

Before The Supreme Court of Missouri

No. SC 93640

DORIS DEMORE,

Appellant and Cross Respondent,

v.

AMERICA FIRST INSURANCE COMPANY,

Respondent and Cross Appellant.

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

SUBSTITUTE BRIEF OF THE APPELLANT AND CROSS RESPONDENT
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 sued for compensation seeking benefits under the Missouri Workers' Compensation Law concerning her injuries she suffered because of a car accident. This accident occurred when she was traveling from her employer's principal place of business to another business location.

The Division of Workers' Compensation awarded benefits. The Labor and Industrial Relations Commission issued its own Final Award, and modified the Division's award upon two issues. The Insurer and Doris filed Notices of Appeal.

Venue is proper in Greene County, Missouri. §287.495.1; §287.640.2.

This Court sustained Doris' Application for Transfer after the Missouri Court of Appeals – Southern District issued its opinion on July 15th, 2013. The Insurer did not apply for Transfer upon issues decided against it.

Statement of Facts¹

The Businesses

Hershel, Doris, Robert and Dolores 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 sells and services 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. Owns, 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 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 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 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). 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 several different buildings 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 at 3616 and 3628 West Division. (Tr. 231-237). Hershel and Doris Demore own the residence at 3559 West Division. (Tr. 231-237).

Vandalism and Burglaries

The Demore family suffered four (4) 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 intruder stole no contents. (Tr. 32:5-14, 212-13). Maybe the motion sensors and audible alarm spooked the burglar. (Tr. 212-13).

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

The Demores next reported the next crime 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 used a bow cutter to cut the chain and damaged the gate so the burglar could drive through the gate. (Tr. 217-18). America First Insurance wrote the premises liability insurance policy and paid this burglary claim. (Tr. 33:15-18). America First is also the workers' compensation insurance carrier in this workers' compensation claim. (Tr. 7:17-21).

A fourth crime led to the accident that is the subject of this claim. The Demores received this notice on Monday, June 29, 2009, at approximately 10:00 a.m., while at the Demore Enterprises building. Dolores 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 when the accident happened. (Tr. 131:8-132:14). Demore Enterprises paid to repair the fence. (Tr. 41:5-42:10).

Mr. Cox reported he had been mowing and noticed that someone vandalized the fence. (Tr. 37:12-38:20). Knowing 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 there was a high probability that business property had been vandalized. (Tr. 39:3-40:16.). That knowledge was confirmed; the fence cut was on a fence owned by the business. (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 Dolores rode with Hershel to assess the damage at the site of the reported vandalism. (Tr. 131:20-132:3). Doris accompanied Dolores and Hershel because she knew that, under 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 Accident

Hershel, Doris, and Dolores entered Hershel's car in the parking lot of the Demore Enterprises building. (Tr. 43:23-44:7). Hershel drove, Dolores was seated in the passenger seat, and Doris was seated in the rear seat behind Dolores. (Tr. 45:8-11, 86:20-87:3). Hershel drove north on West Bypass toward Division Street. (Tr. 44:8-13). 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 extracted the Demores from Hershel's vehicle. (Tr. 45:12-46:22, 48:7-49:21).

Doris Demore's Injuries

Doris was transported and admitted to Cox Medical Center in Springfield when she was extracted from the vehicle. (Tr. 135:22-136:4). Doris received a CAT scan of her head, neck, chest, abdomen, pelvis, and right leg and 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). Doris underwent surgery the first night of her hospitalization for traumatic fractures, including her right ankle and right small finger. (Tr. 136:5-16, Tr. 558).

Doris transferred to a full time nursing care facility after her hospitalization at Cox. (Tr. 136:17-23). There, Doris developed a kidney infection and noticeable confusion. (Tr. 136:24-137:5). Doris was readmitted to Cox after twelve (12) days in nursing care and underwent neurosurgery for a hematoma. (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 received limited therapy during her second stay, and 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 could never return to work. (Tr. 29:14-25).

Doris returned home to live with Hershel, but her physical condition had deteriorated severely. She could not walk and after a year regained that ability, with significant assistance and limitations. (Tr. 69:15-21, 139:10-17). Doris' mental impairments did not improve. Her short-term memory so much that it interferes with such everyday tasks as ordering meals at restaurants, remembering appointments, driving (she could not 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 cannot leave Doris alone at home for any measurable length of time. (Tr. 70:21-71:1, 88:16-21).

The Need for Future Medical Treatment

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, and medical social work arranges 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 must 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). 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 she spent enough time evaluating Doris and Hershel she could make an assessment 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 Dolores's 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). 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 she enjoyed prior to 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). This would provide Hershel some relief from the virtual "24/7" nursing care and supervision role 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).

Division Award

Dolores, through legal counsel, submitted a claim to the Insurer on July 31st, 2009. (Tr. 265). The Insurer denied the claim in a written response on March 29th, 2010. (Tr. 268). Doris sued for Compensation on April 14, 2010. (LF 2-3). The Employer filed its Answer to Claim for Compensation on April 28, 2010. (LF 4-5). The Insurer filed its Answer to Claim for Compensation 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 admitted as Exhibit "AA." (Tr. 1476). The Insurer presented no evidence it offered or provided medical treatment.

There were nine (9) issues before the Division: (1) whether the accident arose out of and in 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. That 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 leading to the conclusion that Doris' injuries arose out of and in employment. The Division stated that the damage to the fence owned by Demore Enterprises prompted the trip and 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 it should have paid without forcing Doris to retain legal counsel to recover those benefits on her behalf. (LF 27-29).

Labor Commission Award

The Insurer applied 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 it reversed the Division's award if it granted to Doris the right to select her own medical providers and if it awarded to Doris costs and expenses for an unreasonable defense. (LF 39-40).

The Labor Commission stated that the following concerning 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 its 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 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 proffered 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).

Opinion by the Southern District

Doris Demore and the Insurer filed respective Notices of Appeal from the Labor Commission Award. The Missouri Court of Appeals – Southern District issued its opinion on July 15th, 2013. The opinions affirm the Labor Commission Awards, except they reverse the ability of the Insurer to select medical providers. Instead, the Court of Appeals held that the Employer, and not the Insurer, was entitled to select Doris' medical providers, and that in any case, Doris was not so entitled. The opinion in Doris' appeal addresses the issues.

The Southern District stated the following 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 is 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, Section 287.140.2 allows her to seek relief from the Commission. Point denied.” *Doris Demore v. America First Ins. Co.*, Appeal Nos. SD32350 and SD23262 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 SD23262 at p. 4.

Doris Demore then moved for Rehearing and Alternative Application for Transfer with the Southern District. The Southern District overruled these pleadings. This Court sustained an Application for Transfer filed by Doris on October 29th, 2013.

Points Relied On

Point I

Reply to Insurer's Point Relied On I

The Labor Commission erred in ruling that the “employer/insurer maintains its control over the selection of employee’s future medical providers,” and in doing so acted in excess of its powers, in that (1) the Insurer has no right to select the medical providers in that Section 287.140.10 grants only an employer, not also an insurer, the right to select those providers; (2) the Employer did not file an application for review; and (3) even if the Employer had filed such an application for review, the Employer waived its right to select such providers because it denied liability on the claim and provided no treatment for over four years despite knowing that Doris Demore required treatment for serious and life threatening injuries.

Section 287.030.2

Section 287.140.10

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

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

Point II

Reply to Insurer's Point Relied on II

The Labor Commission erred in reversing an award of Doris' attorneys' fees in that: (1) the Commission failed to prepare and file a written statement setting forth its findings of fact and conclusions of law on the issue; and (2) the facts found by the Commission do not support the award.

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

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.2 846 (Mo. App. E.D. 1996)

Nouraie v. Missouri Baptist Medical Center, 2013 WL 1093332 Labor and Industrial Relations Commission (March 13th, 2013)

Point III

Reply to Insurer's Point Relied on III

The Labor Commission properly ruled that Doris' injuries arose out of and in her employment because the trip she took to inspect the vandalized fence owned by Demore Enterprises furthered its business interests in that all of the circumstances supported this ruling and the Insurer raises a false issue of whether Doris' regular job duties concerned maintenance of the fence.

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

Leone v. American Can Co., 413 S.W.2d 558 (Mo. App. Kansas City 1967)

Daniels v. Krey Packing Co., 346 S.W.2d 78 (Mo. 1961)

Point IV

Reply to Insurer's Point Relied on IV

The Labor Commission properly awarded medical expenses because Doris submitted a prima facie claim in that: (a) there was substantial evidence upon causation; (b) the “sudden onset” doctrine supports the ruling the accident caused Doris’ injuries; (c) the affidavit signed by Cox personnel attached to her medical records and bills confirms that the bills concerned Doris’ treatment on the day of, and the day after, her accident, and information from the bills and records corroborate that the bills concerned Doris’ injuries and treatment from the accident; and (d) the Insurer failed to preserve its objection that Doris testify about the bills.

Tucker v. Wibbeneyer, 901 S.W.2d 350 (Mo.App. E.D. 1995)

Pruneau v. Sniljanich, 585 S.W.2d 252 (Mo.App. E.D. 1979)

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

Lacy v. Federal Mogul, 278 S.W.3d 691 (Mo.App. S.D. 2009)

Point V

Reply to Insurer's Point Relied On V

The Labor Commission properly awarded future medical treatment to Doris because there was substantial and competent evidence to find that Doris required treatment for her injuries.

Mathia v. CFI, Inc., 929 S.W.2d 271 (Mo. App. S.D. 1996)

Kaderly v. Race Bros. Farm Supply, 993 S.W.2d 512 (Mo. App. S.D. 1999)

Sharp v. New Mac Elec. Co-op., 92 S.W.2d 351 (Mo. App. S.D. 2003)

Williams v A.B. Chance Co., 676 S.W.2d 1 (Mo. App. E.D. 1984)

Point VI

Reply to Insurer's Point Relied on VI

The Labor Commission properly found Doris to suffer temporary total disability and permanent total disability because there was substantial and competent evidence to make these findings.

Pavia v. Smitty's Supermarket, 118 S.W.3d 228 (Mo. App. S.D. 2003)

Grgic v. P&G Construction, 904 S.W.2d 464 (Mo. App. E.D. 1995)

Kerns v. Midwest Conveyor, 126 S.W.3d 445 (Mo. App. W.D. 2004)

Patterson v. Engineering Evaluation Inspections, Inc., 913 S.W.2d 344 (Mo. App. E.D. 1995)

Argument

Point I

Reply to Insurer's Point Relied On I

The Labor Commission erred in ruling that the “employer/insurer maintains its control over the selection of employee’s future medical providers,” and in doing so acted in excess of its powers, in that (1) the Insurer has no right to select the medical providers in that Section 287.140.10 grants only an employer, not also an insurer, the right to select those medical providers, (2) the Employer did not file an application for review, and (3) even if the Employer had filed an application for review, the Employer waived its right to select such providers because it denied liability on the claim and provided no treatment for over four years despite knowing that Doris Demore required treatment for serious and life threatening injuries.

Standard of Review

This Court issued the definitive standard of review in workers' compensation appeals in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003). The court drew upon *Article V, § 18* of the Missouri Constitution and *Section 287.495*. The court undoubtedly knows of its opinion and we therefore do not extensively quote it here.

McGhee v. WR Grace Co., 312 S.W.3d 447 (Mo.App. S.D. 2010) is instructive upon the standard of review. It draws upon *Article V, § 18* of the Missouri Constitution,

Section 287.495, and *Hampton. 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 findings 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.”

The Insurer Cannot Choose Physicians.

The Insurer fails to address that 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, which must be strictly construed under the 2005 amendments, does not apply

to the selection of medical providers. *Section 287.140.10*. “[t]here 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).

Only the Employer has Standing to Appeal upon the Right to Choose Medical Providers.

Insurer addresses the issues raised by Doris’ Points Relied On I and II, that, respectively, the Insurer has no statutory right to select Doris’ medical providers, and that the Insurer had no standing to appeal the ruling concerning who selects medical providers. **But the Insurer does not address the first issue.** A “symbiotic relationship” between an employer and insurer does not affect whether or not the plain language of the statute provides a right of medical provider selection to only the employer and not the insurer. *Section 287.140.10, RSMo.*, provides :

“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.**” (Emphasis added.)

Insurer argues that, even though the Employer failed to appeal this issue, it still has standing to appeal because “the insurer has a contractual obligation to pay for benefits for covered employees.” Brief of Insurer, at p. 20. That may be true, but the General Assembly amended the Workers’ Compensation Law to deny insurers any voice in selecting the medical providers it is directed to pay for. *Teale*, 687 S.W.2d at 220.

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 represented by separate counsel. (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). The employer and insurer are separate and distinct entities and must effectuate their own appeals if either does so. *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 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).

Employer's failure to apply for Review made the Division's Final Award final and not subject to review regarding the Employer. The time limit allowed for applying for Review² is imposed as 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). The failure of a party to a Workers' Compensation claim to apply 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. Company*, 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) (indicating the jurisdictional nature of the application for review process means that failing to timely apply for review strips both the Labor Commission and the Court of

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."

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 the Court of Appeals lacks jurisdiction to review a party's appeal where a party's "application for review was not timely filed").

There is no 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 to select medical providers other than the Employee herself, did not appeal the Final Award issued by the Division. The Labor Commission was not vested with the jurisdiction to reverse the Division on this point, and, regarding the Insurer, the Final Award of the Division remains intact and not subject to review.

The Employer has Waived the Right to Choose Physicians.

There is no dispute in the record that Employer and Insurer denied Doris' claim and refused to provide medical treatment. Insurer claims in response to Doris' Point Relied on III, that *Section 287.140* does not state the employer ever waives the right to control the medical treatment. Brief of Insurer, at p. 10. Insurer further relies upon post-2005 strict construction of the Workers' Compensation Law to support its effort to reverse decades of well-established case law prohibiting employers from withholding medical care and later insisting upon the selection of medical providers. But Insurer

points to no authority indicating the 2005 amendments have had any impact upon this rule. Doris has provided authority, more recent than the amendments, to the contrary.

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, *RSMo.*, 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 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 Insurer further fails to identify an authority providing that, once the right to select medical providers has been waived, the right is revived upon an award of future medical care. Again, only Doris provides authority on her point that the waiver of the selection of medical care applies to future, and past, medical care. See *Balsamo v. Fisher Body Div.-Gen. Motors Corp.*, 481 S.W.2d 536 (Mo. App. St. Louis 1972); *Schuster v. State Div. of Employment Sec.*, 972 S.W.2d 377, 385 (Mo. App. E.D. 1998); *Stephens v. Crane Trucking, Inc.*, 446 S.W.2d 772 (Mo. 1969).

Even the Insurer admits a workers’ compensation claimant is free to choose her own provider, and to assess those costs against her employer when an employer fails to provide medical care. Brief of Insurer, at p. 11-12. Instead, the Insurer takes issue with applying this rule to future medical care because Doris’ cited authorities involve a

specific type of future medical care (nursing). However, the Insurer fails to cite any authority or even provide any reason explaining the significance of this apparently meaningless distinction, especially because future nursing care is precisely the type of medical care that the Labor Commission awarded to Doris (the type awarded in *Stephens*).

The Insurer relies upon strict construction when it argues there is no exception to the rule that the employer select medical providers. The Insurer, however, then contradicts itself by acknowledging, and presumably agreeing with, the proposition that an employer waives the right to select medical providers when it denies liability or fails to select medical providers when it has notice of a work related injury. The Insurer does not tell us what rule it believes should control here. If we take the Insurer's position upon strict construction to its conclusion, an employer would never be liable for medical expenses even when it denied a claim and provided no medical treatment because *Section 287.140* vests the right to control medical treatment with employers. Is that what the Insurer is saying here? It does not say so. It does not recommend a workable rule explaining why it is entitled to deny a claim for four and a half (4½) years and then should be provided a new right to select medical providers.

Strict construction does not address this issue because there are conflicting rules within the medical treatment statute that must be harmonized. An employer must provide medical treatment as may be reasonably required after an injury or disability to cure and relieve the effects of that injury. *Section 287.140.1*. The employer has the right to select

medical providers. *Section 287.140.10*. These provisions conflict, and do not answer our issue.

There are at least three rules of statutory construction why the pre-2005 law should be continued and why the Employer no longer has the right to select medical providers for Doris. First, where a legislature, after a statute has received a settled judicial construction, reenacts a language without change, or reincorporates the exact language previously construed, it is presumed it knew of and adopted the judicial construction previously given to the statute. *Medicine Shoppe Int'l, Inc. v. Director of Revenue*, 156 S.W.3d 333, 334 (Mo.banc 2005); *O'Neil v. State*, 662 S.W.2d 260, 262 (Mo. banc 1983); *Bunker v. Rural Elec. Coop.*, 46 S.W.3d 641,645 (Mo.App. W.D. 2001). That is what happened with *Section 287.140* in the 2005 amendments. 2005 Mo. Legis. SB 130 (Vernon's) 90-3d General Assembly, First Regular Session, SB No. 1 & 130 West No. 4. Second, construing a statute is "not to be hyper-technical, but instead is to be reasonable and logical and to give meaning to the statute []." *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008) quoting *Donaldson v. Crawford*, 230 S.W. 3d 340, 342 (Mo. banc 2007). Last, even under strict construction, provisions of an act must be construed together and harmonized if possible. *Ash v. Millennium Restoration and Constr.*, 408 S.W.2d 257, 260 (Mo.App. S.D. 2013); *Bass Corp. v. Director of Revenue*, 392 S.W.3d 438, 444 (Mo. banc 2013). For several decades, our courts harmonized the requirements to provide medical treatment and the right to select medical providers when they held employers waive the right to select medical providers

when they fail or refuse to provide medical providers, or deny liability. This rule harmonized the statutory requirement to provide medical care with the right of selection vested in the employer. The legislature had due notice of the case law in 2005. Had the legislature been dissatisfied with that case law, it could have easily substituted a new rule as it did elsewhere. We are left to conclude the legislature believed the case law reasonably harmonizes these statutory provisions.

Conclusion

The Labor Commission erred in applying the law by ruling that the “employer/insurer maintains its control over the selection of employee’s future medical providers” because: (1) the plain language of Section 287.140.10 excludes an insurer from the definition of who may select medical providers; (2) the Employer did not apply for review and had no standing to challenge the Division’s award; and (3) even if the Employer had properly appealed, applicable authority provides no “reset button” for an employer who denies a claim, refuses to provide treatment, and then attempts to control future medical providers later.

Point II

Reply to Insurer's Point Relied on II

The Labor Commission erred in reversing an award of Doris' attorneys' fees in that (1) the Commission failed to prepare and file a written statement setting forth its findings of fact and conclusions of law on the issue and (2) the facts found by the Commission do not support the award.

Standard of Review

The Labor Commission issued no findings of fact or rulings of law so this Court cannot know whether it is reviewing a question of fact (to which this Court would either grant deference or not review at all) or a question of law (which this Court would review *de novo*). This notwithstanding, comments concerning the standard of review to Point I apply here.

How the Labor Commission Should Have Reviewed this Issue.

The Labor Commission could not have properly reversed the Division of Workers' Compensation's award of costs to Doris because the Labor Commission did not prepare and file a written statement providing the findings of fact and conclusions of law upon the issue. Who provides the best example to show just how lacking the Labor Commission was addressing this issue? The Labor Commission itself. The Labor Commission properly submitted written findings and conclusions upon costs in a workers' compensation appeal earlier this year. That award is *Nourai v. Missouri Baptist Medical Center*, 2013 WL 1093332 (March 13th, 2013).

The claimant Patricia Nouraie reported to Missouri Baptist she suspected that she suffered a back injury caused by her work. Missouri Baptist denied the claim in writing the day after Nouraie reported her injury. Missouri Baptist denied the claim based on its review of several pages of medical records and reports of injury, but did not investigate the claim based upon the report of injury that Nouraie filed the previous day. The denial mentioned a date of injury that had ostensibly happened several weeks before but did not directly address the date that Nouraie reported. Missouri Baptist fired Nouraie two months later for “not timely returning” an application for personal leave. It did not refer Nouraie for a medical examination for another year. *Nouraie*, at pp. 2-3.

The Division did not award attorney’s fees as costs under *Section 287.560* but the Labor Commission reversed and awarded attorney’s fees. It concluded that Missouri Baptist unreasonably denied benefits because medical causation here, imposed when Missouri Baptist did, was an unreasonable defense. *Nouraie*, at pp. 3-5. The Labor Commission addressed whether an insurer is entitled to require a claimant to submit sufficient evidence before a hearing before the insurer must develop evidence to reasonably deny a claim. It rejected Missouri Baptist’s argument:

“We reject employer’s suggestion that an injured worker must prove the compensability of her injury before employer has any obligation to provide medical examination or treatment. . . . It would be absurd, for example, if the legislature intended that an employer must provide ambulance transportation to a critically injured worker, but only after the critically injured worker provided

employer with a medical opinion that the injury giving rise to the need for ambulance transportation was work-related.” *Nourai*, at p. 4.

The Labor Commission then stated that the decision to refer an injured employee to a physician for an examination and assessment of medical causation was a factor in determining whether an insurer defended the claim unreasonably, and then stated the following about the duty to investigate:

“We do not believe the legislature intended to craft a system wherein an employer possessed of the knowledge that a worker claims she suffered a work-related injury can sit idly by, refuse to investigate a worker’s claimed injury through inquiry and/or medical examination, and then later offer up its willful ignorance as the reasonable ground for denying benefits. In other words, we do not believe the legislature intended to craft a workers’ compensation law that permits an employer to deny a claim with impunity without conducting even the barest of investigations.” *Nourai*, at p. 4 (emphasis original).

But the Labor Commission did not stop there. It announced, and even applied, a test of “shifting burdens” of proof and persuasion to determine whether a defense is unreasonable and subject to fees.

“In support of her claim, employee offered evidence proving that employer was aware employee believed her back injury was caused by her work for employer; that employer knew employee demanded evaluation and/or treatment for her injury; and, that employer’s claims manager denied employee’s claim

without even asking the employee to tell her what happened. Employee satisfied her burden of producing evidence tending to show that it is more likely to be true than not true that employer denied workers' compensation benefits to employee on February 5, 2010 without reasonable ground.

The burden then shifted to employer to put on evidence to discredit, rebut, or outweigh employee's evidence. Employer failed to do so. Employer put on no evidence to show what provisions of "Missouri State Law" employer relied upon to justify the denial of benefits when [the employer's representative] issued the denial. That employer later articulated a colorable ground for denying employee's claim for compensation during formal proceedings before the Division of Workers' Compensation does not cure employer's earlier baseless denial.

* * * * *

We think it clear that employers have an obligation to investigate the circumstances giving rise to alleged work injuries before denying benefits. And where the worker is available to discuss the injury, we think any reasonable employer conducting an investigation designed to determine whether an injury is work-related would discuss the alleged injury with the worker. In the instant case, [the employer's representative] denied evaluation, treatment and benefits to employee, without even discussing employer's alleged back condition with employee. . . . We think employer's act of denying workers' compensation

benefits to employee before even discussing the alleged injury with employee constituted an egregious offense. *Nourai*, at pp. 4-5 (emphasis original).

Please compare the *Nourai* award with this one. In *Nourai*, the Labor Commission:

- 1) Wrote extensive findings of fact;
- 2) Announced the statutory standard and pertinent case law;
- 3) Applied the findings of fact to that statutory standard and case law;
- 4) Applied its administrative expertise when it stated what factors were relevant; and
- 5) Arrived at a conclusion.

The Labor Commission did not do that in the award before this Court. What we got, in one sentence, was the equivalent of this: “We considered this. That costs not are justified. Trust us.” Whether the Labor Commission in *Nourai* will be affirmed or reversed upon this issue is not really the point. At least the Labor Commission did what an administrative agency is supposed to do. And, if the Labor Commission is correct in *Nourai*, why can’t Doris Demore receive the same analysis, and the same result, in their claims?

Insurer addresses this issue by stating the Commission “reviewed all the facts in this matter and considered all the arguments and found that the Insurer did not defend this matter on unreasonable grounds and they went on to note that the issue of course and scope is a highly contested and litigated issue.” Brief of Insurer, at p. 14. However, 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). **The Commission must identify particular facts**, which it did not do. *See Stegman v. Grand River Reg'l Ambulance Dist.*, 274 S.W.3d 529 (Mo. App. W.D. 2008). , the Commission found merely that course and scope of employment is a highly contested issue and 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.”

The glaring issue is that the Commission provided no reason the fact that course and scope of employment is a highly contested issue means that the Insurer defended on reasonable grounds in this case, as required by § 286.090, *RSMo.*, sufficient to indicate that the Commission provided or adopted findings of fact or conclusions of law on whether the insurer’s defense of the claim was egregious or without reasonable grounds. Therefore, at a minimum, the Commission’s decision on this issue must be remanded. *See Brown*, 795 S.W.2d 479 at 482.

There was no Reasonable Defense to Deny the Claim in its Entirety.

Even if the Commission had adequately adopted findings of fact and conclusions of law in reversing the Division’s award of Doris’ attorneys’ fees, there is a lack of substantial evidence for the Commission to so reverse. The Insurer denied the claim and refused to pay even Doris’ medical expenses and temporary disability benefits. Insurer

again relies on oft-contested issue of whether an injury is work-related to insulate itself from an award of attorneys' fees. But that an issue is frequently contested does not make it reasonable to defend in all cases. Even if the employer/insurer is not unreasonable in defending *all* of the issues in a Workers' Compensation claim, an award of attorneys' fees is appropriate where the employer/insurer's denial of a claim 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, Hampton*, 121 S.W.3d 220.

The decision of the Commission was not supported by competent and substantial evidence because there is no evidence on the record it was reasonable to defend a claim on nonexistent grounds. Here, Doris presented substantial and competent evidence indicating Insurer had conducted an unreasonable defense. Insurer offered no evidence to counter this. Unfounded legal arguments pursued through hearings and appeals deserve sanction. *See Delong v. Hampton Envelope Co.*, 149 S.W.3d 549 (Mo. App. E.D. 2004) (affirming an award of costs where employer/insurer denied a claim on the unfounded basis that providing a prosthetic finger was not medical treatment).

Just as in *Delong*, the Insurer has attempted to create an unfounded ground for denying the claim all along. The Insurer still argues an injury is not compensable when an employee performs work not regularly assigned him. Again, as we have stated many times before, **no Missouri court has ever recognized this defense.** The Insurer still relies upon *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. In *Anderson*, an intoxicated employee sustained injury while driving on a separate trip after he had already checked into a motel. *Anderson*, 299 S.W.3d at 734. There was no evidence 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; , 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 could not be denied compensability for his injury *even though* he was not assigned the route he took. *Doerr*, 258 S.W.3d 514, 526.

The Insurer asserts maintenance was not within the claimants' job duties. But the person who handled maintenance for Demore Enterprises, Robert Demore, 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). Hershel and Doris acted within their job duties because, as the Division pointed out from the testimony "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). Therefore, Doris *was* acting within her job duties at the time of the accident. **This is despite this being not what the law requires.** The law requires only a showing the conduct of an employee that resulted in the injury benefitted the employer. There is no requirement under Missouri law that an

employee proves his or her conduct was within the job description. *See Blatter v. Missouri Dept. of Soc. Svcs. Div. of Aging*, 655 S.W.2d 819, 823 (Mo. App. S.D. 1983).

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 five 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 perfectly apparent to the Insurer from 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 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 to the facts of the case. *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).

Not only has the Insurer, without reasonable ground, initially denied the claim, it still appeals four and a half (4½) years after the accident. Costs for unreasonably defending this claim and pursuing these three appeals should be awarded.

The Insurer claims Doris did not properly preserve costs before the Division hearing started. The Insurer ignores the point underlying its unreasonableness. It never specifically alleged before the Division hearing that Doris' injuries were not work related

because Doris' "job" did not include responses to vandalism / burglary reports. The Insurer only did so afterward. The Division was in the best position to assess what the Insurer did; namely, the triviality of this defense; the obvious need to provide medical treatment and temporary disability benefits; the scope of the hearing and record required because the Insurer relied upon this defense; and the lack of any evidence provided to support any recognized defense. The Insurer did not complain about preserving the issue before the Commission and it knew better. It took a big risk before the Division, lost and faced the consequences. It should not complain now that its "sandbag" technique failed with the Division.

Conclusion

Not only did the Labor Commission fail to properly reverse the Division's award of Doris' attorneys' fees in that it did not submit findings of fact and conclusions of law on the subject, even if it had properly reversed, the facts found by the Commission do not support a reversal of the award of attorneys' fees under *Section 287.560*. The record lacks substantial and competent evidence offered the Insurer sufficient to demonstrate, to any degree, that it was reasonable to defend the claim upon whether the Employee's injuries arose out of and in her employment. The Insurer cited no case law supporting its position. All of the evidence, to the contrary, proves 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 her travel fulfilled the business interests of the

Employer. This is what the law requires and, therefore, the Commission erred in ruling otherwise.

Point III

Response to Insurer's Point Relied on III

The Labor Commission properly ruled that Doris' injuries arose out of and in her employment because the trip she took to inspect the vandalized fence owned by Demore Enterprises furthered its business interests in that all of the circumstances supported this ruling and the Insurer raises a false issue of whether Doris' regular job duties concerned maintenance of the fence.

Standard of Review

The Insurer does not state whether the proper standard of review should concern a question of law or question of fact. The Insurer does not state the standard of review for any points. The undersigned counsel, after interprets this point as an issue of law.

The authorities cited that concern the standard of review in Point I also apply here.

Substance of Argument³

The Insurer does not dispute the case law Doris has previously cited. 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 are pertinent:

³ Much of the argument here borrows from Point VI of Doris' first brief.

“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 her 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 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 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 rarely required significant time in the elevator shaft. *Id.* 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 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. 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 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, that amendment does not concern these facts. The amendment in 2005 meant that injuries in a company owned or subsidized automobile were not in 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, does not apply here because no one suggests the Demore family was traveling home.

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 448 (Mo.App. E.D. 1997); *Williams v. Serv. Master*, 907 S.W.2d 193 (Mo.App. 1995); *Enriquez v. Chem. 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 Tel. 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).

So, the Labor Commission states this issue has been “hotly contested” since 2005? The only case that has concerned this amendment 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 the employee was paid mileage and that he died on a highway leading back to the employer’s principal place of business. *Id.* The Missouri Court of Appeals – Southern District held that the 2005 amendment did not apply because there was evidence to support the ruling the employee was driving from a secondary business location to the principal place of 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 Apply.

The Insurer cited three cases: *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 employment.

The first, *Anderson*, stands for the proposition that a compensable injury arises out of and in 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 on a separate trip after he had already checked into a motel. *Id.* at 734. There was no evidence 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.

These Facts Justify Application of the General Rule. Doris' Actions Benefited the Employer and her Injuries were Work Related.

Here, each of the Demores suffered injuries from a car accident that occurred as Hershel Demore drove the Demores to company property 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. This was the fourth criminal incident between March 14 and June 29, 2009. Either Hershel or Dolores 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 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 Dolores (daughter). (Tr. 29:3-30:6). On the day of the accident, Hershel, Doris, and Dolores 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). Dolores accompanied Doris and Hershel because she knew that, under 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 maintenance was not within the claimants' job duties. But the person who handled 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). Dolores testified 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 "a cut to the fence would

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., 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.

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 cites no cases supporting its position that an injury must occur within the employee's job description to be compensable. Rather, Missouri law dictates the only question is whether the injury occurred because of an activity that benefitted the employer, even indirectly.⁶ The law requires only a showing the conduct of an employee that resulted in the injury benefitted the employer. There is no requirement under Missouri law that an employee proves 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 those activities, while falling outside the scope of the employees' job descriptions directly or incidentally benefitted the employer and were compensable. *See Miles*, 259 S.W.3d at 66; *Doerr*, 258 S.W.3d at 526; *Blatter*, 655

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 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).

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 Harness*, 291 S.W.3d at 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 the Demores were acting within the course and scope of each of their employment when the Demores were injured; and there can be even less of a question 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 other than Hershel and Doris owned anything over one tract of real estate (real estate 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.

Conclusion

The law is well settled that an injury arises out of and in employment when an employee suffers that injury while performing an activity that furthers the interests of the Employer. All of the circumstances prove that here. The 2005 amendments did not change this rule. The Insurer strains to argue a false issue never recognized in Missouri and should not be recognized here.

Point IV

Response to Insurer's Point Relied on IV

The Labor Commission properly awarded medical expenses because Doris submitted a prima facie claim in that: (a) there was substantial expert evidence upon causation; (b) the “sudden onset” doctrine supports the ruling the accident caused Doris’ injuries; (c) the affidavit signed by Cox personnel attached to her medical records and bills confirms that the bills concerned Doris’ treatment on the day of, and the day after, her accident, and information from the bills and records corroborate that the bills concerned Doris’ injuries and treatment from the accident; and (d) the Insurer failed to preserve its objection that Doris testify about the bills.

Standard of Review

The Insurer does not designate whether this Point Relied On concerns an issue of law or issue of fact. In reviewing the Argument concerning Point IV, the undersigned counsel believes the Insurer argues there is a lack of substantial evidence to support the award of medical expenses. This brief, therefore, proceeds upon that basis. The authorities cited that concern the standard of review in Point I also apply here.

Doris is also mindful, however, of the standard of review the Southern District stated in *Houston v. Crider*, 317 S.W.3d 178, 187 [13-15] (Mo. App. S.D. 2010) and followed in workers’ compensation appeals in *Jordan v. USF Holland Motor Freight*,

Inc., 383 S.W.3d 93, 94 [2-3] (Mo. App. S.D. 2012). The review in a challenge where the appellant argues there is no substantial evidence to support the award is :

- “(1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment [award];
- (2) identify all of the favorable evidence in the record supporting the existence of that proposition; and
- (3) demonstrate why that favorable evidence, when considered along with the reasonable inferences drawn from that evidence, does not have probative force upon the proposition such that the trier of fact could not have reasonably decided the existence of the proposition.” *Houston v. Crider*, at p. 187 [13-14].

The following is the standard of review when the appellant argues the award is against the weight of the evidence:

- “1. Identify a factual proposition needed to sustain the result;
- 2. Marshal all record evidence supporting the proposition;
- 3. Marshal all contrary evidence of record, subject to the fact finder’s credibility determinations, explicit or implicit; and
- 4. Prove, in light of the whole record, that the step 2 evidence and its reasonable inferences are so non-probative that no reasonable mind could believe the proposition.” *Jordan*, 383 S.W.3d at 94 [3].

The Insurer does not cite either of these authorities, nor does it attempt to review the evidence upon either standard. It is not clear whether the Insurer challenges whether there is substantial evidence to support the findings and conclusions or whether it argues those findings and conclusions are against the overwhelming weight of the evidence. The tenor of the Insurer's argument (for this and other "factual" points) seems to argue there is no substantial evidence to support the findings and conclusions and Doris proceeds upon that basis.

Substance of Argument

The following facts are uncontroverted. With Dolores and Doris as passengers, Hershel was operating a motor vehicle the afternoon of June 29th, 2009 when another vehicle struck the one he was operating and knocked his auto so hard that it landed upside down. (Tr. 45:12-46:22). Doris testified she broke her ankle, fractured her right little finger, and sustained a head injury. (Tr. 87:6-14). Doris testified that on her second admission to Cox Medical Center in Springfield, she required neurosurgery to take blood from her brain that had resulted from the accident. (Tr. 87:15-18). According to Doris' testimony, the accident caused her to be hospitalized at Cox, and endure a period of inpatient rehabilitation at a nursing care facility. (Tr. 87:19-88:9).

The Insurer is incorrect when it argues there is no medical evidence to support causation between the car accident and Doris' injuries. Dr. Bernard Abrams connected the injuries to the accident in his complete medical report:

“This patient, prior to an accident had a mild memory problem, probably best described as minimal cognitive dysfunction or MCS. However, following her accident, she had an immediate and rapid decrement of mental functioning which began to return somewhat to baseline. This speaks against the diagnosis of Alzheimer’s disease and makes the diagnosis of traumatic brain injury with marked memory loss reasonably medically certain. She also had a fracture of the pelvis, a fracture of the right tibia [sic], and has hypertension. The medical conditions derived directly from her accident on June 29th, 2009 are fracture of the right tibia healed, fracture of the pelvis healed, and traumatic brain injury with marked memory loss. I believe that Ms. Demore is at maximum medical improvement with a marked memory loss. Continued medical treatment is required and she should have her Aricept increased to 10 mg daily with a consideration of changing her to Exelon if that does not help.

She suffered from mild memory loss prior to the accident but would have been able to function in her job as bookkeeper and secretary for her company had that company not terminated its activity when it lost its dealership. However, she could have been involved in the family’s real estate business. The disability rating I would ascribe is permanent and total disability based on her cognitive dysfunction alone with 10% or less pre-existing.

She also has a medical issue of hypertension and has been removed, at least transiently from [two medications] because of the confusion. However, these should be re-instituted and I would be happy to talk to her physician about them. The Demores [sic] were instructed to monitor her blood pressures daily. She also was on Lexapro which is given after traumatic brain injuries and it is unlikely that was causing any confusion, therefore, I would recommend reinstatement of it. The Ditropan may well have played a role in some of her confusion” (Tr. 2274).

The Insurer’s examining physician, Dr. Allen Parmet, also verified that Doris’ fractures resulted from the car accident (Tr. 2370-2374). The record here is therefore more than sufficient to conclude that Doris suffered these injuries, underwent treatment, and incurred expenses from the car accident. See, *Proffer v. Federal Mogul Corp.*, 341 S.W.3d 184, 187 [3] (Mo. App. S.D. 2011).

Even if this medical evidence were not here, the “sudden onset” doctrine removes the need for a medical testimony when the trier of fact can infer, from the circumstances that an event led to an obvious medical condition.

“The sudden onset rule obviates the need for medical testimony to establish the element of causation arising from an accident. Under the sudden onset doctrine, causation may be inferred by a lay jury, without the aid of medical testimony, where the obvious symptoms of the injury follow the trauma immediately, or with only short delay, and the injury is the type that is

normally sustained in the kind of trauma involved. [Citation omitted.] The most obvious cases are where a person involved in an accident suffers a broken bone or open wound. [Citation omitted.] Cuts arising during or immediately after an accident or open wounds are covered by the sudden onset rule. Localized pain or soreness occurring immediately or with only short delay is sufficient to fit within the rule.” [Citation omitted.] *Tucker v. Wibbeneyer*, 901 S.W.2d 350, 351 [5, 6] (Mo.App. E.D. 1995). (Cuts and soreness following a motor vehicle accident.)

The onset of back pain three to four days following a motor vehicle accident also may fall within the “sudden onset” rule:

“The element of causation may be established in the absence of medical testimony if the injury suffered may be categorized as one of ‘sudden onset.’ The latter term has been interpreted as embracing those ‘cases or the physical disability develops coincidentally with a negligent act, such as broken bones . . . , immediate, continuing back pain . . . , or an obvious wound.’ *DeMouling v. Kissir*, 466 S.W.2d 162, 165 (Mo.App. 1969). . . . Pruneau [the plaintiff] began to experience pain within three or four days of the accident. There was no evidence that this pain stemmed from a pre-existing condition or intervening cause. The combination of all these factors indicate that the injuries sustained by Mrs. Pruneau are more aligned with those found in ‘sudden onset’ cases rather than those which are the

apparent conduct of a gradual chronic disorder.” *Pruneau v. Sniljanich*, 585 S.W.2d 252, 254 [7] (Mo.App. E.D. 1979).

Other cases that have recently applied this “sudden onset” doctrine include *Crawford Ex rel. Crawford v. Shop-N-Save Warehouse Foods, Inc.*, 91 S.W.3d 646, 652 [12-15] (Mo.App. E.D. 2002); *Robbins v. Jewish Hosp. of St. Louis*, 663 S.W.2d 341, 344-345 [3-6] (Mo.App. E.D. 1984).

Doris testified her visit to the hospital was directly related to the motor vehicle accident. Doris offered those bills into evidence. (Tr. 20:7-13). The medical testimony supports Doris’ testimony. Doris was transported by ambulance and admitted to Cox Medical Center South. (Tr. 509). Doris treated at Cox from June 29 through July 13, 2009. (Tr. 507-899). Doris’ physicians diagnosed Doris with right tibia and fibula fractures with fixation, a compound fracture to her pelvis, a subdural hematoma on Doris’ head, a C2 fracture, anterior displacement, a right-finger fracture, displaced left ankle fracture, and hypoactive delirium. (Tr. 521-523). The Division noted this in its Final Award, “Dr. Chris Miller performed an open reduction and internal fixation of the right tibia and fibula. Dr. Tim Woods performed a subclavian central placement and catheter placement on June 29 and 30. Dr. Michael Grillot performed an open reduction and internal fixation of the right little finger on July 2.” (LF 19).

The medical evidence, admitted in part as Exhibit “S”, also confirmed Doris’ testimony she had to be readmitted to the hospital to undergo neurosurgery. Doris’ subdural hematoma did not improve after she was released from her initial

hospitalization. Dr. Charles Mace, Doris' neurosurgeon, found it was necessary to readmit Doris on July 24, 2009, because she was confused and responding slowly. Dr. Mace performed a left occipital craniotomy and evacuation of the subdural hematoma. Doris was hospitalized for this surgery until August 2, 2009. (Tr. 507-899).

The medical evidence further demonstrated Doris was placed in a skilled nursing facility during the time between her two hospitalizations, from July 13 until July 24, 2009, and from August 4, 2009 until October 31, 2009. (Tr. 1051-1400, 1476-1658). Doris received in home nursing services from Integrity Home Care from November 10, 2009 until March 8, 2010. (Tr. 955-978). She received outpatient physical and speech therapy from November 6, 2009 until February 5, 2010. (Tr. 1476-1659).

The Insurer now objects, for the first time on appeal, that Doris did not identify the bills admitted into evidence as Exhibits S through AA. It apparently argues there is no substantial evidence to believe that the charges were fair and reasonable. However, Doris testified she received treatment the day of the accident and for injuries sustained because of the accident. The affidavits, *to which the Insurer's counsel had no objection*, stated that the bills reflected the treatment set forth in Doris' medical records admitted into evidence as Exhibits S through AA. There was a sufficient factual basis, as required in *Martin v. Mid-America Farm Lines*, 769 S.W.2d 105, 111 [7] (Mo banc. 1989), to satisfy

the requirement that the medical expenses were fair and reasonable. The affidavits supplied that element required under *Martin*.⁷

Further, what the Insurer now objects on appeal is not the objection that the Insurer made at the Division hearing. The Insurer's counsel only objected there was no "medical testimony" concerning medical bills. If the Insurer wanted to object to the admission of the medical bills, it should not have objected to the lack of "medical testimony," but, instead, to the lack of Doris' testimony. *Martin* holds medical testimony is not necessary to establish the fairness and reasonableness of charges. Medical testimony *may* be necessary to causally connect an event with a resulting medical condition and treatment, except where "sudden onset" applies. The Insurer did not timely object to the admission of the medical bills based upon the alleged lack of Doris' testimony. See, *Lacy v. Federal Mogul*, 278 S.W.3d 691, 700 (Mo.App. S.D. 2009); *Hawthorne v. Lester E. Cox Med. Center*, 165 S.W.3d 587, 593 (Mo.App. S.D. 2005).

Conclusion

The Insurer's counsel only objected to the lack of "medical testimony" that causally connected Doris' injuries to her treatment. Doris' testimony, the medical bills,

⁷ The undersigned counsel, of course, recognizes that the claimant in *Martin* identified the bills. The use of a business record affidavit as set forth in *Section 490.692* (enacted in 1988) replaces the need for that testimony. It should be noted that the parties in *Martin* did not have *Section 490.692* available when *Martin* was tried (Division award entered on October 21st, 1986 and Labor Commission award entered on November 10th, 1987).

medical records, and affidavits that accompanied those business records satisfied the requirements in *Martin v. Mid-America Farm Lines, Inc.* where the admission of the bills for the proposition they were fair and reasonable. Last , if the Insurer’s counsel objected to the admissibility of the bills based upon Doris’ lack of testimony, it should have done so at the hearing and, not led the Division ALJ into believing the business records were admissible but for lack of medical testimony on causation.

Point V

Response to Insurer's Point Relied on V

The Labor Commission properly awarded future medical treatment to Doris because there was substantial and competent evidence to find that Doris required treatment for her injuries.

Standard of Review

The standard of review for Point V is the same as that stated for Point IV.

Substance of Argument

The record contains ample and substantial medical evidence that Doris will require future medical care because of her work-related injuries. An award of future medical benefits will be upheld upon showing a “reasonable probability” that, due to an employee’s work-related injury, an employee requires future medical treatment. *Stevens v. Citizens Mem’l Healthcare Found.*, 244 S.W.3d 234, 237 (Mo. App. S.D. 2008). An employee is not required to show “conclusive evidence” of such a need. *Id.* Here, the Division based its opinion of Doris’ need for future medical care on the cognitive limitations demonstrated by the testimony of Doris, Dolores, Hershel, Carol Combs, and Dr. Abrams’ complete medical report.

Doris testified that, because of the automobile accident, she cannot take care of herself in her own home. (Tr. 88:10-23). Dolores and Hershel both testified that Doris cannot drive, cannot carry on simple conversations, and has severe short-term memory

problems. (Tr. 68:14-70:14; 140:8-141:7; 142:16-144:21). This was not the case prior to the accident. (Tr. 68:14-70:14; 140:8-141:7; 142:16-144:21).

Carol Combs testified Doris is unable to attend to basic household functions or care for her own basic needs for any extended period of time since she was released from hospitalization. (Tr. 110:7-23; 113:8-25; 114:1-14). Ms. Combs, who is a medical social worker, recommended that Doris have access to a personal care assistant to provide the supervision and basic care that Doris can no longer provide for herself. (Tr. 113:8-114:20). Doris will require assistance with medication and nursing home assistance that replaces her ability to care for herself in her own home because of the effects of the accident. (Tr. 113:8-114:20).

Dr. Abrams' complete medical report explains the cognitive reasons for Doris' need for nursing home assistance and connects those cognitive problems with the accident to a reasonable degree of medical certainty. He even states that "[c]ontinued medical treatment is required." (Tr. 2274).

Future medical treatment is owed even though the injured employee reaches maximum medical improvement. *Williams v. City of Ava*, 982 S.W.2d 307, 312 [14-15] (Mo. App. S.D. 1998); *Ford v. Wal-Mart Assocs., Inc.*, 155 S.W.3d 824, 828-829 [5-7] (Mo. App. E.D. 2004). This rule goes back at least as far as 1942. *Williams v. AB Chance Co.*, 676 S.W.2d 1, 4 (Mo. App. E.D. 1984), citing *Brollier v. Van Alstyne*, 163 S.W.2d 109 (Mo. App. Kansas City 1942). It is unnecessary for there to be a specific treatment plan when the claim is tried, only that some type of treatment will eventually be

necessary. *Sharp v. New Mac Elec. Co-op.*, 92 S.W.3d 351, 354 [12-13] (Mo. App. S.D. 2003); *Mathia v. CFI, Inc.*, 929 S.W.2d 271, 277 [12] (Mo. App. S.D. 1996). It is a misapplication of law to deny medical treatment for this reason. *Mathia*, 929 S.W.2d at 278. Last, it is error to deny future medical treatment only because past medical treatment may not have succeeded. *Kaderly v. Race Bros. Farm Supply*, 993 S.W.2d 512, 517 [9-13] (Mo. App. S.D. 1999). Each of these propositions applies here. Doris, according to all physicians, is now at maximum medical improvement. It is not clear what medication, or other treatment will work, but Dr. Abrams was clear that future treatment was necessary. Because some medication may have confused Doris before the injury should not disqualify her from future medication regimens. Now, just what does the Insurer mean to say that, under these principles, Doris is not entitled to future medical treatment based upon the Abrams report and Cox testimony?

Conclusion

The Labor Commission properly awarded future medical treatment to Doris because Doris carried the burden of a causal connection. There was substantial and competent evidence on the record to make such a finding.

Point VI

Response to Insurer's Point Relied on VI

The Labor Commission properly found Doris to suffer temporary total disability and permanent total disability because there was substantial and competent evidence to make these findings.

Standard of Review

The standard of review for Point VI is the same as that stated for Point IV.

Substance of Argument

There is ample substantial and competent evidence supporting the Labor Commission's finding of past temporary total disability benefits for Doris. Temporary total disability benefits are properly awarded during the time in which an employee heals from a workplace injury. *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 424 (Mo. App. W.D. 2000), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). The evidence demonstrates that Doris' work-related medical treatment lasted from June 30, 2009 until July 5, 2010, at which time Dr. Abrams placed Doris at maximum medical improvement. (Tr. 2270-2275).

Under Missouri law, temporary total disability benefits must be awarded where the Division finds that a work-related disability required reasonable and necessary medical treatment and the employee cannot work. *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 847 (Mo. App. S.D. 2007). Doris was both a patient in a hospitalization program and spent several months in an in-patient nursing care facility due to a work

related injury. (Tr. 135:22-137:21). Doris has never returned to work and the medical evidence admitted indicates she does not have sufficient cognitive abilities to permit her to perform basic activities of daily living and, therefore, cannot return to work. (Tr. 29:14-25; 68:15-21; 69:2-7; 69:22-70:3; 140:8-141:7; 142:16-21; 143:12-17). There *was* medical evidence on the record Doris was off of work and should have been off of work, and the Labor Commission properly awarded past temporary total disability benefits.

Payment of temporary total disability benefits is due until the employee reaches maximum medical improvement. *Plaster v. Dayco*, 760 S.W.2d 911, 913-14 [4-5] (Mo. App. S.D. 1988). The Labor Commission awarded temporary total disability until July 2nd, 2010, when Dr. Abrams placed Doris at maximum medical improvement. And, even if we place Dr. Abrams' opinion aside, the lay testimony of the Demores constitutes substantial evidence for temporary total disability benefits because expert testimony may not be necessary. *Patterson v. Eng'g Evaluation Inspections, Inc.*, 913 S.W.2d 344, 347-48 [6-8] (Mo. App. E.D. 1995); see also, *Riggs v. Daniel Int'l*, 771 S.W.2d 850, 851-52 (Mo. App. W.D. 1989).

The employee must be incapable of returning to any "reasonable or normal employment." *Proffer v. Fed. Mogul Corp.*, 341 S.W.3d 184, 188 (Mo. App. S.D. 2011). This is the case here. The complete medical report of Dr. Abrams, who rated Doris at ninety percent (90%) to the body as a whole, was admitted without objection. (Tr. 20:14-15). Dr. Abrams concluded Doris was 100% disabled, but noted 10% was likely pre-existing. (Tr. 2274). Dr. Abrams found that, immediately after Doris' hospitalization

that resulted from the work-related automobile accident, Doris was “quite confused and had difficulty with memory.” (Tr. 2271).

Dr. Abrams stated that, although Doris had mild memory problems prior to the accident, she had “an immediate and rapid decrement of mental functioning” immediately following the accident and diagnosed Doris as having suffered “traumatic brain injury with marked memory loss.” (Tr. 2274). Dr. Abrams noted continued medical treatment is required and that, but for the accident, she “would have been able to function in her job as bookkeeper and secretary for her company.” (Tr. 2274).⁸

The testimony of Carol Combs, a medical social worker, supplements Dr. Abrams’ medical report to support an award of permanent total disability benefits. (Tr. 92:17-25; 93:12-95:4; 95:10-97:20). Ms. Combs testified Doris is unable to attend to basic household functions or care for her own basic needs for any extended period of time since she was released from hospitalization. (Tr. 110:7-23; 113:8-25; 114:1-14). Further, Doris’ daughter Dolores testified that Doris cannot return to work since the accident. (Tr. 29:17-25). The evidence proves Doris now has severely limited short-term memory so much that it interferes with such everyday tasks as ordering meals at restaurants, remembering appointments, driving (she could not drive at all since the accident), maintaining conversations, and knowing her way around town. (Tr. 68:15-21; 69:2-7;

⁸ Dr. Abrams found that Doris “could have been involved in the family’s real estate business” upon Demore Enterprise’s termination of activity.

69:22-70:3; 140:8-141:7; 142:16-21; 143:12-17). This precludes Doris' return to reasonable or normal employment to any extent.

Insurer claims that Dr. Alan Parmet testified in his deposition he believed Doris could work. Brief of Insurer, at p. 16. For her **physical limitations only**, Dr. Parmet rated Doris at fifteen to twenty percent (15-20%) of the body as a whole. (Tr. 2358). Dr. Parmet did not assign a disability rating for her cognitive limitations. (Tr. 2358). Dr. Parmet explained he would not evaluate her cognitive limitations because she had a stroke in 1995.⁹ (Tr. 2358). In response to a question asking him to apply **only** Doris' **cognitive** limitations, Dr. Parmet could not provide even one example of the type of work Doris could perform in the open labor market. (Tr. 2363). Therefore, in combination with her physical limitations to which Dr. Parmet testified, the testimony cited by Insurer supports Dr. Abrams' assessment of permanent total disability, and the testimony from Doris, Dolores, Hershel, and Ms. Combs.

There have been several cases in which the appellate courts affirmed either significant permanent partial disability or permanent total disability claims when the injured employee suffered head injuries similar to what Doris suffered. See, *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 237-238 [16] (Mo. App. S.D. 2003); *Grgic v. P&G Constr.*, 904 S.W.2d 464, 465-466 [4-5] (Mo. App. E.D. 1995); *Kerns v. Midwest Conveyor*, 126 S.W.3d 445, 453-456 [7-8] (Mo. App. W.D. 2004); *Redden v. Dan*

⁹ Dr. Parmet essentially guessed that Doris possessed adequate cognitive abilities because of an evaluation method he described as "crude." (Tr. 2358).

Redden Co., 859 S.W.2d 207, 210-211 [9] (Mo. App. E.D. 1993). A comparison of these injured employees with Doris leaves one with the unmistakable conclusion that the Labor Commission had substantial to award permanent total disability benefits and was justified in doing so.

The Insurer cites *Molder v. Missouri State Treasurer*, 342 S.W.3d 406 (Mo. App. W.D. 2011) to support its position. But , the appellate court affirmed the Labor Commission's decision to award permanent total disability. *Molder*, 342 S.W.3d at 407. And in doing so, the *Molder* court found that a finding of permanent total disability does not require a finding the employee cannot perform sporadic or light duty work. *Id.* at 412. Further, such a finding "does not require that the claimant be completely inactive or inert." *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 234 (Mo. App. S.D. 2003), quoting *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 286, 290 (Mo. App. S.D. 1995), *overruled on other grounds*, *Hampton*, 121 S.W.3d 220.

Here, the evidence showed that, not only was Doris unemployable in the open labor market, she could not even care for her own basic needs and requires full-time supervision. (Tr. 109:23-25; 110:7-23; 113:8-114:8). Therefore, the Division's award of permanent total disability benefits followed, rather than contrary to, the weight of the medical evidence and the case law.

Conclusion

The Labor Commission properly awarded Doris past temporary total disability benefits and permanent total disability benefits because there was substantial and competent evidence on the record to make such a finding.

Conclusion

Doris Demore respectfully seeks the same relief as she stated in her original brief.

Respectfully submitted,

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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 15,968 words as counted by Microsoft Word 2010.

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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 December 20th, 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

Patrick J. Platter, #29822