ruling that the "employer/insurer maintains its control over the selection of employee's future medical providers" and thus acted in excess of its powers, an issue reviewable under Section 287.495.1(1), because under Section 287.140 and its interpretation and application by Missouri courts, the Employer and Insurer (assuming arguendo that the Insurer had any right) waived the Employer's right to select such providers, in that they denied liability on the claim and provided no treatment for almost four years despite knowing that Doris Demore required treatment for serious and life threatening injuries.

Stephens v. Crane Trucking, Inc., 446 S.W.2d 772 (Mo. 1969).

Balsamo v. Fisher Body Div. – General Motors Corp., 481 S.W.2d 536 (Mo.App. 1972).

Durbin v. Ford Motor Co., 370 S.W.3d 305 (Mo. App. E.D. 2012).

Herring v. Yellow Freight Sys., Inc., 914 S.W.2d 816 (Mo. App. W.D. 1995), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

Point IV

The Labor Commission erred by failing to prepare and file a written statement setting forth its findings of fact and conclusions of law with respect to its ruling denying Doris Demore her costs under Section 287.560 for Insurer's unreasonable defense, and thus the Commission acted in excess of its powers, an issue reviewable under Section 287.495.1(1), because the Labor Commission was required to make such findings, in that Section 286.090 requires them when the Labor Commission did not adopt the award of the Division of Workers' Compensation.

Michler v. Krey Packing Co., 363 Mo. 707, 253 S.W.2d 136 (1952).

Louden v. Richmond Life Ins. Co., 497 S.W.2d 188 (Mo. App. Springfield 1973).

Parrott v. HQ, Inc., 907 S.W.2d 236 (Mo. App. S.D. 1995)

Stegman v. Grand River Reg'l Ambulance Dist., 274 S.W.3d 529 (Mo. App. W.D. 2008).

Point V

The Labor Commission erred in denying Doris Demore her costs under Section 287.560 in view of the Insurer's unreasonable defense, because the facts found by the Commission do not support the award, an issue reviewable under Section 287.495.1(3), in that:

(a) the evidence proves that Doris Demore was working for the Employer at the time of her accident, that she was traveling with other employees to the site of the vandalism on the Employer's property, and that her travel fulfilled the Employer's business interests; and

(b) the proper inquiry is whether the employer's activities furthered the employer's interests and the Insurer argued only that it was not Doris' job duty to travel to the vandalism site.

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

McCormack v. Carmen Schell Constr. Co., 97 S.W.3d 497 (Mo. App. W.D. 2002).

DeLong v. Hampton Envelope Co., 149 S.W.3d 49 (Mo. App. E.D. 2004).

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

Argument

Point I

The Labor Commission erred in ruling that the "employer/insurer maintains its control over the selection of employee's future medical providers," because the Insurer has no right to select the medical providers to treat Doris Demore's work-related injuries, and by ruling otherwise the Commission acted in excess of its powers, an issue reviewable under Section 287.495.1(1), in that Section 287.140.10 grants only an employer, not also an Insurer, the right to select those medical providers.

Standard of Review

This is an issue of law.

This Court announced the standard of review for workers' compensation appeals in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222-223 [1-3] (Mo banc 2003).

The opinion in *McGhee v. WR Grace Co.*, 312 S.W.3d 447 (Mo. App. S.D. 2010) is instructive upon the standard of review. *McGhee* initially looked to Article V, § 18 of the Missouri Constitution and quoted Section 287.495. *McGhee*, 312 S.W.3d at pp. 450-451. *McGhee* then quoted the following authorities:

'There is nothing in the constitution or section 287.495 that requires a reviewing court to view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award.' *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003). 'We defer to the Commission on issues of fact.' *Copeland v. Associated*

Wholesale Grocers, 207 S.W.3d 189, 191 (Mo. App. S.D. 2006). However, '[q]uestions of law are reviewed *de novo*. *Id*. "When the commission incorporates the ALJ's opinion and decision, as in this case, the reviewing court will consider the commission's decision as including those of the Administrative Law Judge.' *Id.*, at p. 193 n. 5 (citing *Clark v. FAG Bearings Corp.*, 134 S.W.3d 730, 734 (Mo. App. S.D. 2004). *McGhee*, 312 S.W.3d, at p. 451.

Case Law Denies the Insurer the Right to Choose Medical Providers.

The Labor Commission ruled that the "employer/insurer maintains its control over the selection of employee's future medical providers." (LF 40-41). This ruling, however, is irreconcilable with Missouri law, which provides as follows:

> "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**."
>
> *Section 287.140.10* (emphasis added).

Specifically, the Missouri General Assembly amended *subsection 2* in order to expressly prohibit insurers from choosing medical providers and to vest only employers with such control because *subsection 2 of § 287.030* provides that, to the extent an employer is identified in the Workers' Compensation Law, "[a]ny reference to the

employer shall also include his or her insurer or group self-insurer." This subsection, however, does not apply to the selection of medical providers. *Section 287.140.10.*

Case law confirms what the General Assembly said. "There can be no doubt that the **sole purpose of the change in the statute was to deny insurers any voice in directing workers to particular doctors** or classes of doctors for treatment of job-related injuries." *Teale v. Am. Mfrs. Mut. Ins. Co.*, 687 S.W.2d 218, 220 (Mo. App. W.D. 1984) (emphasis added). The plaintiff in *Teale*, a chiropractor, sued a workers' compensation insurer for intentional interference with contract when the insurer announced that it would no longer pay for medical treatment provided by Teale and only pay for services provided by a member of its panel of approved physicians. The Court stated that the "applicability of the compensation law to this case and the basis for inclusion in [Teale's] petition is that it supports the allegation that [the insurer's] interference with the doctor-patient relation was without justification." *Teale*, 687 S.W.2d, at p. 220.

In *Phelps v. Jeff Wolk Const. Co.*, 803 S.W.2d 641 (Mo. App. E.D. 1991), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003), the Missouri Court of Appeals for the Eastern District repeated the rule expressed by the court in *Teale* by explaining that the purpose of the language in § *287.140* "was to deny insurers any voice in directing workers to particular doctors or classes of doctors for treatment of job-related injuries." *Phelps*, 803 S.W.2d at 647. The court in *Phelps* approved a physician selection award only because there was competent and substantial

evidence that the employer, and not the insurer, selected the treating physician. *Id.*

Strict Construction Denies the Insurer the Right to Choose Medical Providers.

In 2005 the General Assembly amended the Workers' Compensation Law to require strict construction of its provisions. *See generally*, *Norman v. Phelps Cnty. Reg'l Med. Ctr.*, 256 S.W.3d 202 (Mo. App. S.D. 2008), *Allcorn v. Tap Enterps, Inc.*, 277 S.W.3d 823 (Mo. App. S.D. 2009), *29 Mo. Prac., Workers' Compensation Law & Practice* § 7.28 (2d ed.). This amendment, when adopted, departed significantly from the previous "liberal construction" standard. *Allcorn*, 277 S.W.3d at 828.

Under the General Assembly's express adherence to strict construction, courts may not write into the Workers' Compensation Law any provisions that do not appear in the text. *See State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14 (Mo. App. W.D. 2011) (interpreting § *287.800.1*, as a legislative mandate requiring the provisions of the Workers' Compensation Law to be interpreted as plainly written and that "strict construction means that a statute can be given no broader application than is warranted by its plain and unambiguous terms") and *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010) (stating that strict construction confers onto a statute no broader application that that "warranted by its plain and unambiguous terms"). More importantly, statutes under the Workers' Compensation Law not expressly amended by the General Assembly's 2005 changes were "narrowed by the new lens of strict construction." *Robinson*, 323 S.W.3d at 424.

Every construction of the Workers' Compensation Law must be excluded which is inconsistent with or outside the scope of the language of the subject statute. *Allcorn*, 277 S.W.3d at 828. Moreover, "[t]he clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions." *Id.*, *citing* 3 *Sutherland Statutory Construction* § 58:2 (6th ed. 2008).

As applied to § *287.140.10*, strict construction eliminates any possibility that the General Assembly intended that insurers be permitted any authority about who chooses medical providers. The plain text of the statute confers upon employers, but not insurers, a limited right to choose an employee's medical providers and in fact specifically indicates that **"employer" does not mean "insurer"** in connection with this particular provision of the Workers' Compensation Law.

The case law that has developed interpreting § *287.140.10* is consistent with such plain reading. For example, the Missouri Court of Appeals for the Southern District recently recited the statute and indicated only that the law applied to the employer:

"*Section 287.140.1* provides, in pertinent part:

> 'The employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right

> to select his own physician, surgeon, or other such requirement at his own expense.'
>
> "This statute requires an employer to provide an injured employee medical care but allows the employer to select the medical provider.
>
> "As a general rule, an employer is not liable for medical treatment incurred by an employee independently. An employer is held liable for independent medical treatment incurred only when the employer has notice that the employee needs treatment, or a demand is made on the employer to provide medical treatment, and the employer refuses or fails to provide the needed treatment."

Pruett v. Fed. Mogul Corp., 365 S.W.3d 296, 307 (Mo. App. S.D. 2012) (internal citations and quotations omitted).

This interpretation has been applied consistently. *See Durbin v. Ford Motor Co.*, 370 S.W.3d 305 (Mo. App. E.D. 2012) (finding that, under § 287.140.10, the employer has the right to select the medical provider and that when the employer fails to provide such care, the employee may choose her own medical provider and assess the costs against the employer), *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836 (Mo. App. S.D. 2007) (stating as a general rule that the employer has control over the choice of medical providers unless the employer refuses to provide the treatment).

The Southern District has also described § *287.140.10* as clear and unambiguous. In *Meyers v. Wildcat Materials, Inc.*, 258 S.W.3d 77 (Mo. App. S.D. 2008), the court,

while contrasting §§ *287.140.1* and *287.140.10*, remarked that "section 287.140.10 clearly provides that the employer shall have the right to select the medical providers for an employee's treatment" and that "[n]either provision when read in isolation is ambiguous." *Meyers*, 258 S.W.3d at 81. *See also Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81 (Mo. App. E.D. 1995) (indicating that "[t]he intent of [§ 287.140.10] is obvious" and that "[a]n employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider" unless "the employer fails to do so").

Conclusion

Section 287.140.10 only grants an employer, but not an insurer, the right to select the Employee's medical providers. In fact, the language of the statute specifically indicates that "employer" does not mean "insurer." As this is a question of interpretation of the law, no deference to the Commission's award is warranted. Therefore, the Labor Commission's award to the Insurer the right to choose Doris' medical providers should be reversed.

Point II

The Labor Commission erred in ruling that the "employer/insurer maintains its control over the selection of employee's future medical providers" and, by so doing, acted in excess of its powers, an issue reviewable under Section 287.495.1(1), because:

(a) the Employer, which has always been a separate party in this case, waived its right to maintain such control, in that the Final Award of the Division of Workers' Compensation was final against the Employer, but the Employer did not file an application for review; and

(b) as discussed in Point I above, the Insurer has no right to select medical providers to treat Doris Demore's work-related injuries, in that Section 287.140.10 grants only an Employer, not also an Insurer, the right to select those medical providers.

Standard of Review

The standard of review for Point II is the same as that stated for Point I.

The Employer and Insurer are Separate Parties.

The Labor Commission ruled that the "employer/insurer maintains its control over the selection of employee's future medical providers." This is error because the Employer did not appeal from the decision of the Division Award. (LF 30-33). The Insurer filed its own Application for Review. (LF 30-33). The Employer did not. (LF

31-34). They were, and have been, separate parties. (Tr. 1). The failure of the Employer to appeal is significant because the Division Award conferred the right of selection of medical providers to Doris. (LF 10-29).

Here, the Division awarded Doris the right to select medical providers, finding that the Employer had denied the claim and that the Employer had thus waived its right to control the selection of Doris' medical providers. (LF 25). The Insurer then filed an Application for Review in order to appeal the Division Award to the Labor Commission, but the Employer failed to do so. (LF 30-33).

The Employer and Insurer were separate parties and represented by separate counsel. (Tr. 1). The employer and insurer are separate and distinct entities and must effectuate their own appeals. *See Curtin v. Zerbst Pharmacol Co.*, 72 S.W.3d 152 (Mo. App. Kansas City 1934) (describing employers and insurers as "separate and distinct [entities]"); *Simpson v. Saunchegrow Const.*, 965 S.W.2d 899 (Mo. App. S.D. 1998); *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (comparing separate appeals brought individually by the employer and the insurer); *Davis v. McKinney*, 303 S.W.2d 189 (Mo. App. SPR.D. 1957) (instructing that the employer and insurer took separate appeals); and *Adams v. Cont'l Life Ins. Co.*, 101 S.W.2d 75 (Mo. 1936) (describing the employer and insurer as separate entities in that they took separate appeals from the judgment of the circuit court).

The Employer had to Appeal the Ruling Concerning the Selection of Medical Providers.

The Employer's failure to file an Application for Review made the Division's Final Award final against the Employer. The time limit allowed for filing an Application for Review[2] is a jurisdictional constraint. *State ex rel. Famous Barr Co. v. Labor and Indus. Relations Comm'n*, 931 S.W.2d 892 (Mo. App. W.D. 1996). Accordingly, the failure of a party to a workers' compensation claim to file an Application for Review with the Labor and Industrial Relations Commission "is jurisdictional and requires strict compliance. Failure to comply with the statutory time for appeals results in a lapse of jurisdiction and of the right of appeal. The procedures outlined for appeal by the statute are mandatory." *Merritt v. Shoney's, Inc.*, 925 S.W.2d 494, 495 (Mo. App. E.D. 1996) (internal citations omitted). *See also Porter v. Emerson Elec. Co.*, 895 S.W.2d 155 (Mo. App. S.D. 1995)(Chapter 287 does not provide for cross appeals as the Rules of Civil Procedure do); *Weber v. Div. of Employment Sec.*, 950 S.W.2d 686 (Mo. App. S.D. 1997)

[2] § *287.480* provides as follows: "If an application for review is made to the commission within twenty days from the date of the award, the full commission, if the first hearing was not held before the full commission, shall review the evidence, or, if considered advisable, as soon as practicable hear the parties at issue, their representatives and witnesses and shall make an award and file it in like manner as specified in section 287.470."

(indicating that the jurisdictional nature of the application for review process means that the failure to timely file an application for review strips both the Labor Commission and the Court of Appeals of jurisdiction and results in the total loss of the right to appeal), *Knuckles v. Apex Indus., Inc.*, 762 S.W.2d 542 (Mo. App. E.D.) (stating that the Court of Appeals lacks jurisdiction to review a party's appeal where a party's "application for review was not timely filed").

Accordingly, the Court of Appeals did not have jurisdiction to hear an appeal from the Employer because the Final Award of the Division is final against the Employer. Therefore, the Labor Commission erred when it ruled that the "employer/insurer maintains its control over the selection of employee's future medical providers." The Division awarded Doris the right to select her medical providers and the Employer, the only party entitled under the law to select medical providers other than the Employee herself, did not appeal the Final Award issued by the Division. The Commission, then, was not vested with the jurisdiction to reverse the Division on this point, and, with respect to the Employer, the Final Award of the Division remains intact and not subject to review.

The Southern District dismissed this point, citing this dictum: the Labor Commission must "rule upon every issue presented which pertains to a determination of liability in a workers' compensation claim; liability is not fixed until it is determined who is entitled to what from whom." *Stonecipher v. Treasurer*, 250 S.W.3d 450, 452 (Mo. App. 2008) (quoting *Highley v. Martin*, 784 S.W.2d 612, 617 (Mo. App. 1989)). This

dictum has strayed from its original context and does not apply here. The language stems from *Harris v. Pine Cleaners*, 274 S.W.2d 328 (Mo.App. 1955), affirmed 296 S.W.2d 27 (Mo. banc 1956) (*Highley* relies upon *Harris* at p. 617). *Harris* concerned which of two insurers were liable. *Highley* concerned whether the claimant and an uninsured employer had agreed to a compromise settlement before the Division hearing. *Stonecipher* concerned ambiguous awards. Either the employer or Second Injury Fund were liable for permanent total disability benefits; this appeal was the second time the Court had heard the case and the Court could not tell, from two different Commission awards, what benefits were awarded and who was liable.

This appeal concerns none of those issues. The Employer ostensibly had the statutory right (see, however, Point III) to assert a right to choose medical providers, but it did not appeal. The Insurer had no such right and it did appeal. This issue does not concern so much liability, such as *Harris* addressed, as it does the procedure of who chooses medical providers. This is not an appeal like *Highley* where the facts are contested and a remand is necessary to determine what happened below, like *Stonecipher*. What we have here is an employer who could have appealed, did not appeal, has never sought review, and still does not seek review. There is nothing unclear here. The Employer is bound by the Division award. The Insurer's appeal upon selection of medical treatment should fail if for no other reason that it has no right to select anyway.

Conclusion

The failure of the Employer to appeal the Division's Final Award is a jurisdictional defect that necessarily resulted in the Court of Appeals being unable to hear an appeal. Under § *287.140.10*, the Employer was the only party entitled to seek the right to select medical providers and waived its right when it did not appeal from the Final Award of the Division. As this is a question of interpretation of the law, no deference to the Commission's award is warranted. Therefore, the Labor Commission erred when it reversed that portion of the Division's award.

Point III

The Labor Commission erred in ruling that the "employer/insurer maintains its control over the selection of employee's future medical providers" and thus acted in excess of its powers, an issue reviewable under Section 287.495.1(1), because under Section 287.140 and its interpretation and application by Missouri courts, the Employer and Insurer (assuming arguendo that the Insurer had any right) waived the Employer's right to select medical providers, in that they denied liability on the claim and provided no treatment for almost four years despite knowing that Doris Demore required treatment for serious and life threatening injuries.

Standard of Review

The standard of review for Point III is the same as that stated for Point I.

The Employer Waives the Right to Select Medical Providers When It Refuses to Provide Treatment.

Even if the Employer had properly filed an Application for Review to the Labor Commission, the Commission erred when it reversed the Division's award allowing Doris to select her own medical providers. This is so because the Employer waived the right to select the providers when it denied compensability.

The Commission reversed the Division's decision allowing the Employee to select her own medical providers, finding that, "going forward, employer/insurer maintains its right to select employee's future medical providers." *Section 287.140* does not provide for, nor does any case interpreting § *287.140* a circumstance in which employer/insurer

permanently waives its right to select employee's future medical care providers." (LF 39-40). This application of the law contradicts both § *287.140* and case law.

While the employer is generally given control of the selection of medical providers, this right is forfeited if an employer fails to provide necessary medical treatment. Specifically, "[w]hile the employer has the right to name the treating physician, the employer may waive that right by failing or neglecting to provide necessary medical aid." *Emert v. Ford Motor Co.*, 863 S.W.2d 629, 631 (Mo. App. E.D. 1993), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In *Herring v. Yellow Freight Sys., Inc.*, 914 S.W.2d 816 (Mo. App. W.D. 1995), *overruled on other grounds by Hampton*, 121 S.W.3d 220, the employee provided substantial evidence of the need for medical care following a work-related accident. The employer refused to provide the necessary medical aid despite having been provided notice of the employee's injury. *Herring*, 914 S.W.2d at 822. The court found that the Commission's award allowing the employee to recover his medical expenses from providers of his own choosing was supported by substantial evidence. *Id.*

The Employer Waives the Right to Select Medical Providers When It Denies Liability.

Here, the Employer was provided notice of Doris' injuries. (Tr. 10, 13). The Employer denied liability and refused to provide necessary medical care to cure and

relieve Doris' injury.[3] (Tr. 11, 14). Under Missouri law, an employer waives its right to choose the employee's medical provider when the employer denies liability and neglects to provide medical treatment. *See Wiedower v. ACF Indus., Inc.*, 657 S.W.2d 71 (Mo. App. E.D. 1983) (finding that the employer waives the right to select the employee's medical provider by refusing to provide treatment after receipt of notice of the employee's injury), *Beatty v. Chandeysson Elec. Co.*, 190 S.W.2d 648 (Mo. App. St. Louis 1945) (directing that an employer must pay for employee's choice of medical providers where employer fails and refuses to provide such treatment), *Finn v. Harrison*, 255 S.W.2d 93 (Mo. App. St. Louis 1953) (reversing the decision of the Commission because, while the Workers' Compensation Law "accords the employer the privilege of choosing the physician or agency to render the medical treatment required by virtue of its provisions, still if said employer neglects or refuses, by reason of a denial of liability or otherwise, to provide such medical treatment, the employee may select his own physician and have the costs of the treatment assessed against the employer"), *Schutz v. Great Am. Ins. Co.*, 103 S.W.2d 904 (Mo. App. Kansas City 1937) (stating that the employee may select the medical provider where the employer fails to provide necessary medical care), *Evans v. Chevrolet Motor Co.*, 105 S.W.2d 1081 (Mo. App. St. Louis 1937) (acknowledging that the employer is initially entitled to choose the employee's medical provider, but that the employer waives that entitlement upon the employer's refusal to provide medical care).

Case Law Does Not Provide Employers a Second Chance to Select Medical Providers.

Knowing this, why does an employer, after having once waived its right to select medical providers, have its right reinstated to select medical providers? Even more specifically, does an employer, who denies liability or refuses medical treatment, waive its right to select providers for future medical treatment? This is especially important given the importance of having a continuity of care between the injured employee and medical providers. The Labor Commission was incorrect when it stated that "nor does any case interpreting § 287.140 RSMo, a circumstance in which employer/insurer permanent waives its right to select employee's future medical providers." In *Durbin v. Ford Motor Co.*, 370 S.W.3d 305 (Mo. App. E.D. 2012), the Missouri Court of Appeals for the Eastern District repeated the rule under § *287.140.10* that "[o]nly when the employer fails to provide medical care is the employee free to choose her own provider, and to assess those costs against her employer" and further that "if the claimant shows by reasonable probability that she needs additional medical treatment as a result of her work-related accident, such evidence will support an award of future medical benefits." *Durbin*, 370 S.W.3d at 312, *citing Poole v. City of St. Louis*, 328 S.W.3d 277 (Mo. App. E.D. 2010). The court in *Durbin* did not suggest that, once the employer waives its right to select the employee's medical provider, that right reappears for purposes of future medical benefits.

In fact, the Eastern District specifically held there is no so-called "reset button" to reverse an employer's waiver of the right to select the medical provider:

> "[W]e see no valid basis on which to uphold the employer's wish to require the employee to discontinue the nursing care he has chosen, and accept whatever is belatedly provided by the employer. Since the employer has been aware of the employee's need for at least some nursing care since 1967, and has heretofore not offered to provide it, **we conclude that he has waived his right under the statute**."
>
> *Balsamo v. Fisher Body Div.-Gen. Motors Corp.*, 481 S.W.2d 536, 538-39 (Mo. App. St. Louis 1972) (emphasis added).

The court subsequently interpreted *Balsamo* to mean that where the employer stops or fails to provide medical care even though the employee is still in need of care, the employer waives its rights under § *287.140.10* with respect to future medical care. *Schuster v. State Div. of Employment Sec.*, 972 S.W.2d 377, 385 (Mo. App. E.D. 1998). ***Section 287.140.10,* then, is applicable to both past and future medical care**, and the Commission's statement to the contrary is erroneous.

This Court applied this rule in a claim concerning future nursing care. In *Stephens v. Crane Trucking, Inc.*, 446 S.W.2d 772 (Mo. 1969), the employer denied the employee's claim for compensation, refused to provide nursing care, and then took the position that the employee's wife should not provide future medical care, as she did upon the employer's denial of the employee's claim. This Court responded to this untenable

position: "It might be said in passing that if appellants dislike the idea of compensating claimant for such services when rendered by his wife, they might have exercised the privilege of purchasing them for him 'in the first instance' from someone in the practical nursing profession." *Stephens*, 446 S.W.2d at 781. Therefore, in this case, when the Employer and the Insurer denied the claim and refused to provide medical care for Doris, the right to select the medical provider under § *287.140.10* terminated, and Doris' need for future medical care does not, as a matter of law, resurrect that extinguished right.

The Southern District mistakenly characterized this issue as one of fact. This is incorrect for several reasons. First, the Division found the employer waived the right to select medical providers and the Labor Commission affirmed those findings. Second, the Labor Commission even acknowledged the employer previously waived the right to select medical providers when it stated, "However, going forward, the employer/insurer maintains its right to select employee's future medical providers. *Section 287.140 RSMo* does not provide for, nor does any case interpreting § *287.140 RSMo*, a circumstance in which employer/insurer permanently waives its right to select employee's future medical providers." The Labor Commission does not disagree with the Division's decision the employer waived the right to select medical providers before the hearing. The Commission only addresses **future** selection when it uses the phrase "going forward" and mistakenly states there is no case concerning waiver of future selection of medical providers. And, further, the Southern District forgets to recognize that an employer who

denies liability waives the right to select providers. Bottom line, the Labor Commission did not find any facts that supported its ruling. It ruled as a matter of law, not fact.

We must respectfully disagree with the Southern District when it suggests remedies. It stated that *Section 287.140.2* provides a remedy for disputes concerning future treatment. The Labor Commission cannot review any issue unless there is a substantial change in condition. *Section 287.470.* That procedure leads to several uncertainties and potentially opens all parties to further litigation. *See*, for example, *Sachs Electric Company v. Mates*, 254 S.W.3d 900 (Mo.App. W.D. 2008). How much worse should the condition become before a motion is ripe? What evidence is procedurally necessary? How must that evidence be presented? Must treatment be commenced or need it only be recommended? The Southern District also suggests that Doris and Delores will not have any difficulty in getting the family owned business to authorize care. Just how should they do that? And, even if it were authorized, when will the insurer pay it?

Conclusion

Missouri law does not provide a "reset" button that permits an Employer to refuse medical treatment and then choose medical providers upon the need for future medical care. In fact, the case law interpreting *Section 287.140.10* says so explicitly, and this Court has rejected the Insurer's position. As this is a question of interpretation of the law, no deference to the Commission's award is warranted. Therefore, the Labor

Commission erred when it reversed the portion of the Division's Final Award allowing Doris to select the medical providers for her future care.

Point IV

The Labor Commission erred in failing to prepare and file a written statement setting forth its findings of fact and conclusions of law with respect to its ruling denying Doris Demore her costs under Section 287.560 for Insurer's unreasonable defense, and thus the Commission acted in excess of its powers, an issue reviewable under Section 287.495.1(1), because the Labor Commission was required to make such findings, in that Section 286.090 requires them when the Labor Commission did not adopt the award of the Division of Workers' Compensation.

Standard of Review

The problem here with stating a standard of review is that the Labor Commission issued no findings of fact or rulings of law so that this Court may know whether it is reviewing a question of fact (to which this Court would either grant deference or no review at all) or a question of law (which this Court would review *de novo*).

The Governing Statute and Primary Authority Require Findings of Fact and Rulings of Law.

The Labor Commission could not have properly reversed the Division of Workers' Compensation's award of costs to the Employee because the Labor Commission did not prepare and file a written statement providing the findings of fact and conclusions of law upon the issue.

The Commission reversed the Division Award when it stated the following:

> "The primary issue in this case concerns whether employee's June 29, 2009, injury arose out of and in the course of her employment. Following the 2005 amendments to Missouri Workers' Compensation Law and the introduction of strict construction to Chapter 287 of the Revised Statutes of Missouri, this issue of whether an injury 'arises out of' and 'in the course of' employment has been highly contested. Based on the facts of this case and the arguments proffered by insurer, we do not find that its defense of this claim was egregious or without reasonable grounds. Therefore, we reverse the ALJ's award of § 287.560 RSMo costs against insurer."
>
> (LF 40).

The Labor Commission provided no findings of fact on the issue. (LF 39-40). The Workers' Compensation Law provides as follows:

> "In every appeal coming before the commission from any of the divisions of the department, the commission shall prepare and file a written statement giving the commission's findings of fact and conclusions of law on the matters in issue in such appeal together with the reasons for the commission's decision in the appeal; except that a decision of a division of the department meeting the requirements of this section may be affirmed or adopted without such written statement."
>
> § *286.090*.

Here, the Division found that the Insurer conducted an unreasonable defense to the Employee's claim and **specifically stated why**. (LF 28-30). The Commission reversed this finding but failed to provide findings of fact and conclusions of law. (LF 39-40). The only exception to the law requiring the Commission to provide findings of fact and conclusions of law is that the Division's award may be affirmed and the Division's own findings of fact and conclusions of law may be adopted in such cases. However, in this case, the Commission purported to reverse the Division's award of attorney's fees, which necessarily means that the only exception contained in the law does not apply here.

Under the circumstances of the instant case, "[t]his requirement is a prerequisite for appellate review." *Mader v. Rawlings Sporting Goods, Inc.*, 73 S.W.3d 83, 85 (Mo. App. S.D. 2002), *citing Brown v. Sunshine Chevrolet GEO, Inc.*, 27 S.W.3d 880, 885 (Mo. App. S.D. 2000). Of course, generally the Commission's decision may be reversed on appeal only where there is no substantial and competent evidence to support the decision or if the decision is clearly contrary to the evidence on the record. *Mader*, 73 S.W.3d at 84-85, *citing Dunn v. Hussman Corp.*, 892 S.W.2d 676, 680-81 (Mo. App. E.D. 1994). However, "[f]indings made based on interpretation of the law are reviewed without deference to the commission's decision. Thus, **the commission's findings and conclusions are essential to appellate review**." *Mader*, 73 S.W.3d at 85 (internal citations omitted) (emphasis added).

The Commission's failure to provide findings of fact and conclusions of law to an issue raised at the Division level is fatal to appellate review. At a minimum, the issue

should be remanded to the Commission in order for the Commission to enter its findings and conclusions that concern why it was reasonable for the Insurer to dispute whether the Employee's activity furthered the interests of the Employer.

Any research that concerns the absence of findings and rulings by a Missouri administrative agency should start with *Michler v. Krey Packing Co., 363 707, 253 S.W.2d 136 (Mo. 1952).* This Court reversed and remanded a workers' compensation claim in which the Labor Commission failed to make affirmative findings of fact upon the issue of whether the claimant was married to the deceased employee in a death claim. The Court stated that the findings should be sufficient to show whether the basis of the decision was an issue of fact or a question of law. The Court relied upon most persuasive authorities, including Chief Justice Hughes and Justice Frankfurter of the U.S. Supreme Court, Judge Cardozo of the New York Court of Appeals, and Professor Davis upon administrative law. *Michler,* 253 S.W.2d, at 142-43. Perhaps the rationale of *Michler* can be boiled down to one sentence, taken from Judge Cardozo: 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *Michler,* at p. 143, quoting *United States v. Chicago M. St. P. & R. Co*., 294 U.S. 499, 55 S.Ct. 462, 79 L.Ed. 1023. See also, *Parrott v. HQ, Inc*., 907 S.W.2d 236, 244 (Mo. App. S.D. 1995) which also heavily relies upon *Michler*.

More Recent Authorities Also Require Findings and Rulings.

Louden v. Richmond Life Ins. Co., 497 S.W.2d 188 (Mo. App. Springfield 1973) is perhaps the first authority upon this issue in Missouri which emphasized Section 286.090 in remanding the case for findings and rulings:

> "Here, the Commission failed to comply with the statutory mandate in its reversal of the division's decision denying benefits since no findings of conclusions as to insurance coverage or insurance carriers were made. The matter of non-coverage of the alleged employers was raised and contested by both U.S.F. & G. and Firemen's. Whether there was live and subsisting insurance coverage by either, or both, of the alleged carriers '. . . (I)s part and parcel of the ultimate determination of liability under the Act of those persons before the Commission. . . .' The question as to who is the insurance carrier for an employer is ordinarily a question of fact. The Commission should make findings of fact and conclusions of law which show the actual grounds of decision and which are sufficiently specific to make possible an intelligent judicial review. And, the findings of fact should be stated in affirmative terms, positively and not negatively.
>
> "In view of the foregoing we must defer consideration of the remaining issues herein until such time as the Commission '. . . (S)hall prepare and file a written statement giving its findings of fact and conclusions of law on

(all) the matters in issue . . . together with the reasons for its decision . ...'"

Louden, 497 S.W.2d at 189-90 (internal citations omitted).

A more recent authority takes this requirement to heart. In *Stegman v. Grand River Reg'l Ambulance Dist.*, 274 S.W.3d 529 (Mo. App. W.D. 2008), the Labor and Industrial Relations Commission, on the issue of whether or not a claimed injury was work-related, made a finding that the only dispositive fact was that the employee had not left her house at the time of the injury. The employee appealed the Commission's award and the Missouri Court of Appeals for the Western District stated that because of the Commission's failure to adopt findings of fact and conclusions of law on the issue, the court could not know how the Commission understood and resolved the nature of the employee's employment and the applicable legal theory and therefore the court could not hear the issue on appeal "without understanding the pertinent facts the Commission found were part of this employment." *Stegman*, 274 S.W.3d at 529. The court was forced to "vacate the award and remand the matter to the Commission for findings of fact and conclusions of law and any other proceedings not inconsistent with this decision." *Id.* *See also Brown*, 27 S.W.3d at 884-85, 885 (finding that, if the Commission fails to provide findings of facts and conclusions of law on an issue, it cannot comply with § *286.090* unless it adopts the Division's decision and the Division's decision includes findings of fact and conclusions of law and declaring that the Commission's failure to include such findings and conclusions of law resulted in the appellate court's inability to carry out its duty of review pursuant to § *287.495*.

An award issued by the Commission fails to comply with the mandates of § *286.090* when it does not state a **reason** for its decision disposing of an issue raised in an application for review. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. E.D. 1990). In *Brown*, the Commission determined that "the injury to the right foot and the exacerbation of the preexisting back condition would entitle [the employee] to an award for permanent partial disability" but this determination did "not furnish a reason for finding that he was not totally disabled by virtue of the combination of these disabilities with the preexisting back disability." *Id.* In addition, the record disclosed no evidentiary support for the Commission's conclusion. *Id.* at 483. In fact, the court pointed out that the physician report that the employee, and presumably, the Commission, relied upon, was "of no assistance in determining the liability of the Second Injury Fund and lends no support to the conclusion that the combination of disabilities increased the degree of partial disability." *Id.*

In *Brown v. Sunshine Chevrolet GEO, Inc.*, 27 S.W.3d 880 (Mo. App. S.D. 2000), the Commission issued no findings of fact or rulings of law on the issue of whether a notice of hearing was sent to the correct address. The issue for determination was whether there was good cause for the attorney for the claimant in that case failing to take required acts necessary to prosecute the case. Therefore, the requirements of § 286.090 were not met. The Missouri Court of Appeals for the Southern District held that it could not "perform its duty of review under § 287.495". *Brown*, 27 S.W.3d, at p. 885. *See also Hunt v. Laclede Gas Co.*, 869 S.W.2d 770 (Mo. App. E.D. 1993) (reversing on the

ground of impossibility of judicial review the Commission's award dividing attorney's fees where both the Division's and the Commission's award failed to provide findings of fact or conclusions of law on the matters in dispute).

In this case, the Commission found merely that, "[b]ased on the facts of this case and the arguments proffered by insurer, we do not find that its defense of this claim was egregious or without reasonable grounds." (LF 41). No reason for its decision, as required by § *286.090* was provided by the Commission sufficient to indicate that the Commission provided or adopted findings of fact or conclusions of law on the issue of whether the insurer's defense of the claim was egregious or without reasonable grounds, and therefore, at a minimum, the Commission's decision on this issue must be remanded for determination in compliance with the Workers' Compensation Law. *See Brown*, 795 S.W.2d 479 at 482.

Ironically, the Southern District cites *Stegman v. Grand River Regional Ambulance District*, 274 S.W.3d 529 to conclude the Commission award complies with *Section 286.090.* However, *Stegman* held the Commission award there did not comply. The case concerned whether an EMT suffered injuries arising out of and in the course of her employment when she was dressing and hurrying out of her house to answer an emergency call. The Western District stated the Commission only made one finding: that the claimant had not yet left her house when she was injured. That was insufficient, according to the Western District, to understand "how the employment worked." *Stegman*, at p. 536. Or, as the Western District also stated: "[w]e need to know what the

Commission actually found to be operative and significant as it reviewed the testimony." *Stegman*, at p. 536. If anything, *Stegman* supports a remand here, not an affirmance.

Conclusion

The Labor Commission did not provide findings of fact and conclusions of law upon the issue of whether the Insurer submitted an unreasonable defense, as required in § *286.090*. The findings of fact and conclusion of law provided by the Commission are essential to judicial review. At a minimum, a remand to the Labor Commission is necessary in order for the Commission to enter its findings and conclusions that concern why it was reasonable for the Insurer to dispute whether the Employee's activity furthered the interests of the Employer. As this is a question of interpretation of the law, no deference to the Commission's award is warranted.

Point V

The Labor Commission erred in denying Doris Demore her costs under Section 287.560 in view of the Insurer's unreasonable defense, because the facts found by the Commission do not support the award, as issue reviewable under Section 287.495.1(3), in that:

(a) the evidence proves that Doris Demore was working the Employer at the time of her accident, that she was traveling with other employees to the site of vandalism on the Employer's property, and that her travel fulfilled the Employer's business interests; and

(b) the proper inquiry is whether the employer's activities furthered the employer's interests and the Insurer argued only that it was not Doris' job duty to travel to the vandalism site.

Standard of Review

Pursuant to the *Missouri Constitution, Article V*, § 18, this Court shall review the award of the Labor and Industrial Relations Commission to determine whether the award "is supported by competent and substantial evidence upon the whole record." *See Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (finding that the judicial review as set forth in *Article V, § 18*, applies to appellate review of Commission awards).

On appeal, an appellate court "shall review only questions of law and may modify, reverse, remand for hearing, or set aside the award upon any of the following grounds and no other:

(1) That the Commission acted without or in excess of its powers;

(2) That the award was procured by fraud;

(3) That the facts found by the Commission do not support the award;

(4) That there was not sufficient competent evidence in the record to warrant the making of the award."

Section 287.495.1

There are additional authorities that the Court may find helpful which concern the standard of review. *Clark v. Harts Auto Repair*, 274 S.W.3d 612, 615, (Mo. App. W.D. 2009), affirmed an award of costs issued by the Labor Commission against an employer and insurer for an unreasonable defense. *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 516 (Mo. App. W.D. 2011) concerned a misapplication of law by the Labor Commission once the Commission found a compensable injury. *Angus v. Second Injury Fund*, 328 S.W.3d 294 (Mo. App. W.D. 2011) reversed factual findings of the Labor Commission because they were against the weight of the overwhelming evidence.

"Whether the award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. An award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence." *Hampton*, 121 S.W.3d at 223.

No Facts Here Provide a Defense the Law Recognizes.

The Labor Commission erred in denying Doris costs under § *287.560* because the facts here do not provide a defense the law recognizes Under *§ 287.495*, the facts found

by the Commission do not support the denial and there was insufficient evidence to warrant the denial. *§ 287.495(3)(4)*. The Division properly taxed attorney's fees and expenses to Doris because Missouri law so provides. *Section 287.560* permits an award of attorney's fees and expenses in favor of the employee where "any proceedings have been brought, prosecuted or defended without reasonable ground." Here, the Insurer should have, at a minimum, paid the medical expenses and temporary disability that the Employee suffered without requiring the Employee to obtain legal counsel to recover those expenses.

The Division's award was entirely consistent, and the Commission's reversal of this part of the award was entirely inconsistent, with the prevailing case law on the subject. In *Landman v. Ice Cream Specialties, Inc.*, this Court affirmed an award of attorney's fees based on an insurer's unreasonable defense. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003), *overruled on other grounds by Hampton*, 121 S.W.3d 220 (Mo. banc 2003). In that case, the Commission found that the insurer conducted an unreasonable defense because it agreed to pay for the employee's medical expenses if and when the employer's doctor determined that the employee's injuries were work-related. *Landman*, 107 S.W.3d at 250. The insurer continued to refuse to pay, even after the employer's doctor concluded that the injury was work-related. *Id.* The insurer defended its continued refusal to pay medical expenses based on medical records the insurer claimed concluded that the employee's injuries were unrelated to work. *Id.* However, this Court affirmed the award of attorney's fees because

the insurer failed to put on any evidence to support its defense. *Id.* Because the records the insurer relied on to prove the reasonableness of its defense were not overwhelming, the Commission's decision was supported by the evidence and affirmed. *Id.* at 250-51.

Similarly, in *McCormack v. Carmen Schell Constr. Co.*, the appellate court found that even where the employer/insurer had not been unreasonable in defending *all* of the issues in a Workers' Compensation claim, an award of attorney's fees was appropriate because the employer/insurer's denial of temporary total disability benefits was "clearly unreasonable and arbitrary." *McCormack v. Carmen Schell Constr. Co.*, 97 S.W.3d 497, 511 (Mo. App. W.D. 2002), *overruled on other grounds by Hampton*, 121 S.W.3d 220. The appellate court further found that although the employer/insurer had articulated facts at trial and upon appeal to the Commission rebutting the administrative law judge's and the Commission's conclusion that the defense was unreasonable, "evidence to the contrary was before the Commission." *McCormack*, 97 S.W.3d at 512. Therefore, the decision finding an unreasonable defense was "supported by competent and substantial evidence on the whole record and [was] not against the overwhelming weight of the evidence." *Id.* The award of attorney's fees to the employee was affirmed. *Id.*

The Southern District relies upon *Nolan v. Degussa Admixtures, Inc.*, 276 S.W.3d 332, 335 (Mo.App. S.D. 2009) to justify its reasoning that is should affirm an ostensible finding of fact. We believe this mistaken for several reasons. The parties in *Nolan* dispute whether a workplace penalty applied and both cited evidence supporting their contradictory positions. That is not the issue here. The facts were uncontradicted. And,

we know a question of law exists when pertinent facts are not disputed upon whether an accident arose out of and in the course of employment. Many authorities are in accord. See, for example, *Bennett v. Columbia Health Care*, 80 S.W.3d 524, 528 (Mo.App. W.D. 2002); *Rogers v. Pacesetter Corporation*, 972 S.W. 2d 540, 542 (Mo.App. E.D. 1998); *Cook v. St. Mary's Hospital*, 939 S.W.2d 934, 936 (Mo.App. W.D. 1997); *Cherry v. Powdered Coatings*, 897 S.W.2d 664, 666 (Mo.App. E.D. 1995).

We submit the "abuse of discretion" standard relied upon by the Southern District, citing *Nolan*, at p. 335[5], conflicts with the standard of review required under *Section 287.495*. The only authority *Nolan* cites is from a premises liability case where the Court of Appeals affirmed a ruling by the trial court denying leave to amend a petition during trial. *Ratliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 542-543 [7-11] (Mo.App. W.D. 2008). The "abuse of discretion" standard reviewing rulings by trial court upon procedural issues is not the same as the statutory review exercised by appellate courts of workers' compensation appeals. *Section 287.495*. *Section 287.495.1(3)* calls for a reviewing court to determine whether the facts found support the award. All facts here prove the Demore family was furthering the interests of the business by checking upon the vandalism. There was no evidence the Demores were traveling for personal activities. It was unreasonable to deny this claim when there was no evidence the Demores traveled to the vandalism site for personal reasons. Citations to the "abuse of discretion" standard under procedural rules promulgated by this Court will confuse the

public about the statutory role of courts when reviewing workers' compensation appeals under *Section 287.495.*

This Court firmly stated that where there has been an unreasonable claim for defense, the "offending party is to be charged." *Landman v. Ice Cream Specialties*, 107 S.W.3d 240, 251 (Mo. banc 2003). The facts here were undisputed. Those facts could lead to no defense. The judiciary should not decline its jurisdiction. Had the Insurer presented facts that could lead a fact finder to believe that the injuries did not arise out of and in the course of employment, this issue would be different. That, however, is not the situation before this Court. This Court can, and indeed should, remind the public what it stated in *Landman*. Unreasonable claims and defenses should be charged to the offending party.

The Uncontested Facts Prove the Injuries Arose Out of and in the Course of Employment.

The decision of the Commission was not supported by competent and substantial evidence because there is no evidence on the record that it was reasonable to defend a claim on nonexistent grounds. Here, Doris presented substantial and competent evidence at trial indicating that Insurer had conducted an unreasonable defense. The following evidence is undisputed:

(1) A residential tenant, Jim Cox, called the Demores at their place of business to report a cut to a fence owned by Demore Enterprises. (Tr. 42:11-16, 127:24-129:13, 130:24-131:19).

(2) The Demores drove to the site of the fence cut in order to evaluate the damage. (Tr. 131:20-132:3).

(3) A cut in the fence compromised the safety and security of Demore Enterprise's customers. (Tr. 30:7-31:9; 39:3-40:16, 40:17-41:4, 130:24-131:19).

(4) The report at issue was the fourth incident of vandalism or burglary since March 14, 2009. (Tr. 129:5-13).

(5) Demore Enterprises owned the fence in question and paid for the repair. (Tr. 40:17-42:10).

(6) The Demores traveled directly to the location of the reported fence cuts during business hours. (Tr. 42:11-16, 127:24-129:13).

(7) The intersection where the accident occurred, and the site of the reported vandalism, was close to the business location of Demore Enterprises. (Tr. 44:8-13, 44:14-45:7, 132:15-133:9).

Unfounded legal arguments pursued through hearings and appeals may also deserve sanction. In *Delong v. Hampton Envelope Co.*, 149 S.W.3d 549 (Mo. App. E.D. 2004), the employer argued that providing a prosthetic finger was only cosmetic and should not be considered medical treatment because the finger was not functional. Both the Division and Labor Commission ruled that the finger was compensable medical treatment and the Court of Appeals affirmed an award of costs under § 287.560, RSMo. The Insurer's argument is really no different here. In spite of eighty (80) years of case

law before 2005, and in spite of a limited exception to the compensability of injuries while on company trips, the Insurer still argues that an injury is not compensable when an employee performs work not regularly assigned him. **No Missouri court has ever recognized this defense.** The Insurer points us to no such authority and no such authority was developed during the course of the hearing and appeal.

The case law as it existed at the time of the injury is described herein and not disputed by the Insurer. Under well-established Missouri law before 2005, it was irrelevant whether an employee is injured while performing his regularly assigned work duties. The test is, instead, whether the employee was injured while performing activity that either furthered the employee's business or was incidental to the employee's own work. *Korte* addresses this subject and two provisions out of his text are particularly pertinent:

> "An event, activity or exposure which causes an injury, death or occupational disease arises out of an employment if it is a natural and reasonable incident of the employment. It is the nature of an employee's activity at the time of the event in question (whether it be an accident or an exposure to occupational disease) which will largely govern whether or not the event, activity or exposure arises out of or in the course of the employee's employment.
>
> "An employee is usually within the scope of employment when acting in furtherance of his or employer's business, for the benefit of the employer,

or if the employer expects to derive a benefit from the employee's actions.

. . .

"Under any circumstances, an employee is both permitted and expected to use the employee's intelligence to do that which is necessary to benefit the employee's employer, and is not required to limit his or her activities to the performance in robot-like fashion of those acts specifically authorized by the employer. An act outside an employee's regular duties which is undertaken in good faith to advance the interests of the employee's employer is within the course of employment whether or not the employee's own assigned work is thereby furthered. This includes acts undertaken by one employee to assist to assist a co-employee in the latter's work and acts within the discretion allowed the employee by the employer."

29 *Mo. Prac., Workers' Compensation Law in Practice* § 2.4 (2nd Edition), pp. 1-2 (November 2011) (electronic version).

Time and again, courts held that injuries arise out of and in the course of employment when an employee is injured while performing activity that furthers the business of the employer, even if the activity does not fall within the regularly assigned or recognized work duties. In *Leone v. American Can Co.*, 413 S.W.2d 558 (Mo. App. Kansas City 1967), the family of a deceased employee was awarded benefits after the deceased was killed in an elevator shaft. *Leone*, 413 S.W.3d at 560. The deceased was a

maintenance employee and worked all over the plant. *Id.* at 560-61. His work duties typically did not require significant time in the elevator shaft. *Id.* In this case, however, he accompanied another employee because employees normally did not enter elevator shafts alone and it was reasonably foreseeable that the deceased was working in this situation as a "safety man." *Id.* He was warning coworkers of the dangers in the elevator shaft when the accident happened. *Id.* at 560. The Court of Appeals held that his activities were reasonably incident to his employment. *Id.* at 562. In *Daniels v. Krey Packing Co.*, 346 S.W.2d 78 (Mo. 1961), the court held that an injury suffered by an employee during a lunch period and after eating lunch arose out of and in the course of employment. In this case, the employee entered a storeroom to exchange a knife for one more suitable for work. *Daniels*, 346 S.W.2d at 81-82. A knife was required for the job. *Id.* at 83. Likewise, in *Mann v. City of Pacific*, 860 S.W.2d 12 (Mo. App. E.D. 1993), *overruled on other grounds by Hampton*, 121 S.W.3d at 222, the Missouri Court of Appeals for the Eastern District held that injuries suffered by the police chief while refueling his vehicle (on his day off) but after assisting patrol officers arose out of and in the course of employment.

These cases, and others such as those cited by *Korte*, reflect the law upon this subject before 2005.[4] While the General Assembly amended this subject slightly in 2005,

[4] Other cases that have supported this proposition over the years include *Brenneisen v. Leach's Standard Serv. Station*, 806 S.W.2d 443 (Mo.App. 1991); *Cox v. Copeland Bros. Constr. Co.*, 589 S.W.2d 55 (Mo.App. W.D. 1979); *Chambers v. SDX, Inc.*, 948 S.W.2d

that amendment does not control here. The amendment in 2005 meant that injuries in a company owned or subsided automobile were not in the course of employment when: (1) the employee was traveling from home to the employer's principal place of business; and (2) the employee is traveling from the employer's principal place of business to the home. That amendment, of course, does not apply here because no one suggests that the Demore family was traveling to a home.

So, the Labor Commission states that this issue has been "hotly contested" since 2005. The only case that has concerned this subject since 2005 is *Harness v. Southern Copyroll, Inc.*, 291 S.W.3d 299 (Mo. App. S.D. 2009). The traveling employee started a trip from a secondary business location and was killed in an accident on U.S. Highway 65. *Harness*, 291 S.W.3d at 300. One could infer that the employee could have been driving to the principal business location or, instead, his residence. *Id.* at 305-6. The Commission found that the employee was paid mileage and that he died on a highway leading back to the employer's principal place of business. *Id.* This Court held that the 2005 amendment did not apply because there was evidence to support the ruling that the employee was driving from a secondary business location to the principal place of

448 (Mo.App. E.D. 1997); *Williams v. Serv. Master*, 907 S.W.2d 193 (Mo.App. 1995); *Enriquez v. Chemical Ceiling Corp.*, 409 S.W.2d 686 (Mo. 1966); *Champion V. J.B. Hunt Transport, Inc.*, 6 S.W.3d 924 (Mo.App. S.D. 1999); *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326 (Mo.App. S.D. 1986); and *Smith v. Hussmann Refrigerator Co.*, 658 S.W.2d 948 (Mo.App. 1983).

business. *Harness*, 291 S.W.3d at 305. This was, as the Court stated, the "compensable portion of the trip." *Id.*

Authorities Cited by the Insurer Do Not Provide a Defense.

The Insurer cited three cases in its Application for Review: *Anderson v. Veracity Research Co.*, 299 S.W.3d 720 (Mo. App. W.D. 2009), *Miles v. Lear Corp.*, 259 S.W.3d 64 (Mo. App. E.D. 2008), and *Doerr v. Teton Transp., Inc.*, 258 S.W.3d 514 (Mo. App. S.D. 2008). None of these apply. *Anderson* concerns a second trip that was a deviation from previously established employment. The next two authorities concerned claims in which the reviewing court affirmed the grant of benefits for injuries that arose out of and in the course of employment.

The first, *Anderson*, stands for the proposition that a compensable injury arises out of and in the course of employment "even though the advantage to the employer is slight." *Anderson*, 299 S.W.3d at 730 (internal citations omitted). In *Anderson*, an intoxicated employee sustained injury while driving. *Id.* at 734. There was no evidence presented at trial that the employee's injuries arose out of work that benefitted the employer to any extent. *Id.* at 723, 734. In *Miles*, the court found that an activity that provided only *incidental* benefit to the employer **was** compensable; in that case, a basketball game during break time. *Miles*, 259 S.W.3d at 66. There, the court found that promotion of punctuality and enhancement of employee morale were sufficient benefits to classify related injuries as compensable. *Id.* at 68. And the court in *Doerr* merely

found that a truck driver who deviated from his route assignment could not be denied compensability. *Doerr*, 258 S.W.3d 514, 526.

Here, each of the Demores suffered injuries from a car accident that occurred as Hershel Demore drove the Demores to company property in order to respond to a call that property owned by the employer had been vandalized. (Tr. 39:3-41:4). The fence, owned by Demore Enterprises, the employer, and designed to protect company property and the property of various customers, had been vandalized for the fourth time in three months. In fact, this was the fourth criminal incident between March 14 and June 29, 2009. Either Hershel or Delores Demore reported each of the previous vandalism, burglary and stealing incidents. (Tr. 31:23-34:4, 42:11-16, 127:7-23, 127:24-129:13, 130:24-131:19).

Demore Enterprises is a small family owned business that is currently engaged in the ownership, rental and management of both commercial and residential properties. (Tr. 28:10-29:2; 86:4-7; 125:22-126:21). At the time of the accident, it had four (4) employees: Hershel (father); Doris (mother); Robert (son) and Delores (daughter). (Tr. 29:3-30:6). On the day of the accident, Hershel, Doris, and Delores were en route to attend to the fence during business hours, and proceeded from one business location to another.[5] (Tr. 40:17-41:4, 42:11-16, 43:23-44:7, 127:24-129:13). Doris accompanied

[5] Missouri courts have consistently ruled before the 2005 amendment that the mere fact that an injury occurred in a location outside the employer's premises does not, alone, mean that an injury did not arise out of and in the course of employment. *See, e.g.*,

Delores and Hershel because she knew that, pursuant to her job duties, she planned to call the fence company to have the fence repaired and, therefore, needed to see the location of the fence cut. (Tr. 43:12-22).

The Insurer asserts that maintenance was not within any of the claimants' job duties. But the person who did handle maintenance for Demore Enterprises, Robert, was out of town on the day that the Demores learned of the vandalism, which was also the day of the accident. (Tr. 36:16-37:2). Delores testified that it was within her job duty to call the fence company and describe the needed repairs. (Tr. 43:12-22). Hershel and Doris acted within their job duties because, as the Division pointed out from the testimony at trial, "a cut to the fence would compromise the privacy of the company's customers, including Thermo King and Great Dane." (Tr. 30:7-31:9, 39:3-40:16, 40:17-41:4, 130:24-131:19).

The Insurer never cited any cases, at trial or in its briefing, to support its position that, in order to be classified as compensable, an injury must occur within the employee's job description. Rather, Missouri law dictates that the only question is whether the injury occurred because of an activity that benefitted the employer, even indirectly.[6] The

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Blatter v. Missouri Dept. of Soc. Svcs. Div. of Aging, 655 S.W.2d 819 (Mo. App. S.D. 1983), *overruled on other grounds by Hampton*, 121 S.W.3d at 222.

[6] "A claim is not compensable if, at the time of the injury, the employee is engaged in 'pleasure purely his own.' On the other hand, '[a]n injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually

Insurer's following statement in its Brief before the Commission isolates precisely where Insurer went wrong in assessing the law: "There is nothing in traveling to the rental property to indicate that Herschel [sic] Demore, Deloris [sic] Demore or Doris Demore were performing any function or duty of their employment with Demore Enterprises." Yet, **this is not what the law requires.** The law requires only a showing that the conduct of an employee that resulted in the injury benefitted the employer. There is no requirement under Missouri law that an employee prove that his or her conduct was within the job description. *Blatter*, 655 S.W.2d at 823.

Playing basketball while on break was not within the employee's job description in *Miles*; deviating from his assigned route was not within the employee's job description in Doerr; socializing at an offsite bar was not within the employee's job description in *Blatter*; yet the court found that those activities, while falling outside the scope of the employees' job descriptions, nonetheless directly or incidentally benefitted the employer and were thus compensable. *See Miles*, 259 S.W.3d at 66; *Doerr*, 258 S.W.3d at 526; *Blatter*, 655 S.W.2d at 823. Trips away from the employer's principal place of business will be found to be in the course and scope of the employee's employment when a benefit to the employer is had by travel away from the principal place of business, unless the travel occurs between the principal place of business and the employee's home. *See*

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compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to the employment.'" *Blatter*, 655 S.W.2d at 823 (internal citations omitted).

Harness, 291 S.W.3d 299 (finding an injury sustained during a trip compensable even though there was no direct evidence that the employee was not driving home at the time of the injury). Here, there can be no question that the Demores were acting within the course and scope of each of their employment at the time that the Demores were injured; and there can be even less of a question that there was no evidence on the record for the Commission to find otherwise. *See Blatter*, 655 S.W.2d 819 (finding compensable an injury that an employee sustained on a business trip while crossing the street from a workplace social function back to his hotel).

The Insurer offered no evidence that Hershel and Doris owned anything more than one tract of real estate (real estate that was adjoined by tracts owned by Demore Enterprises). (Tr. 30:15-23). The Insurer offered no evidence that the Demores were traveling to check only on the separate tract owned by Hershel and Doris. The Insurer offered no evidence to rebut the testimony that the Demores were traveling to inspect a fence owned by Demore Enterprises, for the benefit of Demore Enterprises. (Tr. 40:17-41:4; 41:5-42:10). The Insurer offered no evidence to challenge any testimony or evidence offered by the Demores. Because no reasonable fact finder, applying the proper legal standard, could rule that it was reasonable to defend the claim upon whether the Employee's injuries arose out of and in the course of her employment, and because the record contains no evidence to support the Insurer's denial, the Commission's decision to reverse the Administrative Law Judge's award of attorney's fees pursuant to § *287.560* must be reversed.

This Case Should Never Have Been Denied.

This case should have easily avoided litigation. At a minimum, litigation concerning past medical expense and temporary disability should have been avoided. We are now approaching four years since the date of the accident. The Demores should not have had to pursue litigation to recover past medical expense and temporary disability, given the overwhelming weight of the evidence that was perfectly apparent to the Insurer from the date of the accident. The Insurer, America First, even knew about the ongoing problems of vandalism and burglaries because it paid a property damage claim before the accident that is the subject of the Demore claims. The Division quite astutely awarded attorneys' fees based upon the past medical expense and temporary disability. In doing so, it wisely followed past precedent in tailoring the sanction. *See*, particularly, *Clark v. Hart's Auto Repair*, 274 S.W.3d 612 (Mo.App. W.D. 2009); *PM v. Metro Media Steak Houses Co., Inc.*, 931 S.W.2d 846 (Mo.App. E.D. 1996); *Vallejo-Davila v. Osco Drug, Inc.*, 895 S.W.2d 49 (Mo.App. W.D. 1995).

In this case, not only has the Insurer, without reasonable ground, resisted payment of the claim, it has now, once confronted with these basic propositions, still refused to pay the claim and appealed. The undersigned counsel respectfully submits that costs for this appeal should be awarded.

Conclusion

The record lacks substantial and competent evidence to demonstrate it was reasonable to defend the claim upon whether the Employee's injuries arose out of and in

the course of her employment. In fact, the Insurer cited no case law supporting its position. All of the evidence, to the contrary, proves that the Employee was working at the time of her accident, that she was traveling with other employees to the site of vandalism of the Employer's property, and that her travel fulfilled the business interests of the Employer. This is what the law requires and, therefore, the Commission erred in ruling otherwise.

Conclusion

The rulings by the Labor Commission that concern who may select medical providers and attorneys' fees should be reversed. This can be done under Points I and II or Points I and III. Upon reversal, the Court should remand to the Commission that it affirm the Division award upon the issue of selection of medical providers.

The Court should remand upon the issue of attorneys' fees at a minimum, to enter findings of fact and rulings of law upon Point IV.

Doris moves though under Point V, alternative to Point IV, that the defense submitted by the Insurer was unreasonable, as a matter of law, and to remand to the Labor Commission for assessment of attorneys' fees and expenses.

Respectfully submitted,

NEALE & NEWMAN, L.L.P.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I certify the following:

1. The foregoing Brief complies with the type and volume limitation of Rule 84.06. The typefaces are EngrvrsOldEng BT (title page only) and Times New Roman.

2. The signature block of the foregoing Brief contains the information required by Rule 55.03(a). To the extent that Rule 84.06(c)(1) may require inclusion of the representations appearing in Rule 55.03(b), those representations are incorporated herein by reference.

3. The foregoing Brief, excluding the cover, certificate of service, this certificate, and the signature block, contains 16,039 words as counted by Microsoft Word 2010.

/s/ Patrick J. Platter_____
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Supreme Court of Missouri by using the Supreme Court's e-filing system on November 13th, 2013.

I certify that all participants in the case are registered e-filing users and that service will be accomplished by the e-filing system.

/s/ Patrick J. Platter
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