IN THE SUPREME COURT OF MISSOURI

Supreme Court No.: SC83477

MICHAEL A. FISHER
Employee/Appellant

v.

WASTE MANAGEMENT OF MISSOURI
Employer/Respondent

and

RSKCO
Insurer/Respondent

SUBSTITUTE BRIEF OF RESPONDENTS WASTE MANAGEMENT OF MISSOURI AND RSKCO

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JURISDICTIONAL STATEMENT

The instant matter involves two workers' compensation Claims brought by Michael Fisher against Waste Management, Inc., seeking benefits for right shoulder injuries allegedly occurring as a result of work accidents in June and September of 1997. On July 8, 1999, ALJ Joseph Dennigan held a hearing on the consolidated Claims. Thereafter, on September 1, 1999, ALJ Dennigan issued separate Awards on each Claim for Compensation. In these Awards, ALJ Dennigan ruled that surveillance videotapes taken of the claimant which did not contain an audio component were "statements" of the employee, which should have been provided to the claimant upon his certified request for statements pursuant to RSMO. § 287.215 of the Workers' Compensation Act and, therefore, the ALJ excluded the videotapes from evidence. While the ALJ awarded the employee permanent partial disability benefits on the Claim arising from the June, 1997 injury, the ALJ denied the employee's Claim for the September, 1997 injury, finding that the employee had failed to prove the occurrence of a second, independent right shoulder injury.

Employer filed its timely Application for Review on both Claims with the Industrial Commission on September 15, 1999. On May 25, 2000, the Industrial Commission issued its Final Award. Therein, the Industrial Commission held that the ALJ improperly excluded the surveillance videotapes taken of the employee in that those videotapes did not constitute a "statement" of the employee within the meaning of RSMO. § 287.215. Further, the Industrial Commission reduced the permanent partial disability benefits awarded to the employee on the Claim for the July, 1997 injury. The Industrial

Commission affirmed the ALJ's denial of the employee's Claim arising out of the September, 1997 injury. Subsequently, on June 20, 2000, the employee filed his timely Notice of Appeal with the Industrial Commission, appealing from the Industrial Commission's Final Award.

On January 30, 2001, the Missouri Court of Appeals, Eastern District, issued its Opinion, affirming the Award of the Industrial Commission. Therein, the Eastern District held that pursuant to **Erbschloe v. General Motors Corp.,** 823 S.W.2d 117 (Mo. App. ED 1992), a videotape without an audio portion did not constitute a "statement" under Section 287.215 of the Workers' Compensation Act and, therefore, the surveillance videotapes were admissible in evidence, despite the employer's failure to produce the videotapes in response to the employee's certified request for statements pursuant to Section 287.215. The Court of Appeals affirmed the Industrial Commission's findings regarding the nature and extent of claimant's permanent partial disability arising from the June, 1997 injury, as well as the Industrial Commission's denial of the employee's Claim arising from the September, 1997 injury.

On February 13, 2001, the employee filed in the Court of Appeals his Motion for Rehearing, Application for Transfer, and Suggestions in Support. The Court of Appeals denied the employee's Motion for Rehearing and Application for Transfer on March 12, 2001.

Thereafter, on March 27, 2001, claimant filed his Application for Transfer with the Missouri Supreme Court. On April 23, 2001, the Supreme Court sustained the

employee's Application for Transfer.

This Court has jurisdiction to entertain appeals on transfer from the Court of Appeals pursuant to Article V, § 3 and Article V, § 10 of the Missouri Constitution (1945) (as amended 1982). Therefore, jurisdiction of this Court is invoked pursuant to Article V, § 3 and Article V, § 10 of the Missouri Constitution (1945) (as amended 1982).

STATEMENT OF FACTS

Introduction

The dispositive question for resolution is whether surveillance videotapes of an injured employee which do not contain an audio component constitute "statements" of the employee within the meaning of RSMO. § 287.215. Employer submits that the Industrial Commission did not err in following the previous decision in **Erbschloe v. General Motors Corp.,** 823 S.W.2d 117 (Mo. App. ED 1992), and in holding that a surveillance videotape with no audio portion does not constitute a "statement" of an employee discoverable under Section 287.215 of the Workers' Compensation Act.

Procedural History

This case arises out of two workers' compensation Claims filed by employee Michael Fisher against Waste Management for injuries to his right shoulder allegedly occurring in June and September of 1997.

June, 1997 Injury

On September 8, 1997, the employee filed his Claim for Compensation with the Division, Injury No. 97-091097. (L.F. 1-2).[1] Therein, the employee asserted that he injured his right shoulder and right arm on June 1, 1997 while lifting in the course and

[1]Matters referred to herein which are contained in the Legal File shall be designated as (L.F. ___). Matters referred to herein which are contained in the Transcript of Hearing shall be designated as (Tr. ___).

scope of his employment. (L.F. 1-2). Thereafter, on October 2, 1997, employer Waste Management of St. Louis and insurer CNA Insurance Company (hereinafter "employer" or "Waste Management"), filed their Answer to the employee's Claim for Compensation. (L.F. 4). Employer admitted that the employee sustained accidental injury on June 1, 1997 for which all necessary compensation benefits and medical aid had been provided. (L.F. 4). By way of further answer, the employer denied all allegations contained in the Claim not specifically admitted therein. (L.F. 4).

September, 1997 Injury

On October 6, 1997, the employee filed an additional Claim for Compensation with the Division, Injury No. 97-429036. (L.F. 18-19). Therein, the employee asserted that he injured his right shoulder and right arm on September 18, 1997 while he was lifting in the course and scope of his employment. (L.F. 18-19).

Employer, on March 25, 1999, filed its Answer to the employee's Claim for Compensation. (L.F. 21). Therein, the employer admitted that the employee sustained accidental injury on September 18, 1997 for which all compensation benefits and medical aid had been provided. (L.F. 21). By way of further answer, the employer denied all allegations contained in the Claim not specifically admitted therein. (L.F. 21). The employer's Answer contained a typographical error, which referred to Injury No. 97-429063 rather than 97-429036, the injury number for the employee's Claim. (L.F. 21). Subsequently, on March 31, 1999, the employer filed its Amended Answer to the Claim for Compensation, correcting the injury number for the employee's Claim. All other allegations in the employer's Answer remained the same. (L.F. 22).

Hearing

On July 8, 1999, ALJ Dennigan held a hearing on the consolidated Claims. (Tr. 1-175). The issues for resolution on each Claim were: (1) medical causation/attribution; and (2) nature and extent of permanent partial disability. (Tr. 2).

A third issue arose when the employer offered into evidence surveillance videotapes made of the claimant. (Tr. 5-9). These videotapes did not contain an audio component. (Tr. 7). Employee objected to the admission of the videotapes, arguing that the videotapes were "statements" under the Missouri Supreme Court case of **State ex rel. McConaha v. Allen,** 979 S.W.2d 188 (Mo. banc. 1998), and that the employer failed to disclose the videotapes to the employee's counsel, despite his certified request for statements pursuant to RSMo § 287.215. (Tr. 5-6).

In response, the employer argued that the Supreme Court decision in **McConaha v. Allen** was inapplicable in that the decision involved a *subpoena duces tecum* under Rule 56.01(b)(3) of the Missouri Rules of Civil Procedure and whether that Rule applied under RSMO. § 287.560 of the Workers' Compensation Act governing discovery depositions in workers' compensation cases. (Tr. 7). Employer asserted that the employee's request for statements was made pursuant to RSMO. § 287.215 and that this statutory provision had been interpreted in **Erbschloe v. General Motors, Corp.,** 823 S.W.2d 117, which held that, in a workers' compensation case, a surveillance videotape without an audio track was not a "statement" and, thus, was not discoverable under RSMO. § 287.215. (Tr. 7-8). At hearing, the ALJ excluded the surveillance videotapes offered by the employer. (Tr. 8-9).

Award of the ALJ

ALJ Dennigan issued separate Awards on the Claims on September 1, 1999. (L.F. 5-12, 23-30). In both Awards, the ALJ held that the surveillance videotapes constituted an electronically recorded statement in the possession of the employer that should have been provided to the claimant upon

his request pursuant to RSMO. § 287.215 of the Act. (L.F. 5-12, 23-30). Since the employer failed to produce the videotapes in response to the employee's request for statements, the ALJ ruled that the videotapes were to be excluded from evidence. (L.F. 5-12, 23-30).

As to the Claim for the employee's June, 1997 injury, the ALJ found that claimant sustained a 30% permanent partial disability of the right upper extremity at the level of the shoulder. (L.F. 5-12). As to the Claim for the employee's September, 1997 injury, the ALJ held that claimant had failed to prove the occurrence of a second, independent right shoulder injury and, consequently, denied the employee's Claim. (L.F. 23-30).

Employer filed its timely Application for Review on both Claims with the Industrial Commission on September 15, 1999. (L.F. 13-17, 31-33).

Award of the Industrial Commission

On May 25, 2000, the Industrial Commission issued its Final Award on both Claims. (L.F. 34-53). Therein, the Industrial Commission held that the ALJ improperly excluded the surveillance videotapes taken of the employee. (L.F. 34-53). It found that **Erbschloe v. General Motors Corp.**, 823 S.W.2d 117, was still controlling precedent and that the ALJ erred in failing to follow that decision. The Industrial Commission held that the employer/insurer were not required to disclose the silent surveillance videotapes pursuant to RSMO. § 287.215. (L.F. 34-53).

Upon admitting the videotapes into evidence and reviewing the videotapes, the Industrial Commission reduced the extent of permanent partial disability awarded to the employee on the Claim for the July, 1997 injury from 30% permanent partial disability of the right upper extremity at the level of the shoulder to 10% permanent partial disability. (L.F. 34-53). The Industrial Commission affirmed the denial of the Claim for the September, 1997 injury. (L.F. 34-53).

Subsequently, on June 20, 2000, the employee filed his timely Notice of Appeal with the

Industrial Commission, appealing from the Industrial Commission's Final Award. (L.F. 54-80).

Opinion of the Court of Appeals, Eastern District

On January 30, 2001, the Missouri Court of Appeals, Eastern District, issued its Opinion. Therein, the Court of Appeals affirmed the Award of the Industrial Commission. (Opinion, 7). It held that, pursuant to **Erbschloe v. General Motors Corp.,** 823 S.W.2d 117, a videotape without an audio portion does not constitute a "statement" under Section 287.215 of the Workers' Compensation Act. (Opinion, 6). The holding in **Erbschloe** was still good law, despite the subsequent Supreme Court decisions in **State ex rel. Missouri Pacific Railroad Co. v. Koehr,** 853 S.W.2d 925 (Mo. banc. 1993); and **State ex rel. McConaha v. Allen,** 979 S.W.2d 188 (Mo. banc. 1998). (Opinion, 6). As the Court of Appeals observed, the **Koehr** decision distinguished **Erbschloe** on the grounds that it was decided under Section 287.215, which did not contain an internal definition of "statement", whereas Rule 56.01(b)(3) at issue in **Koehr**, did define the term "statement". (Opinion, 6). **McConaha** was distinguishable, the Court of Appeals found, because the Supreme Court therein specifically limited its holding to depositions taken pursuant to Section 287.560 and stated that it was not holding that any other civil rules were applicable to workers' compensation proceedings. (Opinion, 6).

As the Court of Appeals observed, claimant herein did not attempt to obtain statements pursuant to Rule 56.01(b) or in connection with a deposition taken under RSMO. § 287.560. Rather, the employee asserted a right to the production of the videotapes only pursuant to his request for statements under RSMo § 287.215. The Court of Appeals held that the word "statement," as used in RSMo § 287.215, did not include non-audio surveillance videotapes. (Opinion, 6). In so holding, the Court of Appeals rejected claimant's argument that the definition given to the term "statement" in Rule 56.01(b)(3) should apply to the word "statement" as used in RSMo § 287.215. (Opinion, 7). Giving the word "statement" in RSMo § 287.215 its ordinary meaning, the Court ruled that a person's conduct picked up

by a surveillance videotape was not conduct intended as an assertion and, therefore, the conduct was not a "statement" within the contemplation of the statutory provision. (Opinion, 7).

As to the nature and extent of claimant's permanent partial disability, the Court of Appeals held that the Industrial Commission's determination that claimant sustained a 10% permanent partial disability of the right upper extremity at the level of the shoulder as a result of the June, 1997 injury was supported by the competent and substantial evidence in the record. It affirmed the Industrial Commission's Award of permanent partial disability benefits. (Opinion, 4).

On February 13, 2001, the employee filed in the Court of Appeals his Motion for Rehearing, Application for Transfer, and Suggestions in Support. The Court of Appeals denied the employee's Motion for Rehearing and Application for Transfer on March 12, 2001.

Subsequently, on March 27, 2001, claimant filed his Application for Transfer with the Missouri Supreme Court. On April 24, 2001, the Supreme Court sustained the employee's Application for Transfer.

Relevant Facts

Testimony of Claimant Michael Fisher

Claimant works as a trash hauler for Waste Management. (Tr. 10). He has been so employed for seven years. (Tr. 11). As a trash hauler, the employee takes trash away from houses and transports it to the landfill. (Tr. 10). His duties entail driving a trash truck on daily rounds over approximately 700 residential stops. (Tr. 11, 39-40). The employee is required to pick up trash cans from residential containers and dump them into the truck. (Tr. 11). In addition, the employee is required to lift and dump other objects left on the curb, including chairs, couches and similar items. (Tr. 39). Normally, the employee performs the job by himself; he does not have a helper on the truck. (Tr. 11, 38).

In June of 1997, the employee generally worked 50 hours a week. (Tr. 12). He earned

approximately $500.00 per week. (Tr. 12).

June, 1997 Injury

Claimant testified that on June 18, 1997, he was on his daily trash route when he picked up a heavy trash can and felt his right shoulder pop. (Tr. 12-13, 34). At the time, the employee experienced a stabbing pain in his right shoulder. (Tr. 13). Subsequently, claimant took his time in finishing out his route that day. (Tr. 12, 13). After completing his route, the employee informed the employer that he had injured his right shoulder while picking up a trash can. (Tr. 13).

Prior to June of 1997, the employee had never injured his right shoulder. (Tr. 13). He did, however, have a previous back injury in 1995. (Tr. 13). This back injury occurred as a result of lifting in claimant's employment for Waste Management. (Tr. 14). While the employee believed that he filed a Claim for Compensation for this injury, he received no compensation beyond temporary total disability benefits. (Tr. 14).

Following the June injury, claimant continued to work for the employer. (Tr. 15). He did not seek medical treatment until approximately one week after the incident. (Tr. 15). Employer referred claimant to MedFirst, which treated his right shoulder with shock treatment, physical therapy, and the placement of his right arm in a sling. (Tr. 15-16, 36). It was the employee's testimony that his immediate supervisor, Chris Wilson, told him to take his arm out of the sling and to drive his trash truck. (Tr. 16).

In addition to the treatment provided by Med Stop, claimant received physical therapy prescribed by Dr. Nogalski. (Tr. 17-18, 19). The employee missed several physical therapy appointments. (Tr. 18-20). While claimant testified that he missed some physical therapy sessions because the employer would not let him leave work, he was unable to identify the supervisor who denied his request to leave work for treatment. (Tr. 18, 20, 37-38). Besides prescribing physical therapy for the employee, Dr. Nogalski treated claimant for approximately two months. (Tr. 22). While Dr. Nogalski

recommended cortisone injections, claimant refused to undergo the injections. (Tr. 22-23).

During the period when he was receiving physical therapy, the employee continued to work on a full-time basis. (Tr. 18). He did, however, have a helper on his route. (Tr. 18, 20). This helper picked up one side of the street while claimant did the other side. (Tr. 20). Claimant had the helper for approximately one month. (Tr. 20-21). After that, the employee went back to doing his regular duties, albeit with some pain. (Tr. 21). There was never any period following the June 18, 1997 incident when claimant was totally off work. (Tr. 21).

September 18, 1997 Injury

While on his route in Maryland Heights, claimant attempted to pick up a trash can, pulling his right arm. (Tr. 24). The trash can was filled with concrete, but it was covered with paper so that claimant was unaware that it contained concrete when he tried to pick it up. (Tr. 25). This incident increased claimant's right shoulder symptoms. He experienced severe pain in his shoulder. (Tr. 25).

When claimant requested medical treatment from the employer, the employer sent claimant to Dr. Nogalski, who prescribed physical therapy. (Tr. 25-26). It was claimant's testimony that he missed some of his physical therapy sessions because he had trouble getting off work. (Tr. 26-27). In addition to physical therapy, Dr. Nogalski again suggested cortisone injections for the claimant, but claimant, again, refused. (Tr. 26, 38). Since being released by Dr. Nogalski, the employee has not requested any additional medical treatment from the employer. (Tr. 40).

At the time of hearing, claimant was working full-time, performing his regular duties as a trash hauler. He used both arms to lift and carry trash cans. (Tr. 39). In addition to dumping trash cans over approximately 700 stops, the employee lifted other items, such as furniture. (Tr. 39). Claimant performed his job without the services of a helper. (Tr. 40).

As to his current complaints from his shoulder injuries, the employee stated that he had constant pain in his right shoulder. (Tr. 24, 29). This shoulder pain increased with activity. (Tr. 29, 30-31, 33). The employee was unable to lift his arm above his head without pain. His right shoulder popped and rattled when he moved it. (Tr. 28). Claimant had difficulty sleeping because of pain and numbness in his hands. (Tr. 30). While claimant was able to lift approximately 50 pounds, he lifted with his left hand and used his right hand primarily for balance. (Tr. 30). He was unable to steer the trash truck with his right arm. (Tr. 31, 32). As to the effect of his injuries on his recreational activities, claimant testified that he had only attempted to water ski one time since injuring his shoulder. (Tr. 41).

Testimony of Kenneth Skaggs

Kenneth Skaggs is employed by Waste Management. (Tr. 43). At the time of hearing, he had been employed as a supervisor in the Residential Department for about two weeks. (Tr. 43). Prior to that time, he was a lead man in the Residential Department. (Tr. 43). As a lead man, it was Mr. Skaggs' job to go out onto the routes to make sure that the drivers were doing their jobs. (Tr. 44).

In his capacity as a lead man, Mr. Skaggs would see the claimant once or twice each Thursday while working on his route. (Tr. 44). When Mr. Skaggs observed the claimant, he did not appear to be limited in any manner. (Tr. 44). Claimant would use both his right and left hands to pick up trash containers. (Tr. 44). On his route, the employee would have to pick up all kinds of trash receptacles. (Tr. 44). This included picking up "toters," 90 gallon containers with wheels, and pushing them up against the truck and into the bucket or manually lifting them up into the bucket if the lift was not working. (Tr. 44-45). When dumping toters or other trash containers, claimant had to lift the receptacles approximately three and one half feet off the ground. (Tr. 45). During the times that Mr. Skaggs observed the claimant, claimant did not show any limitations in regards to the use of his right arm or shoulder. Nor did he complain to Mr. Skaggs about his right arm or shoulder in any way. (Tr. 45).

On occasion, Mr. Skaggs talked with claimant about his recreational activities, in particular water skiing. (Tr. 45). The employee informed Mr. Skaggs that he had gone skiing since the June and September 1997 incidents, and as recently as Memorial Day weekend of 1999. (Tr. 46).

Testimony of Chris Wilson (Traughber)

Chris Wilson has been Operations Manager over Residential Transfer Stations at Waste Management for seven years. (Tr. 49). She was aware that claimant injured his right shoulder at work. (Tr. 39-50). After the injury, the employer sent claimant for medical care, which included physical therapy. (Tr. 50). It was the company's policy that an employee would be allowed off work for physical therapy whenever the employee informed the employer of the dates for physical therapy. Once the employer was so informed, it would schedule the employee so that he or she would have the necessary time off. (Tr. 50, 57). Ms. Wilson testified that claimant had requested time off to attend physical therapy and that she had granted his request. (Tr. 50). To her knowledge, Ms. Wilson had never denied the employee time off for physical therapy when he requested it. (Tr. 50).

Ms. Wilson received work restrictions from the claimant's physicians in regard to his right shoulder injury. (Tr. 50-51). She honored those restrictions. (Tr. 51). To her knowledge, Ms. Wilson had never required the employee to perform his job in contravention of his work restrictions. (Tr. 51). When claimant came in with a sling on his right arm, Ms. Wilson told him that he could not work, in particular, drive his trash truck, with a sling on. (Tr. 51). The employee said he needed the money. (Tr. 51). Claimant then left the office and returned without the sling on and said that he was ready to work. (Tr. 51). At no time did Ms. Wilson demand that claimant take his sling off to drive the trash truck. Nor did she threaten the employee with termination if he did not remove his sling. (Tr. 51).

Following the work incidents in June and September of 1997, Ms. Wilson observed claimant performing his job. (Tr. 51-52). Claimant did not appear to be limited in any way. (Tr. 52). He

used both arms to lift trash receptacles; Ms. Wilson did not observe any limitation in regard to the employee's use of his right arm or right shoulder. (Tr. 52). In fact, Ms. Wilson observed claimant picking up trash, as well as other bulky items such as furniture, without difficulty. (Tr. 52). In the six months prior to hearing, the employee did not complain to Ms. Wilson about any problems with his right shoulder or right arm. (Tr. 53, 58-59). If the employee had voiced such complaints, Ms. Wilson would have sent him back to the company physician. (Tr. 59).

As Ms. Wilson testified, claimant was a top producer for the employer. (Tr. 58, 60). Waste Management has an incentive program, based upon the number of stops that an employee can pick up. (Tr. 60). Claimant picked up the most stops of the company's seven front-load drivers. (Tr. 60).

Evidence Regarding Surveillance Videotapes

At hearing, employer offered into evidence as Exhibits No. 2 and 3 a surveillance videotape taken by Brian Lewis of the claimant's work activities on October 22, 1998. (Tr. 9, 64-65). Employer also offered as Exhibits 4 and 5 surveillance videotapes taken by Michael Aiken and Lance DeClue of claimant's work activities on March 30, 1999. (Tr. 172-175).

Claimant objected to these videotapes. He offered into evidence a certified letter directed to the employer's counsel, dated October 6, 1997, which requested a copy of any statements made by the employee. The employee's request was made pursuant to RSMo. § 287.215. (Tr. 121, 122). Specifically, the letter sought a copy of any statement or statements made by the injured employee, whether taken and transcribed by a stenographer, signed or unsigned by the employee, or any statement which was mechanically or electronically recorded, or taken in writing by another person, or otherwise preserved and which might be admissible in evidence, used or referred to in any manner at any hearing or action to recover benefits under the Workers' Compensation Act. (Tr. 121-122).

While the ALJ ruled that the surveillance videotapes were inadmissible, he permitted the

employer to make an offer of proof in support of its position that a surveillance videotape without an audio component was not a "statement" within the meaning of RSMo § 287.215. This offer of proof included the testimony of the private investigators who took the surveillance videotape footage of the claimant on October 22, 1998 and March 30, 1999.

Testimony of Brian Lewis

Brian Lewis has been an investigator with Research Consultants Group for approximately two years. (Tr. 61-62). He observed the employee on October 22, 1998, during the period from 5:30 a.m. to 2:00 p.m., while the employee was working on his trash route in the area between Highway 270 and New Halls Ferry Road. (Tr. 62). While observing the claimant, Mr. Lewis took a videotape of his activities. (Tr. 62). The videotape was an accurate reflection of what Mr. Lewis personally observed of the employee. (Tr. 63, 66). During the period between 5:30 a.m. and 2:00 p.m., Mr. Lewis did not observe the employee continuously, but on a periodic basis when he saw the employee's trash truck along the route and was close enough to film the employee while he was working. (Tr. 69, 70). Since claimant was moving, it was difficult to monitor his activities. At times, the employee was as far away from Mr. Lewis as 100 yards. (Tr. 70, 71).

On October 22, 1998, Mr. Lewis observed claimant on several of his residential stops as he pushed and lifted garbage cans and other types of refuse and placed it in the truck. (Tr. 63). The employee did not appear to have any limitations in the use of his right arm while engaging in these activities. (Tr. 63, 69). Mr. Lewis did not observe any grimacing of pain on the employee's face when he was lifting. (Tr. 63). In addition to trash cans, Mr. Lewis personally observed the employee lift boxes and other items that people had left on the curb in front of their homes. (Tr. 64).

Testimony of Lance DeClue

Lance DeClue is an investigator for Research Consultants Group. As a part of his job, he

performed surveillance of the employee on March 30, 1999 while the employee was working on his route in Moline Hills. (Tr. 72-73). Along with investigator Michael Aiken, who was in a separate vehicle, Mr. DeClue videotaped the claimant. (Tr. 73). He observed the employee on his route from 6:00 a.m. till 2:00 p.m. (Tr 73-74).

During this time, Mr. DeClue personally observed the employee performing his job. (Tr. 74). The employee drove his truck around the neighborhood, loading trash barrels into the truck by hand and using the machine to dump the larger barrels. (Tr. 74-75). Claimant used both hands without limitation to perform these activities. (Tr. 75-76). Mr. DeClue did not observe the employee having any problems in lifting trash cans. He moved and worked at a fast pace. (Tr. 75-76).

Testimony of Michael Aiken

Prior to being employed with Tower Grove Park as a park ranger, Michael Aiken worked for Research Consultants Group as a investigator for three years. (Tr. 81-82). Along with a second investigator, Mr. Aiken conducted surveillance of the employee on March 30, 1999. (Tr. 82-83). He observed claimant from approximately 5:00 a.m. to 2:00 p.m. along his route in Moline Acres and videotaped claimant's activities. (Tr. 83, 84).

During this time, Mr. Aiken observed claimant picking up trash cans and emptying them into the truck. At one residence, he saw claimant pick up a large couch, two chairs, and a lawnmower, which the employee also placed in the trash truck. (Tr. 83-84). When he observed the claimant on his route, claimant did not appear to be limited in any way in the use of his arms or shoulders, either in driving the trash truck or in picking up trash receptacles. (Tr. 84).

Medical Testimony

Testimony of Dr. Joseph Morrow

Dr. Joseph Morrow, an osteopathic physician, testified on behalf of the employee. (Tr.

94-95). He examined claimant on March 2, 1998. (Tr. 95). In addition to providing Dr. Morrow with a history of 1995 back injury, claimant gave Dr. Morrow a history of the alleged injuries to his right shoulder. (Tr. 95-96, 100). The employee stated that, prior to June 18, 1997, he had no previous injuries to his right shoulder or treatment for right shoulder pain. (Tr. 100). Claimant reported that, on June 18, 1998, while on his route, he felt a sudden pain in his right shoulder while lifting a trash can to chest level. (Tr. 100-101). In addition, the employee reported a second incident occurring on September 18, 1997. (Tr. 103). At that time, the employee experienced considerable pain in his right shoulder when he grabbed a trash can and tried to lift it up. The trash can was full of rocks. (Tr. 103).

As to his complaints, the employee reported that he had constant pain in his right shoulder, which increased with activity. (Tr. 105). Additionally, the employee noted popping and grinding in the right shoulder with movement of the arm at the shoulder. When the employee worked, the pain became more severe. It gradually subsided after the employee got home. (Tr. 106).

Dr. Morrow took x-rays of the claimant's right shoulder. They were negative for fracture or dislocation. (Tr. 106).

Upon performing a physical examination, Dr. Morrow diagnosed the employee with a sprain of the right shoulder and rotator cuff referable to the June, 1997 incident and a further aggravation of this condition from the September, 1997 event. (Tr. 108-109). In Dr. Morrow's opinion, there was no evidence of a rotator cuff tear. (Tr. 115-116).

It was Dr. Morrow's opinion that claimant had sustained a 45% permanent partial disability of the right upper extremity at the level of the shoulder due to the injuries in June and September of 1997. (Tr. 109). Dr. Morrow was unable to break this rating down into separate percentages for each injury, because the injuries were too close in proximity, having occurred only a few months apart. (Tr. 109-110). As Dr. Morrow conceded, the employee's disability rating was based, in part, upon the

employee's subjective complaints of pain. (Tr. 114-115). At the time of his examination, Dr. Morrow did not recommend surgery for the employee. (Tr. 116).

Testimony of Dr. Michael Nogalski

Dr. Michael Nogalski, a board certified orthopedic surgeon, testified on behalf of the employer. (Tr. 126-127). He first saw the employee on July 28, 1997. (Tr. 130). At that time, the employee reported that he had been having pain in his right shoulder for about one and one half months and that his symptoms came on after throwing trash one day. (Tr. 131). Claimant stated that he received conservative treatment in the form of physical therapy and anti-inflammatory medications, but that this treatment did not improve his shoulder pain. (Tr. 131).

After taking a history from the employee, Dr. Nogalski performed a physical examination. (Tr. 131-132). This examination demonstrated that the employee's right shoulder was equally tender in both the sternoclavicular joint and the rotator cuff region. In addition, the acromioclavicular joint was minimally tender and there was a mild enlargement of the sternoclavicular joint on the right side, as compared with the left. (Tr. 132).

Dr. Nogalski had x-rays taken of the claimant's right shoulder. (Tr. 133). They demonstrated a Type 2 acromion and no clear, discernable abnormalities in the sternoclavicular joint area. (Tr. 133).

Based upon his initial examination of the employee and his x-ray studies, Dr Nogalski diagnosed claimant with mild sternoclavicular joint arthritis with an exacerbation of this condition, as well as rotator cuff tendinitis. (Tr. 134). As to the cause of these conditions, it was Dr. Nogalski's opinion that the employee's work would be considered a minor contributing cause to his permanent sternoclavicular joint arthritic symptoms, but that it would be a substantial cause of claimant's rotator cuff tendinitis. (Tr. 134-135). Dr. Nogalski recommended that the employee change his anti-inflammatory medications,

continue physical therapy, and undergo a bone scan if his symptoms did not improve. (Tr. 135).

Claimant followed up with Dr. Nogalski on August 25, 1997. (Tr. 136). At that time, the employee's right shoulder symptoms had improved, as the employee reported, and as evidenced by the employee's physical therapy reports. (Tr. 137). As of August 25, 1997, Dr. Nogalski's diagnosis was that of resolving symptoms due to a suspected sternoclavicular joint arthritis. (Tr. 137-138). He recommended that claimant continue with physical therapy and work in a light duty position. (Tr. 138).

When claimant returned to Dr. Nogalski on September 8, 1997, he complained of pain in his sternoclavicular region, as well as the rotator cuff region. (Tr. 138). After examining the employee, Dr. Nogalski reached a diagnosis of persistent sternoclavicular joint symptoms and suspected sternoclavicular joint arthritis and rotator cuff tendinitis. (Tr. 139-140). He recommended a bone scan for the employee, along with a subacromial injection of the shoulder. This injection would aid in identifying the exact source of the employee's pain, along with improving his pain symptoms and assisting in his rehabilitation. (Tr. 140). Claimant refused to undergo the injection. (Tr. 140). However, the employee underwent a bone scan on September 9, 1997. (Tr. 140-141). The bone scan was normal. (Tr. 141).

Dr. Nogalski next saw claimant on September 15, 1997. (Tr. 142). At that time, the employee complained of symptoms in his sternoclavicular joint area, as well as increasing symptoms in the glenohumeral joint and rotator cuff region. (Tr. 142). The employee stated that he had been working without a helper and had engaged in overhead activities that caused him discomfort. (Tr. 143). Upon examination, the employee demonstrated tenderness over the rotator cuff region and impingement in the right shoulder, along with subacromial crepitus. (Tr. 143). Motor testing and strength were normal. (Tr. 143). Dr. Nogalski recommended an injection for the claimant's shoulder, but claimant declined the injection. (Tr. 144). Also, Dr. Nogalski recommended that the employee continue on a stretching program, as well as physical therapy. (Tr. 144-145). In Dr. Nogalski's opinion, claimant could return to

full duty work. (Tr. 145). When Dr. Nogalski saw claimant on September 19, 1997, however, he placed claimant under the work restrictions of no lifting over 20 pounds and no over chest level activity. (Tr. 146).

An MRI taken of claimant's right shoulder on September 23, 1997 showed acromioclavicular joint hypertrophy (enlargement of the joint between the collar bone and the roof of the shoulder), with low-lying acromion (a lowering of the space available for the rotator cuff to move in) and supraspinous tendonosis (a degenerative condition). (Tr. 147-148). It was Dr. Nogalski's opinion that the acromioclavicular joint hypertrophy was a pre-existing condition that had progressed over time. (Tr. 148). The low-lying acromion was a pre-existing problem, an anatomical variance. (Tr. 148). Dr. Nogalski explained that claimant's supraspinous tendonosis was a non-specific finding, which could have been present either before or after some form of an injury. (Tr. 148).

At Dr. Nogalski's next examination of the employee on September 29, 1997, claimant reported pain both at rest and while laying on his shoulder. (Tr. 148-149). Claimant was working in a light duty position. (Tr. 149). Dr. Nogalski went over the MRI results with the claimant, informing him that the studies showed rotator cuff tendonosis, but no evidence of a rotator cuff tear. (Tr. 149). Upon examination, it was Dr. Nogalski's diagnosis that the employee had rotator cuff tendinitis with resolving sternoclavicular joint tenderness of an uncertain etiology. (Tr. 150). With a normal bone scan and an inconsistent examination, Dr. Nogalski could not clearly ascribe any specific injury or problem to claimant's sternoclavicular joint condition. (Tr. 150-151).

While Dr. Nogalski recommended a shoulder injection, claimant adamantly refused. (Tr. 151). Dr. Nogalski also recommended that the employee undergo physical therapy for an additional three week period. (Tr. 151). Claimant was allowed to return to a light duty position, with no lifting more than five pounds and no driving a commercial vehicle. (Tr. 152). These work restrictions were intended to be

temporary, not permanent. (Tr. 166).

Following examinations on October 20 and November 3, 1997, Dr. Nogalski next saw claimant on May 18, 1998. (Tr. 153). Claimant stated that he was much better in regards to his shoulder, but that he still had pain over the lateral and posterior aspects of the shoulder. (Tr. 153-154). The employee had been assisted by a helper on his route. (Tr. 154). Upon examination, Dr. Nogalski diagnosed claimant with chronic rotator cuff tendinitis. (Tr. 154). Dr. Nogalski again recommended an injection and the employee, again, refused. (Tr. 154-155). As of his May 18, 1998 examination, Dr. Nogalski felt that the majority of claimant's problems had resolved. (Tr. 155). He returned claimant to full duty work and released claimant from his care. (Tr. 155).

Dr. Nogalski's final examination of the claimant took place on July 29, 1998. (Tr. 155). On that date, the employee reported that, while he still had soreness in his shoulder, in general, he had improved considerably. (Tr. 155). Claimant denied any new problems. (Tr. 155). Upon examination, the employee showed full forward flexion, abduction, and external rotation. (Tr. 156). Internal rotation was three to four inches higher than previously reported. (Tr. 156). Claimant's impingement signs were negative. There was some mild subacromial crepitus. (Tr. 156).

Based upon the employee's history, his previous positive impingement findings, and his MRI results, Dr. Nogalski diagnosed the claimant with mild chronic rotator cuff tendinitis. (Tr. 156). In Dr. Nogalski's opinion, claimant had reached maximum medical improvement and no restrictions were in order as regards the claimant's work. (Tr. 157). Dr. Nogalski found that claimant had sustained a 3% permanent partial disability of the right upper extremity at the level of the shoulder. (Tr. 157).

POINTS RELIED ON

I

THE INDUSTRIAL COMMISSION DID NOT ERR IN ADMITTING INTO EVIDENCE SURVEILLANCE VIDEOTAPES MADE OF THE EMPLOYEE, DESPITE THE FACT THAT THE EMPLOYER DID NOT DISCLOSE THE VIDEOTAPES TO THE EMPLOYEE IN RESPONSE TO HIS CERTIFIED REQUEST FOR STATEMENTS PURSUANT TO RSMO. § 287.215 OF THE WORKERS' COMPENSATION ACT, FOR THE REASONS THAT THE VIDEOTAPES, WHICH DID NOT CONTAIN AN AUDIO COMPONENT, DID NOT CONSTITUTE "STATEMENTS" OF THE EMPLOYEE WITHIN THE MEANING OF RSMO. § 287.215 AND, THEREFORE, THEY WERE NOT DISCOVERABLE UNDER THAT STATUTORY PROVISION; AND THE PRIOR DECISION IN ERBSCHLOE V. GENERAL MOTORS CORP., 823 S.W.2d 117 (MO. APP. ED 1992), HOLDING THAT SURVEILLANCE VIDEOTAPES WHICH CONTAIN NO AUDIO PORTION ARE NOT "STATEMENTS" REQUIRED TO BE FURNISHED TO AN EMPLOYEE PURSUANT TO RSMO. § 287.215 OF THE ACT, IS STILL GOOD LAW.

Erbschloe v. General Motors Corp., 823 S.W.2d 117 (Mo. App. ED 1992)

State ex rel. Lakeman v. Siedlik, 872 S.W.2d 503 (Mo. App. WD 1994)

State of Missouri ex. rel Missouri Pacific Railroad Co. v. Koehr, 853 S.W.2d 925 (Mo. banc. 1993)

State ex rel. McConaha v. Allen, 979 S.W.2d 188 (Mo. banc. 1998)

Sheets v. Hill Brothers Distributors, Inc., 379 S.W.2d 514 (Mo. 1964)

State ex rel. McDonnell Douglas Corp. v. Ryan, 745 S.W.2d 152 (Mo. banc. 1988)

Farmer v. Barlow Truck Lines, Inc., 979 S.W.2d 169 (Mo. banc. 1998)

Kristanik v. Chevrolet Motors Co., 41 S.W.2d 911 (Mo. App. ED 1931)

State ex rel. River Cement Co. v. Pepple, 585 S.W.2d 122 (Mo. App. ED 1979)

State ex rel. Kerns v. Cain, 8 S.W.3d 212 (Mo. App. WD 1999)

Hendricks v. Motor Freight Corp., 570 S.W.2d 702 (Mo. App. ED 1978)

Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81 (Mo. App. ED 1995)

Defendoll v. Stupp Brothers Bridge & Iron Co., 415 S.W.2d 36 (Mo. App. ED 1967)

Frazier v. Treas. of Mo., 869 S.W.2d 152 (Mo. App. ED 1993)

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

Budding v. SSM Healthcare, 19 S.W.3d 678 (Mo. banc. 2000)

State ex rel. Baumruk v. Belt, 964 S.W.2d 443 (Mo. banc. 1998)

Simpson v. New Madrid Stave Co., 52 S.W.2d 615 (Mo. App. SD 1932)

Delta Airlines, Inc. v. Dir. of Revenue, 908 S.W.2d 353 (Mo. banc. 1995)

Asbury v. Lombardi, 846 S.W.2d 196 (Mo. banc. 1993)

Allen v. St. Louis San Francisco Railway Co, 90 S.W.2d 1050 (Mo. 1935)

Clingan v. Carthage Ice and Cold Storage Co., 25 S.W.2d 1084 (Mo. App. SD 1930)

State ex rel. Sei v. Haid, 61 S.W.2d 950 (Mo. 1933)

St. Louis Country Club v. Admin. Hearing Comsn. of Mo., 657 S.W.2d 614 (Mo. banc. 1983)

Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo. banc. 1999)

Suffian v. Usher, 19 S.W.3d 130 (Mo. banc. 2000)

Giddens v. Kansas City Southern Railway Co., 29 S.W.3d 813 (Mo. banc. 2000)

Reese v. Coleman, 990 S.W.2d 195 (Mo. App. SD 1999)

State of Missouri on the Information of John M. Dalton v. Miles Laboratories, Inc., 282 S.W.2d 564

(Mo. banc. 1955)

RSMo. § 287.215

RSMo. § 287.210

RSMo. § 287.560

RSMo. § 287.010

RSMo. § 287.220

Rule 56.01

Rule 57.09

Rule 58.01

Merriam-Webster Collegiate Dictionary, 10th Ed.

Black's Law Dictionary, 7th Ed.

II

THE INDUSTRIAL COMMISSION DID NOT ERR IN RULING THAT THE EMPLOYEE SUSTAINED A 10% PERMANENT PARTIAL DISABILITY OF THE RIGHT UPPER EXTREMITY AT THE LEVEL OF THE SHOULDER AS A RESULT OF THE JUNE, 1997 WORK INJURY FOR THE REASON THAT THE INDUSTRIAL COMMISSION'S FINDING REGARDING PERMANENT PARTIAL DISABILITY WAS SUPPORTED BY THE OVERWHELMING WEIGHT OF THE COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD, INCLUDING THE MEDICAL TESTIMONY OF DR. NOGALSKI, CLAIMANT'S TREATING PHYSICIAN, AND THE SURVEILLANCE VIDEOTAPES MADE OF THE EMPLOYEE, WHICH DEMONSTRATED THAT THE EMPLOYEE COULD PERFORM HIS REGULAR JOB DUTIES WITH LITTLE, IF ANY, PHYSICAL LIMITATIONS.

Landers v. Chrysler Corp., 963 S.W.2d 275 (Mo. App. ED 1998)

Williams v. City of Ava, 982 S.W.2d 307 (Mo. App. SD 1998)

Mathia v. Contract Freighters, Inc., 929 S.W.2d 271 (Mo. App. SD 1996)

Davis v. Brezner, 380 S.W.2d 523 (Mo. App. SD 1964)

Hall v. Spot Martin, 304 S.W.2d 844 (Mo. 1957)

Schwartz v. Shamrock Dairy Queen, 23 S.W.3d 768 (Mo. App. ED 2000)

Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo. App. SD 1997)

Sanderson v. Porta-Fab Corp., 989 S.W.2d 599 (Mo. App. ED 1999)

Hunsperger v. Poole Truck Lines, Inc., 886 S.W.2d 656 (Mo. App. ED 1994)

Matzker v. St. Joseph Minerals Corp., 740 S.W.2d 362 (Mo. App. ED 1987)

Sanders v. St. Clair Corp., 943 S.W.2d 12 (Mo. App. SD 1997)

Brookman v. Henry Trans., 924 S.W.2d 286 (Mo. App. ED 1996)

Kopolav v. Zavodnick, 177 S.W.2d 647 (Mo. App. ED 1944)

Deffendoll v. Stupp Brothers, 415 S.W.2d 36 (Mo. App. ED 1967)

Waterman v. Chicago Bridge & Ironworks, 41 S.W.2d 575 (Mo. 1931)

Page v. Green, 686 S.W.2d 528 (Mo. App. SD 1985)

Hall v. Country Kitchen Restaurant, 936 S.W.2d 917 (Mo. App. SD 1997)

Lawrence v. Joplin R-8 S. D., 834 S.W.2d 789 (Mo. App. SD 1992)

Duncan v. Springfield R-12 S. D., 897 S.W.2d 108 (Mo. App. SD 1995)

RSMo. § 287.190

RSMo. § 287.495

STANDARD OF REVIEW

In reviewing the Industrial Commission's Award,[2] the Court reviews the evidence in the light most favorable to the Award and upholds the Award if it is supported by competent and substantial evidence on the whole record. **Akers v. Warson Garden Apts.,** 961 S.W.2d 50, 53 (Mo. banc. 1998); **Johnson v. City of Duenweg Fire Dept.,** 735 S.W.2d 364, 366 (Mo. banc. 1987). The Court can disturb the Industrial Commission's decision only if there is no competent and substantial evidence to support the Industrial Commission's Award or, in the alternative, if the Award is clearly contrary to the overwhelming weight of the evidence. **Johnson,** 735 S.W.2d at 366; **Merriman v. Gen Gutman Truck Service, Inc.,** 392 S.W.2d 292, 296 (Mo. 1965). Moreover, the Court may modify, reverse, remand, or set aside the Award only upon the grounds specified by statute, namely that: (1) the Industrial Commission acted without or in excess of its power; (2) the Award was procured by fraud; (3) the facts found by the Industrial Commission do not support the Award; or (4) there was not sufficient competent evidence in the record to warrant the making of the Award. RSMO. § 287.495.1; **Akers,** 961 S.W.2d at 52-53.

Questions of law are reviewed independently. **Blades v. Comm. Transport, Inc.,** 30 S.W.3d 827, 828-829 (Mo. banc. 2000) (Supreme Court engages in *de novo* review of Industrial Commission's conclusions of law). Decisions of the Industrial Commission that are clearly an interpretation or application of the law, as distinguished from a determination of fact, are not binding upon

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[2]The Standard of Review set forth herein applies to the claims of error discussed in Point I and Point II of employer/insurer's Substitute Brief.

the reviewing Court and fall within the Court's province of review and correction. **West v. Posten Constr. Co.,** 804 S.W.2d 743, 744 (Mo. banc. 1991); **Ikerman v. Koch,** 580 S.W.2d 273, 278 (Mo. banc. 1979) (where an Industrial Commission's ruling is based upon an interpretation of law, the Supreme Court is not bound by that ruling); **Merriman,** 392 S.W.2d at 297.

The Industrial Commission is the ultimate trier of fact in workers' compensation cases. **Sanderson v. Porta-Fab Corp.,** 989 S.W.2d 599, 601 (Mo. App. ED 1999). It is the sole judge of the weight of the evidence and the credibility of witnesses. **Id.; Johnson v. Denton Constr. Co.,** 911 S.W.2d 286, 288 (Mo. banc. 1995) (Supreme Court defers to the Industrial Commission on issues involving the credibility of witnesses and the weight to be given to their testimony). As to fact questions, the reviewing Court cannot substitute its judgment on issues of fact for that of the Industrial Commission, even if the Court would have made a different initial conclusion. **Merriman,** 392 S.W.2d at 297; **Sanderson,** 989 S.W.2d at 601. In the absence of fraud, the factual findings made by the Industrial Commission are conclusive and binding. RSMO. § 287.495.1; **Wright v. Sports Assoc., Inc.,** 887 S.W.2d 596, 599 (Mo. banc. 1994).

ARGUMENT

I

THE INDUSTRIAL COMMISSION DID NOT ERR IN ADMITTING INTO EVIDENCE SURVEILLANCE VIDEOTAPES MADE OF THE EMPLOYEE, DESPITE THE FACT THAT THE EMPLOYER DID NOT DISCLOSE THE VIDEOTAPES TO THE EMPLOYEE IN RESPONSE TO HIS CERTIFIED REQUEST FOR STATEMENTS PURSUANT TO RSMO. § 287.215 OF THE WORKERS' COMPENSATION ACT, FOR THE REASONS THAT THE VIDEOTAPES, WHICH DID NOT CONTAIN AN AUDIO COMPONENT, DID NOT CONSTITUTE "STATEMENTS" OF THE EMPLOYEE WITHIN THE MEANING OF RSMO. § 287.215 AND, THEREFORE, THEY WERE NOT DISCOVERABLE UNDER THAT STATUTORY PROVISION; AND THE PRIOR DECISION IN ERBSCHOLE V. GENERAL MOTORS CORP., 823 S.W.2d 117 (MO. APP. ED 1992), HOLDING THAT SURVEILLANCE VIDEOTAPES WHICH CONTAIN NO AUDIO PORTION ARE NOT "STATEMENTS" REQUIRED TO BE FURNISHED TO AN EMPLOYEE PURSUANT TO RSMO. § 287.215 OF THE ACT, IS STILL GOOD LAW.

Scope of Discovery in Workers' Compensation Proceedings

A proper resolution of the question before the Court requires an understanding of the nature of workers' compensation proceedings and the scope of discovery permitted therein. The Workers' Compensation Act is not supplemental or declaratory of any existing rule, right or remedy, but creates an entirely new right or remedy which is wholly substitutional in character and supplants all other rights and remedies, where an employer and employee have elected to accept the Act or are subject thereto by operation of law. **Sheets v. Hill Brothers Distributors, Inc.,** 379 S.W.2d 514, 516 (Mo. 1964); **State ex rel. McDonnell Douglas Corp. v. Ryan,** 745 S.W.2d 152, 153 (Mo. banc. 1988) (the workers' compensation law is substitutional; it supplants all other common law rights of an employee if the Act is

applicable). All remedies, claims or rights accruing to an employee against an employer for compensation for injury arising out of and in the course of his employment are those provided for in the Act, to the exclusion of any common law or contractual rights. **Sheets,** 379 S.W.2d at 516. As a creature of statute, workers' compensation law is governed by Chapter 287, RSMO. **Farmer v. Barlow Truck Lines, Inc.,** 979 S.W.2d 169, 170 (Mo. banc. 1998).

Rights of the parties under the Workers' Compensation Act and the manner of procedure thereunder must be determined by the provisions of the Act. **Kristanik v. Chevrolet Motors Co.,** 41 S.W.2d 911, 912 (Mo. App. ED 1931) (proceedings under the Workers' Compensation Act are purely statutory and the code of civil procedure is inapplicable). The scope of discovery available to each party in a workers' compensation case is set by statute. No additional common law rights to discovery exist in workers' compensation cases beyond those provided for in the Act. **State ex rel. Lakeman v. Siedlik,** 872 S.W.2d 503, 506 (Mo. App. WD 1994); **State ex rel. River Cement Co. v. Pepple,** 585 S.W.2d 122, 125 (Mo. App. ED 1979) (claim for workers' compensation benefits is limited to those methods of discovery specifically authorized by the Workers' Compensation Act); **State ex rel. Kerns v. Cain,** 8 S.W.3d 212, 215 (Mo. App. WD 1999).

For example, **Lakeman,** 872 S.W.2d at 507, held that an ALJ lacked the authority to order a claimant to undergo a vocational rehabilitation evaluation at the request of either the employer or the Second Injury Fund. Employer and the Fund requested that the claimant submit to an examination by a vocational expert to determine the extent of his employment capabilities. **Lakeman,** 872 S.W.2d at 505. In addition, the Fund requested that the ALJ order the employee to submit to a physical examination by a doctor of its choice. **Id.**

As the Court observed, the ALJ had only the authority granted to him by the Workers' Compensation Act. **Lakeman,** 872 S.W.2d at 506. While Section 287.210 of the Act expressly granted

certain parties, including the employer, the right to have a physician conduct a medical examination of the claimant, the statutory provision did not allow for any examination of the claimant by non-medical persons. **Lakeman,** 872 S.W.2d at 506. Consequently, the ALJ lacked the authority to order an examination of the claimant by a person who was not a physician. **Lakeman,** 872 S.W.2d at 507. As to the Fund's request that the employee be directed to submit to a physical examination by a doctor of its choice, the Court found that the Fund was not included in Section 287.210 as a party that could request that the employee submit to a physical examination. **Lakeman,** 872 S.W.2d at 507. Accordingly, the ALJ lacked the authority to order that the employee undergo a medical examination at the request of the Fund. **Id.**

River Cement Co., 585 S.W.2d at 123, involved the propriety of an ALJ's Order permitting the claimant's attorney, a photographer, and a technical expert to photograph the site in the employer's plant where the employee was injured. The Court held that Rule 58.01, which provided for discovery by inspection in civil actions, could not be invoked for the claimant's benefit, since the Rules of Civil Procedure were generally inapplicable in workers' compensation cases. **Id.** It went on to hold, however, that the right to inspect was inherent in the powers authorized by Section 287.560 of the Workers' Compensation Act and served to promote the rights granted to the claimant in the penalty provision of the Act. **River Cement Co.,** 585 S.W.2d at 125.

The recent decision of **State ex rel. Kerns v. Cain,** 8 S.W.3d at 215-216, reaffirmed the rule that the scope of discovery in workers' compensation cases is set by statute and that no additional common law rights to discovery exist in workers' compensation cases beyond those enumerated by the Act. Therein, the Court addressed the propriety of an ALJ's Order compelling the claimant to submit to an examination by a neuropsychologist chosen by the employer in preparation for trial. **Kerns,** 8 S.W.3d at 214. While Section 287.210.1 of the Act granted an ALJ the authority to order a medical examination of the claimant at the request of an employer, it did not confer upon an ALJ the authority to order an

examination by a non-physician. Hence, the ALJ exceeded his authority in ordering that claimant submit to an evaluation by the neuropsychologist selected by the employer. **Kerns,** 8 S.W.3d at 216.

Discovery of Employee Statements Under RSMO. § 287.215

Section 287.215 governs the disclosure of employee statements in workers' compensation proceedings. It states:

> "**Injured Employee To Be Furnished Copy of His Statement, Otherwise Inadmissable as Evidence.** No statement in writing made or given by an injured employee, whether taken and transcribed by a stenographer, signed or unsigned by the injured employee, or any statement which is mechanically or electronically recorded, or taken in writing by another person, or otherwise preserved, shall be admissible in evidence, used or referred to in any manner at any hearing or action to recover benefits under this law unless a copy thereof is given or furnished the employee, or his dependents in case of death, or their attorney, within fifteen days after written request for it by the injured employee, his dependents in case of death, or by their attorney. The request shall be directed to the employer or its insurer by certified mail."

RSMO. § 287.215

Generally, where an employee or his attorney makes a request for statements that meets the procedural requirements of RSMO. § 287.215 and the employer fails to disclose an employee's statement within the time prescribed by statute, the Division can exclude that statement from evidence, as well as any testimony based upon the statement. *See for example,* **Hendricks v. Motor Freight Corp.,**

570 S.W.2d 702, 708 (Mo. App. ED 1978), holding that where a claimant's attorney sent a letter to the employer's insurer requesting copies of any statements taken from the claimant by or on behalf of the employer concerning the accident or injury, and the documents in question were not furnished until well after the expiration of the period set forth in RSMO. § 287.215, admission of the claimant's statement and the testimony of a state trooper based upon that statement were properly refused in a workers' compensation proceeding, despite the employer/insurer's contention that they were not obligated to furnish the claimant's statement because the accident did not occur on the date specified, but on a subsequent date.

And see, **Blackwell v. Puritan-Bennett Corp.,** 901 S.W.2d 81, 84 (Mo. App. ED 1995), ruling that RSMO § 287.215 precluded admission of the testimony of a co-employee as to what the claimant had told the co-employee, where the employer never produced a copy of the co-employee's statement for the claimant, even though the claimant's attorney had requested a copy of any statements made by the employee. *Compare,* **Defendoll v. Stupp Brothers Bridge & Iron Co.,** 415 S.W.2d 36, 43 (Mo. App. ED 1967), finding that a statement given by a workers' compensation claimant at a hospital with respect to how his back injury occurred was not inadmissible where written requests for a copy of the claimant's statement were complied with by the employer/insurer within the requisite statutory period.

In the case instanter, the pivotal question is not one of the timeliness of the employer's disclosure of an employee statement, as was at issue in **Hendricks**. Rather, the pivotal question is the meaning of the term **"statement"** as used within Section 287.215 of the Workers' Compensation Act. Namely, does that term encompass surveillance videotapes made of an employee which contain no audio component? That question has been definitively answered in **Erbschloe v. General Motors Corp.,** 823 S.W.2d 117, 119 (Mo. App. ED 1992) and the answer is "no".

In **Erbschloe,** an employee alleged that he injured his back while lifting an object in his

employment as an assembly line worker. He filed a claim for compensation, seeking benefits for his back injury. **Erbschloe,** 823 S.W.2d at 118. Employee testified at hearing that he still had constant, severe pain, and that he could not stand, sit or walk for long periods of time, could not bend over very far, or raise his hands above his head. **Id.** At hearing, employer produced a surveillance videotape, which contained no audio portion, that contradicted the employee's testimony. **Id.** Prior to hearing, claimant's counsel had asked the employer to produce all statements of the employee pursuant to Section 287.215. Employer did not produce the videotape in response to this request. **Id.** The ALJ admitted the videotape into evidence over the employee's objection. **Id.**

In his award, the ALJ found the employee's testimony incredible, at least in part due to the videotape, and denied the employee's claim for compensation. Further, the ALJ ruled that the videotape was not a "statement" under Section 287.215. **Id.** The Industrial Commission and the Circuit Court affirmed the ALJ's rulings. **Id.**

On appeal, the employee contended that the videotape was a "statement" within the meaning of Section 287.215 and, therefore, it should have been furnished to him by the employer. **Id.** Employee suggested that because Missouri courts had found conduct to be an admission, videotapes such as the one at issue should be considered statements for discovery purposes in workers' compensation cases. **Id.**

The Court of Appeals rejected the employee's argument. It found that Section 287.215 clearly addressed only statements. **Erbschloe,** 823 S.W.2d at 119. There was no authority for the employee's proposition that a videotape with no audio portion constituted a statement under Section 287.215. **Id.** Further, such evidence was valuable in determining the credibility of a witness. **Id.** Hence, the videotape was admissible to impeach the employee's testimony and diminish his recovery. **Id.**

Judge Stephan concurred in a separate opinion. **Id.** He had no reservation in finding that

the videotape was non-verbal conduct. **Id.** However, there was no indication that the employee, who was unaware that the employer's agent was videotaping him, intended such conduct to be an assertion. **Id.** Consequently, it did not constitute a "statement" within the contemplation of Section 287.215. **Id.**

Erbschloe is on all fours with the instant case and requires an affirmance of the Industrial Commission's ruling that the silent surveillance videotape tapes made of the claimant were not employee "statements" within the meaning of RSMO § 287.215, and consequently, they were admissible at hearing. As in **Erbschloe,** claimant herein alleged significant symptoms and physical limitations arising from a work related injury. **Erbschloe**, 823 S.W.2d at 118. As in **Erbschloe,** the employer's agent obtained a videotape of the employee which contained no audio component and which contradicted the employee's testimony regarding his physical condition and limitations. **Id.** As in **Erbschloe,** the employee's counsel made a request to the employer/insurer for any employee statements, the authority for said request being strictly limited to RSMO. § 287.215 of the Act. **Id.** As in **Erbschloe,** the employer herein did not disclose the videotapes to the employee in response to that request. **Id.**

Apart from decisions construing the term "statement" as used within Civil Rule 56.01(b)(3), the employee has offered no authority to support his assertion that a videotape without an audio portion constitutes a "statement" within the meaning of Section 287.215. **Erbschloe** is the only Missouri decision to address the issue of whether a silent surveillance videotape of an employee constitutes a "statement" of the employee for the purposes of Section 287.215 of the Act. Its answer to that question was an unequivocal "no." **Erbschole**, 823 S.W.2d at 119. In that **Erbschloe** involved substantially identical facts to those in the case at bar and in that no subsequent decision has reversed or otherwise limited the holding in **Erbschloe,** that decision is controlling in the instant case.

In holding that a surveillance videotape with no audio portion did not constitute an employee "statement" within the contemplation of Section 287.215, **Erbschloe** gave effect to the plain and

ordinary meaning of the terms of that statutory provision, as this Court must do. Workers' compensation law is entirely a creature of statute; the Court, then, is bound by general rules of statutory construction in interpreting the Act. **Frazier v. Treas. of Mo.,** 869 S.W.2d 152, 156 (Mo. App. ED 1993); **Simpson v. Saunchegrow Constr.,** 965 S.W.2d 899, 903 (Mo. App. SD 1998). In interpreting the Workers' Compensation Act, the Court's role is to ascertain the intent of the Legislature from the language used in the statute, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. **Budding v. SSM Healthcare,** 19 S.W.3d 678, 680 (Mo. banc. 2000); **State ex rel. Baumruk v. Belt,** 964 S.W.2d 443, 446 (Mo. banc. 1998); **Simpson v. New Madrid Stave Co.,** 52 S.W.2d 615, 616 (Mo. App. SD 1932) (language used in the Workers' Compensation Act must be given its plain and ordinary meaning). Where a statute does not provide a definition for the words used therein, the plain meaning of the words is to supply their definition. This plain meaning is to be found in the dictionary. **Delta Airlines, Inc. v. Dir. of Revenue,** 908 S.W.2d 353, 356 (Mo. banc. 1995); **Asbury v. Lombardi,** 846 S.W.2d 196, 201 (Mo. banc. 1993) (undefined words are given their plain and ordinary meaning as found in the dictionary in order to ascertain the intent of the lawmakers). When statutory language is clear, courts must give effect to the language as written. **Baumruk,** 964 S.W.2d at 446. Provisions not plainly written in the Workers' Compensation Act, or necessarily implied therefrom, will not be imparted or interpolated therein in order that the existence of a right may be made to appear when otherwise, on the face of the statute, it does not appear. **Allen v. St. Louis San Francisco Railway Co,** 90 S.W.2d 1050, 1053 (Mo. 1935); **Clingan v. Carthage Ice and Cold Storage Co.,** 25 S.W.2d 1084, 1085 (Mo. App. SD 1930) (compensation law is not to be frustrated by interpolating, by construction, provisions not written therein so as to affect the rights of the parties). Section 287.800, requiring that the Workers' Compensation Act be liberally construed, does not authorize an extension of the terms of the Act beyond their plain meaning. **State ex rel. Sei v. Haid,** 61 S.W.2d 950, 954 (Mo. 1933).

Section 287.215 does not specially define the term "statement" used therein. RSMO. § 287.215. Consequently, the term is to be given its plain and ordinary meaning. **St. Louis Country Club v. Admin. Hearing Comsn. of Mo.,** 657 S.W.2d 614, 617 (Mo. banc. 1983); **Asbury,** 846 S.W.2d at 201. As defined by Merriam-Webster's Collegiate Dictionary, 10th Edition, a "**statement**" is:

> "**1:** something stated: as **a:** a single declaration or remark: assertion **b:** a report of facts or opinions **2:** the act or process of stating or presenting orally or on paper **3:** proposition... **6:** an opinion, comment or message conveyed indirectly usu. by non-verbal means."

Merriam-Webster's Collegiate Dictionary, 10th Ed., at 1148.

Similarly, Black's Law Dictionary, 7th Edition, defines "**statement**" to mean:

> "**1.** *Evidence*. A verbal assertion or non-verbal conduct intended as an assertion. **2.** A formal and exact presentation of facts."

Black's Law Dictionary, 7th Ed., at 1416.

These dictionary definitions contemplate either a verbal assertion or conduct intended as an assertion. **Id.** Giving the term "statement" contained in Section 287.215 this meaning, it becomes apparent that the term does encompass a videotape of an injured employee which contains no audio track. In that such a tape contains no audio component, it necessarily does not include any verbal assertions made by the employee who is being taped. And, since employees, such as claimant herein, are usually unaware that they are being videotaped, they lack the requisite intent for their conduct to constitute an assertion on their behalf. **Id.; Erbschloe,** 823 S.W.2d at 119; **Steffan, J.,** concurring.

Erbschloe was handed down in January of 1992. **Erbschloe,** 823 S.W.2d at 117. In 1993, the Missouri Legislature passed sweeping amendments to the Workers' Compensation Act, redefining such basic concepts as "accident" and "injury". *See,* RSMO. § 287.010 et seq. (1994); **Kasl v. Bristol**

Care, Inc., 984 S.W.2d 852, 854 (Mo. banc. 1999). The Legislature is *presumed* to have been aware of the **Erbschloe** decision at the time it enacted the 1993 amendments. *See,* **Suffian v. Usher,** 19 S.W.3d 130, 133 (Mo. banc.. 2000) (in construing a statute, the Court must presume that the Legislature was aware of the state of the law at the time of its enactment). Had the Legislature wished to change the meaning of the term "statement" contained in Section 287.215, by including therein a technical definition giving the term a different meaning apart from its plain and ordinary meaning, the Legislature could have included a definition to that effect in the statutory provision. The absence of such a technical definition is evidence that the term "statement" is to be given its ordinary, i.e., dictionary meaning. *See for example,* **Frazier,** 869 S.W.2d at 156, holding that the failure of the Legislature to include a provision in Section 287.220 allowing for offsets of prior settlements by the Second Injury Fund was evidence that such an offset provision was not intended.

Discovery of Party Statements Under Rule 56.01(b)(3)

The absence of a technical definition of the term "statement" contained in Section 287.215, expressly including therein a videotape or motion picture, sets that statutory provision apart from Rule 56.01(b)(3)(b) at issue in **State of Missouri ex. rel Missouri Pacific Railroad Co. v. Koehr,** 853 S.W.2d 925 (Mo. banc. 1993); and **State ex rel. McConaha v. Allen,** 979 S.W.2d 188 (Mo. banc. 1998).

At issue in **Koehr** was whether surveillance photos or motion pictures constituted a "statement" of a party in a civil action discoverable under Rule 56.01(b)(3). In the underlying civil case, the plaintiff's request for production of documents sought all photos or motion pictures taken of the plaintiff subsequent to the accident alleged in the petition. Relatedly, plaintiff's interrogatories inquired whether any motion picture or photographs of the plaintiff had been taken by the defendant, or any one acting on its behalf. **Koehr,** 853 S.W.2d at 925-926. Defendant objected to the request for production and the interrogatories on the ground that they sought protected work product. However, the trial judge

overruled its objections and ordered the defendant to respond to the plaintiff's discovery requests. **Koehr,** 853 at 926.

The Supreme Court held that the surveillance photos and motion pictures were discoverable under Rule 56.01(b)(3). There was no question but that photos taken in anticipation of litigation were work product and, prior to the 1989 amendment to Rule 56.01(b)(3), they were not discoverable absent a showing of substantial need and undue hardship. **Id.** However, an exception to the required showing of need and hardship was found in Rule 56.01(b)(3)(b), which provided that a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. For the purposes of this exception, Rule 56.01(b)(3)(b) defined a "statement" as a "stenographic, mechanical, electrical, audio, video, motion picture or other recording, or a transcription thereof, of the party or of a statement made by the party and contemporaneously recorded." **Koehr,** 853 at 926. Thus, the plain language of the Rule defined a "statement" to include a video or motion picture. **Id.**

This definition of "statement" was at variance with the standard dictionary definition of the term. **Id.** However, when the internal definition of a term within a rule was contrary to the dictionary definition, the internal definition superceeded the commonly accepted dictionary definition. **Id.** The words of Rule 56.01(b)(3)(b) were clear and unambiguous and, therefore, they had to be accorded their plain meaning. **Koehr,** 853 at 927.

In so holding, **Koehr** distinguished the **Erbschole** decision. **Id.** It observed that RSMO. § 287.215 at issue in **Erbschole** did not provide an internal definition of the term "statement," as did Rule 56.01(b)(3)(b). **Id.** Similarly, cases from other jurisdictions forbidding or strictly limiting the discovery of surveillance pictures, did not involve rules or statutes containing language similar to that found in the amended version of the Rule. **Id.**

State ex. rel McConaha v. Allen, 979 S.W.2d at 189-190, applied Rule 56.01(b)(3)(b) in the workers' compensation context. Therein, claimant McConaha sought workers' compensation benefits from his employer. **McConaha,** 979 S.W.2d at 188. In anticipation of litigation, the employer obtained a surveillance videotape of the claimant for use by its medical expert in preparing a report regarding the claimant's physical condition. **Id.** Claimant directed a *subpoena duces tecum* to the physician's office manager and custodian of records, requesting that they appear for deposition and produce the videotape. **Id.** The ALJ granted the employer's motion for a protective order, on the grounds that the videotape was work product under Rule 56.01(b)(3) and, therefore, not discoverable absent some showing of substantial need or undue hardship. **Id.** On appeal, the Supreme Court reversed, finding that the surveillance videotape of a party constituted a "statement" of that party within the meaning of Rule 56.01(b)(3)(b). **Id.**

As the Court observed, RSMO. § 287.560 guaranteed litigants before the Division of Workers' Compensation certain discovery rights, including the right to compel the attendance of witnesses and the production of books and papers, and to "take and use depositions in like manner as in civil cases in the circuit courts." **McConaha,** 979 S.W.2d at 189. Rule 57.09 governed the use of subpoenas for taking depositions in civil cases. **Id**. It provided that a subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. **McConaha,** 979 S.W.2d at 188-189. Consequently, Section 287.560 authorized the use of a *subpoena duces tecum* under Rule 57.09(b) in exactly the same manner as such a subpoena would be appropriate in a deposition in a civil matter in a circuit court. **McConaha,** 979 S.W.2d at 189.

While the employer argued that Rule 56.01(b)(3) did not apply in workers' compensation cases because Section 287.560 supplied the sole method of discovery in such matters, and because that statutory provision did not specifically incorporate the Rule, the Supreme Court disagreed. **McConaha,** 979 S.W.2d at 189. It found that Rule 56.01(b)(3) was applicable in workers' compensation cases since

RSMO. § 287.560 expressly required that depositions in workers' compensation matters were to be taken in the same manner as depositions in civil actions. **McConaha,** 979 S.W.2d at 189. Hence, Rule 56.01 was necessarily implicated to the degree that the Rule applied in civil depositions taken in circuit court proceedings. **Id.** And, because Rule 56.01(b) specified the scope of what could be discovered using a deposition under Rule 57, the Rule also controlled what could be discovered using a deposition under Section 287.560 in workers' compensation cases. **Id.** Under Rule 56.01(b)(3)(b) and the **Koehr** decision, the surveillance videotape at issue was a "statement" of claimant McConaha discoverable without a showing of undue hardship. **Id.** Section 287.560 entitled the claimant to conduct the requested discovery. **McConaha,** 979 S.W.2d at 189-190.

In so ruling, the Court was careful to limit the scope of its decision. While defendant had argued that application of Rule 56.01(b)(3) to the case amounted to a holding that all civil discovery rules, in particular Rule 57.01 (relating to interrogatories) and Rule 58.01 (relating to production of documents), applied in workers' compensation cases, the Court rejected this contention, stating that "[o]ur holding is not that broad." **McConaha,** 979 S.W.2d at 189. Rather, the Court only held that the rules of civil procedure governing depositions in civil actions also governed, as the statute authorized, depositions taken pursuant to RSMO. § 287.560. **Id.** The Court's opinion did not

> "address or decide the question of what rules of civil procedure, other than those that apply to depositions, are applicable to proceedings before the division of workers' compensation."

McConaha, 979 S.W.2d at 189.

In **Giddens v. Kansas City Southern Railway Co.,** 29 S.W.3d 813, 819-820 (Mo. banc. 2000), the Supreme Court held that a surveillance videotape of a FELA claimant was a "statement" of the claimant which was discoverable under Rule 56.01(b)(3)(b) and **Koehr.** Consequently, an employer was

obligated to supplement its interrogatory answers to inform the claimant of the existence of a surveillance videotape in response to the claimant's interrogatory inquiring whether the employer had any knowledge of videotapes taken of the claimant since the time of the accident. **Id.**

Erbschloe Is Still Good Law

Claimant argues that the holding in **Erbschloe** is no longer the law in Missouri in light of the **Koehr** and **McConaha** decisions. In making this argument, claimant ignores the fact that **Erbschloe** was decided under Section 287.215 of the Act, which does not contain an internal definition of the term "statement," whereas **Koehr** and **McConaha** were decided under Rule 56.01(b)(3)(b), which contains an internal definition of the term "statement" that is at variance with the ordinary definition of the term and that expressly includes videotapes or motion pictures. In fact, the Supreme Court in **Koehr** distinguished **Erbschloe** on this exact basis. **Koehr,** 853 S.W.2d at 927. **McConaha** did not affect the holding in **Erbschloe,** since the Court limited its application of Rule 56.01(b)(3) to depositions in workers' compensation cases taken pursuant to RSMO. § 287.560. Given the express limitations of the Supreme Court's rulings in **Koehr** and **McConaha**, **Erbschloe** is still good law and claimant's argument to the contrary must be rejected.

The Definition Of "Statement" Offered By The Claimant Must Be Rejected

The employee also asserts that the meaning of the term "statement" as defined in Rule 56.01(b)(3)(b) and as construed in **Koehr** and **McConaha**, should apply to the term "statement" in Section 287.215. He asserts that the meaning of "statement" is contextually interchangeable under RSMO. § 287.215 and Rule 56.01(b)(3). (Employee's Brief, 18-20; Application for Transfer, 4-6).

However, claimant's argument ignores the fact that the definition of "statement" set forth in Rule 56.01(b)(3)(b) is specifically limited to the purposes of that paragraph of the Rule, i.e., setting forth those instances where the work product privilege does not apply. Also, claimant's argument contravenes

the long-standing rule of law that rules of civil procedure govern only those actions pending in the civil courts and that rules of civil procedure are not applicable to proceedings under the Workers' Compensation Act. **Kristanik,** 41 S.W.2d at 912. Finally, claimant's argument violates the rule of statutory construction providing that where a technical or special definition of a word is not included in a statute, the word is to be accorded its plain and ordinary meaning. **Asbury,** 846 S.W.2d at 201. In giving the term "statement" as used in Section 287.215 the technical meaning that is ascribed to the term in Rule 56.01(b)(3)(b), claimant violates this rule of statutory construction and eviscerates the decision in **Erbschloe**, which construed the term "statement" contained in RSMO. § 287.215 according to the plain and ordinary meaning of the word. **Erbschloe,** 823 S.W.2d at 119.

In his Brief and Application for Transfer, claimant asserts that the inclusion of phrases like "electronically recorded" and "otherwise preserved" in RSMO. § 287.215 necessarily moves that provision beyond the dictionary definition of "statement". (Employee's Brief at 18-20; Application for Review, 5-6). Claimant posits that the terms "electronically recorded" and "otherwise preserved" compel the production of a silent surveillance videotape made of an employee as a "statement" under RSMO. § 287.215. This argument confuses the medium with the message.

As claimant would have it, the medium by which a verbal assertion or non-verbal conduct is preserved would dictate whether that verbal assertion or non-verbal conduct constitutes a "statement" discoverable under RSMO. § 287.215. Claimant fails to acknowledge the fact that the terms "electronically recorded" and "otherwise preserved" merely refer to the *medium* of preserving an employee's "statement" and do not serve to define what constitutes a "statement" in the first instance. That the terms "electronically recorded" or "otherwise preserved' may suggest more than paper or mere audiotape memorials of party's statement does not serve to change the meaning of what constitutes a "statement" for purposes of the statute. (Employee's Brief, 19). Consequently, those terms do not

change the ordinary meaning of "statement" as used in Section 287.215, as the employee suggests. To allow the medium of preservation of verbal assertions or non-verbal conduct to determine whether those verbal assertions or conduct constitute an employee "statement" within the contemplation of RSMO. § 287.215 would lead to an absurd result, one not intended by the Legislature. **Budding,** 19 S.W.3d at 681.

Claimant contends that it is difficult to rationalize an argument that surveillance videotapes may be acquired in workers' compensation cases under one pre-trial discovery procedure, but not under another pre-trial discovery procedure. (Application for Transfer, 6; Employee's Brief, 20). This argument is without merit. What claimant ignores is the fact that RSMO. § 287.560 *expressly* provides that depositions in workers' compensation cases are to be taken in the same manner as they are in civil proceedings, thereby necessarily implicating Rule 56.01. On the other hand, RSMO. § 287.215 does not expressly or by implication incorporate any civil rule which pertains to the disclosure of a party's statements. Given the clear and unambiguous terms of both RSMO. § 287.560 and RSMO. § 287.215, the only proper conclusion to draw is that the Legislature intended that a silent surveillance videotape, such as the one at issue herein, be discoverable in a deposition under RSMO. § 287.560 through the use of a *subpoena duces tecum* pursuant to Rule 56.01(b)(3), but not be discoverable under a request for employee statements made pursuant to RSMO. § 287.215.[3]

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[3]Claimant overlooks the fact that he had a method available to him whereby he could have secured the surveillance videotapes prior to hearing. **McConaha** was handed down in 1998. Hearing was not held in this matter until July 8, 1999. In that interval, claimant could have discovered the videotapes using a deposition under RSMO. § 287.560, as indicated in **McConaha. McConaha,** 979 S.W.2d at 189. Having failed to avail himself of this discovery option, the employee should not be permitted to rewrite the Workers'

Compensation Act to make the videotapes discoverable as employee statements under RSMO. § 287.215.

Workers' compensation law being entirely a creature of statute, and discovery in workers' compensation cases being strictly governed by the terms of the Act, the Legislature was free to dictate those instances in which a silent surveillance videotape of an employee is discoverable. **Lakeman,** 872 S.W.2d at 506. *See for example,* **Reese v. Coleman,** 990 S.W.2d 195, 201 (Mo. App. SD 1999). In **Reese,** the court found that the Legislature could provide that RSMO. § 287.203 permitted recovery of a claimant's "cost of recovery" while RSMO. § 287.560 permitted assessment against a party who had proceeded in bad faith the "whole cost of the proceedings." It reasoned that had the Legislature intended to permit the Industrial Commission to award recovery of the same items in both circumstances, it could have used the same language in both statutes. But it did not. **Id.**

The same reasoning applies with equal force to RSMO. § 287.215 and RSMO. § 287.560. In that the Legislature has spoken on the subject of discovery in workers' compensation cases and, inferentially, dictated those circumstances in which the civil rules are applicable to such discovery, that Legislative statement is public policy and this Court must defer to that policy determination. *See for example,* **Budding,** 19 S.W.3d at 682 (when the Legislature has spoken on a subject, the Court must defer to its determinations of public policy); **State of Missouri on the Information of John M. Dalton v. Miles Laboratories, Inc.,** 282 S.W.2d 564, 574 (Mo. banc. 1955) (where the Legislature, acting withing its constitutional orbit, has declared the public policy of the State, courts are bound by such declared policy).

II

THE INDUSTRIAL COMMISSION DID NOT ERR IN RULING THAT THE EMPLOYEE SUSTAINED A 10% PERMANENT PARTIAL DISABILITY OF THE RIGHT UPPER EXTREMITY AT THE LEVEL OF THE SHOULDER AS A RESULT OF THE JUNE, 1997 WORK INJURY FOR THE REASON THAT THE INDUSTRIAL COMMISSION'S FINDING REGARDING PERMANENT PARTIAL DISABILITY WAS SUPPORTED BY THE OVERWHELMING WEIGHT OF THE COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD, INCLUDING THE MEDICAL TESTIMONY OF DR. NOGALSKI, CLAIMANT'S TREATING PHYSICIAN, AND THE SURVEILLANCE VIDEOTAPES MADE OF THE EMPLOYEE, WHICH DEMONSTRATED THAT THE EMPLOYEE COULD PERFORM HIS REGULAR JOB DUTIES WITH LITTLE, IF ANY, PHYSICAL LIMITATIONS.

Introduction

In his Award, the ALJ held that, as to the Claim for the June, 1997 injury, the employee sustained a 30% permanent partial disability of the right upper extremity at the level of the shoulder. (L.F. 5-12). Regarding the Claim for the September, 1997 injury, the ALJ ruled that claimant failed to prove the occurrence of a second, independent right shoulder injury and, consequently, denied the employee's Claim for Compensation. (L.F. 23-30).

The Industrial Commission modified the Award of the ALJ regarding permanent partial disability. Upon admitting the surveillance videotapes into evidence and reviewing those tapes, the Industrial Commission reduced the extent of permanent partial disability awarded to the employee on the Claim for the June, 1997 injury to 10% permanent partial disability of the right upper extremity at the level of the shoulder. (L.F. 34-53). However, the Industrial Commission affirmed the denial of the Claim for

the September, 1997 injury. (L.F. 34-53).[4]

The Industrial Commission's award of permanent partial disability should be affirmed in that it is supported by the overwhelming weight of the evidence in the record, including the testimony of claimant's treating physician, Dr. Nogalski, and the surveillance videotapes, which demonstrated claimant's ability to perform his regular job duties with little, if any, physical limitations.

Standards Governing Permanent Partial Disability

Pursuant to RSMO. § 287.190, an employee who has sustained a work related injury may recover up to 400 weeks of permanent partial disability. RSMO. § 287.190; **Schwartz v. Shamrock Dairy Queen,** 23 S.W.3d 768, 774 (Mo. App. ED 2000). As defined by the Act, **"permanent partial disability"**

[4]Claimant does not contest the Industrial Commission's denial of the Claim arising out of the September, 1997 event. (Employee's Brief, 17-18). In that the employee had not fully recovered from the June, 1997 injury at the time of the September, 1997 event, the September event was merely an exacerbation of his prior injury and, consequently, it was not compensable as a separate injury. See, **Hall v. Spot Martin**, 304 S.W.2d 844, 853 (Mo. 1957).

is a disability that is permanent in nature and partial in degree. RSMO. § 287.190.6; **Tiller v. 166 Auto Auction,** 941 S.W.2d 863, 865 (Mo. App. SD 1997).

A workers' compensation claimant bears the burden of proving all essential elements of his claim. **Sanderson v. Porta-Fab Corp.,** 989 S.W.2d 599, 603 (Mo. App. ED 1999); **Mathia v. Contract Freighters, Inc.,** 929 S.W.2d 271, 276 (Mo. App. SD 1996). Thus, the claimant must not only show causation between the accident and injury, he must also show that a disability resulted and the extent of such disability. **Hunsperger v. Poole Truck Lines, Inc.,** 886 S.W.2d 656, 658 (Mo. App. ED 1994); **Mathia,** 929 S.W.2d at 276; **Davis v. Brezner,** 380 S.W.2d 523, 528 (Mo. App. SD 1964) (it is the claimant's burden to prove the duration and extent of disability).

Permanency of disability must be shown with reasonable certainty. **Matzker v. St. Joseph Minerals Corp.,** 740 S.W.2d 362, 363 (Mo. App. ED 1987); **Davis,** 380 S.W.2d at 528 (a finding as to permanency of injury must be based upon evidence which produces a reasonable certainty). Although absolute certainty is not required, evidence which amounts to no more than conjecture, or shows no more than a likelihood, will not sustain a finding of permanent disability. **Matzker,** 740 S.W.2d at 363. Mere continuance of a disability is not, in and of itself, proof of permanency. **Davis,** 380 S.W.2d at 529.

The determination of a specific amount or percentage of disability to be awarded to a claimant is a finding of fact within the exclusive province of the Industrial Commission. **Mathia,** 929 S.W.2d at 276; **Landers v. Chrysler Corp.,** 963 S.W.2d 275, 284 (Mo. App. ED 1998). In making this determination, the Industrial Commission is not bound by the medical experts' percentages of disability. **Landers,** 963 S.W.2d at 284; **Mathia,** 929 S.W.2d at 276. Rather, the Industrial Commission may consider all the evidence in the record and it is free to find a disability either higher or lower than that expressed in the medical testimony. **Davis,** 380 S.W.2d at 528; **Landers,** 963 S.W.2d at 284.

When determining matters of disability, the Industrial Commission is the sole judge of

witness credibility. **Sanders v. St. Clair Corp.,** 943 S.W.2d 12, 17 (Mo. App. SD 1997); **Landers,** 963 S.W.2d at 282. As such, the Industrial Commission has the discretion to weigh and value the evidence and may disbelieve the medical testimony offered. **Id.** Where the right to compensation depends upon which of two conflicting medical theories should be accepted, the issue is peculiarly for the Commission's determination. **Landers,** 963 S.W.2d at 282. An assessment of the percentage of disability made by the Industrial Commission will not be disturbed where, as here, the extent of disability is hotly contested. **Landers,** 963 S.W.2d at 284; **Brookman v. Henry Trans.,** 924 S.W.2d 286, 291 (Mo. App. ED 1996).

The Basis For The Industrial Commission's Award of Permanent Partial Disability

In reducing the amount of permanent partial disability awarded to the employee on the Claim for the June, 1997 injury, the Industrial Commission relied upon two factors. First, it relied upon the surveillance videotapes made of the employee while working on his route. (L.F. 34-53). It found the videotapes to be persuasive. (L.F. 34-53). As the Industrial Commission noted, on the videotapes, the employee was seen engaging in repetitious activities with a full range of movement in his right shoulder. He did not appear to favor his injured arm. Nor did the claimant demonstrate any grimace or hint of difficulty in performing his physically demanding work. (L.F. 34-53). In effect, the Industrial Commission found that the videotapes rendered less than credible the employee's testimony regarding his current medical condition and the physical limitations resulting from that condition. (L.F. 34-53).

In addition to relying on the surveillance videotapes in deciding to reduce the amount of permanent partial disability awarded to claimant for the June, 1997 injury, the Industrial Commission also relied upon the testimony of Dr. Michael Nogalski, claimant's treating physician. It found Dr. Nogalski's testimony to be the more persuasive of the two medical opinions offered regarding the nature and extent of claimant's permanent partial disability. (L.F. 34-53). The Industrial Commission noted that Dr. Nogalski's testimony was more persuasive in light of his medical expertise (Dr. Nogalski was a board certified orthopedic surgeon, while Dr. Morrow was an osteopathic physician) and his personal involvement in the employee's treatment. (L.F. 34-53).

Claimant's Testimony Was Refuted By The Videotapes And The Testimony Of His Supervisors And That Of The Private Investigators

At hearing, claimant testified as to his current complaints resulting from the June and September, 1997 incidents. Claimant stated that he had constant pain in his right shoulder, which increased with activity. (Tr. 24, 29, 30-31, 33). It was the employee's testimony that he was unable to lift

his arm above his head without pain and that his right shoulder popped and rattled whenever he moved it. (Tr. 28). While claimant testified that he was able to lift approximately 50 pounds, he also testified that he lifted with his left hand and used his right hand primarily for balance. (Tr. 30). Finally, claimant testified that he was unable to steer the trash truck with his right arm. (Tr. 31-32).

However, the employee also testified that, at the time of hearing, he was working full-time, performing his regular duties as a trash hauler. As a result, he used both arms to lift and carry trash cans. (Tr. 39). In addition to dumping trash cans at approximately 700 stops, the employee lifted other heavy items, such as furniture. (Tr. 39). He performed his job without the services of a helper. (Tr. 40).

Claimant's testimony was contradictory. On one hand, he testified as to significant physical limitations and symptoms resulting from the work incidents. On the other hand, he testified that he was able to perform a physically strenuous job without any significant limitations.

That the employee was able to perform his job duties as a trash hauler following the June and September, 1997 incidents was demonstrated by the testimony of claimant's supervisors, as well as the testimony of the private investigators who performed surveillance of the claimant and captured his activities on videotape. As a lead man in the Residential Department of the employer, Kenneth Skaggs saw claimant weekly while working on his route. (Tr. 44). When Mr. Skaggs observed the claimant, he did not appear to be limited in any manner. (Tr. 44). The employee would use both his right and left hands to pick up trash containers. (Tr. 44). In fact, the employee picked up all kinds of trash receptacles, including 90 gallon trash containers known as "toters". (Tr. 44-45). When dumping trash receptacles, including toters, claimant lifted those receptacles some three and one half feet off the ground. (Tr. 45). On the occasions that Mr. Skaggs observed the claimant, the employee did not show any limitations in regards to the use of his right arm or his right shoulder. (Tr. 45).

The testimony of Kenneth Skaggs is mirrored by that of Chris Wilson, Residential

Transfer Stations Manager for Waste Management. Ms. Wilson testified that following the work incidents in June and September of 1997, she observed the employee performing his job. (Tr. 51-52). On those occasions, the claimant did not appear to be limited in any way. (Tr. 52). He used both arms to lift trash receptacles and did not demonstrate any limitation in regard to the use of either his right arm or his right shoulder. (Tr. 52). In fact, Ms. Wilson observed the claimant picking up trash, as well as other bulky items such as furniture, without any apparent difficulty. (Tr. 52).

Like the testimony of claimant's supervisors, the testimony of the private investigators who observed the claimant while working on his route, demonstrates that the employee was capable of performing his job duties without any significant limitations in either his right arm or his right shoulder. It was the testimony of Brian Lewis that he observed the claimant on October 22, 1998 on several residential stops as he pushed and lifted garbage cans and other types of refuse and placed them in his trash truck. (Tr. 63). The employee did not appear to have any limitation in the use of his right arm while engaging in these activities. (Tr. 63, 69). Nor did Mr. Lewis observe any grimacing of pain on the employee's face when he was lifting. (Tr. 63). In addition to trash cans, Mr. Lewis observed the employee lift boxes and other items that people had left on the curb in front of their homes. (Tr. 64).

In a similar vein, Lance DeClue testified that he personally observed the employee performing his job on March 30, 1999 while the employee was working on his route in Moline Hills. (Tr. 72-73). During this time, the employee drove his trash truck around the neighborhood, loading trash barrels into the truck by hand, and using the machine to dump the larger barrels into the truck. (Tr. 74-75). Claimant used both hands without limitation to perform these activities. (Tr. 75-76). Mr. DeClue did not observe the employee having any problems in lifting the trash cans. To the contrary, the employee moved and worked at a fast pace. (Tr. 75-76).

Michael Aiken, who observed the employee on his route in Moline Hills on March 30,

1999 along with Lance DeClue, presented similar testimony. While he observed the employee on that date, Mr. Aiken saw the claimant picking up trash cans and putting them into the truck. (Tr. 83). At one residence, he observed the claimant pick up a large couch, two chairs, and a lawnmower, which the employee also placed into the trash truck. (Tr. 83-84). When Mr. Aiken observed the claimant on his route, the employee did not appear to be limited in any way in the use of his arms or shoulders, either in picking up trash receptacles or in driving the trash truck. (Tr. 84).

The surveillance videotapes taken by Brian Lewis, Lance DeClue, and Michael Aiken accurately portray what the private investigators personally observed while the claimant was working on his trash route on October 22, 1998 and March 30, 1999. In short, the videotapes demonstrate that the employee was able to perform his job as a trash hauler, a physically strenuous job which required the repetitive lifting of heavy objects, without any apparent limitation in the use of his right arm or right shoulder.

The Industrial Commission was free to find that the testimony of the employee was not credible, in light of his activities shown on the surveillance videotapes. **Williams v. City of Ava,** 982 S.W.2d 307, 311 (Mo. App. SD 1998); **Kopolav v. Zavodnick,** 177 S.W.2d 647, 655 (Mo. App. ED 1944) (Industrial Commission was entitled to disbelieve the testimony of the claimant); **Deffendoll v. Stupp Brothers,** 415 S.W.2d 36, 42 (Mo. App. ED 1967) (Industrial Commission does not have to accept the testimony of a workers' compensation claimant as true, especially where there is a substantial basis from all the evidence for finding such testimony to be untrue). It was also free to diminish the award of permanent partial disability made to the employee for the June, 1997 injury, based upon its finding that the claimant's testimony lacked credibility. **Williams,** 982 S.W.2d at 311; **Waterman v. Chicago Bridge & Ironworks,** 41 S.W.2d 575, 579 (Mo. 1931) (as part of its *de novo* review, the Industrial Commission has the power to end, diminish, or increase a workers' compensation award). Since the Industrial

Commission's finding, that claimant's testimony regarding his disability was not credible, is supported by the overwhelming weight of the evidence in the record, including the testimony of Kenneth Skaggs, Chris Wilson, Brian Lewis, Michael Aiken, and Lance DeClue, as well as the surveillance videotapes, it is binding upon this Court. RSMO. § 287.495.1; **Williams,** 982 S.W.2d at 311.

Dr. Nogalski's Testimony Was More Credible And Probative Than That Of Dr. Morrow

The same holds true for the Industrial Commission's acceptance of the testimony of Dr. Nogalski, and its finding that his testimony was more credible than that of Dr. Morrow on the issue of permanent partial disability. Dr. Nogalski was claimant's treating physician. He provided treatment to the employee for his shoulder complaints during the period from July 28, 1997 to July 29, 1998. (Tr. 130, 155). When Dr. Nogalski examined the claimant on May 18, 1998, he felt that the majority of claimant's shoulder problems had resolved and released the claimant from his care. (Tr. 155). Dr. Nogalski returned claimant to full-duty work. (Tr. 155).

The doctor's final examination of the claimant took place on July 29, 1998. (Tr. 155). Claimant's symptoms had improved considerably; he only reported some soreness in his right shoulder. (Tr. 155). On examination, claimant's range of motion was good. (Tr. 156). His impingement signs were negative. (Tr. 156). At that time, Dr. Nogalski diagnosed the claimant with mild chronic rotator cuff tendinitis. (Tr. 156). In Dr. Nogalski's opinion, claimant had reached maximum medical improvement and no restrictions were in order as regards the claimant's work. (Tr. 157). Dr. Nogalski found that claimant had sustained a 3% permanent partial disability of the right upper extremity at the level of the shoulder. (Tr. 157).

Dr. Morrow, an osteopathic physician who does not specialize in orthopedics, testified on behalf of the claimant. (Tr. 94-95). It was Dr. Morrow's opinion that claimant had sustained a 45% permanent partial disability of the right upper extremity at the level of the shoulder due to his injuries in

June and September of 1997. (Tr. 109). The doctor was unable to break this rating down into separate percentages for each injury, since the injuries were too close in proximity. (Tr. 109-110). As Dr. Morrow conceded, his disability rating was based, in part, upon the employee's subjective complaints of pain. (Tr. 114-115).

Generally, the Industrial Commission is charged with the responsibility of passing on the credibility of witnesses and may disbelieve the testimony of a witness even if no contradictory evidence is presented. **Page v. Green,** 686 S.W.2d 528, 530 (Mo. App. SD 1985). Its acceptance or rejection of part or all of a witnesses' testimony cannot be disturbed on review, unless its acceptance or rejection is against the overwhelming weight of the evidence in the record. **Id.**

The Industrial Commission's award of 10 % permanent partial disability of the right upper extremity at the level of the shoulder for the June, 1997 injury should be upheld by this Court, since it is consistent with the testimony of Dr. Nogalski. *See,* **Hall v. Country Kitchen Restaurant,** 936 S.W.2d 917, 921 (Mo. App. SD 1997) (a finding of the Industrial Commission consistent with either of two conflicting medical opinions will be upheld by the appellate court if it is supported by competent and substantial evidence on the whole record). Where, as here, the right to compensation depends upon which of two conflicting medical opinions should be accepted, the issue is peculiarly for the Industrial Commission's determination. **Landers,** 963 S.W.2d at 282. That the testimony of Dr. Morrow might support a finding of permanent partial disability in excess of 10% of the right upper extremity at the level of the shoulder does not require a reversal of the Industrial Commission's ruling on the issue of permanent partial disability arising from the June, 1997 injury. **Mathia,** 929 S.W.2d at 276; **Lawrence v. Joplin R-8 S. D.,** 834 S.W.2d 789, 795 (Mo. App. SD 1992). To the contrary, the Court must disregard Dr. Morrow's testimony. **Duncan v. Springfield R-12 S. D.,** 897 S.W.2d 108, 113 (Mo. App. SD 1995).

CONCLUSION

The Industrial Commission did not err in ruling that the surveillance videotapes taken of the claimant, which did not contain an audio component, did not constitute "statements" of the employee within the meaning of RSMO. § 287.215. In so ruling, the Industrial Commission gave effect to the plain and ordinary meaning of the language in the statutory provision. And, it followed the decision in **Erbschole v. General Motors Corp.,** 823 S.W.2d 117, 119 (Mo. App. ED 1992), which is still good law and which is controlling on the issue of whether silent surveillance videotapes of an employee are discoverable as employee "statements" under RSMO. § 287.215 of the Workers' Compensation Act. Consequently, the Award of the Industrial Commission should be affirmed.

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CERTIFICATE OF SERVICE

A copy of the brief pursuant to Special Rule 1 has been mailed this **31st** day of **May, 2001** to: Mark F. Haywood and Patrick Niall Mehan, Attorneys for Employee/Appellant at 7700 Bonhomme Avenue, Suite 450, St. Louis, MO 63105.

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CERTIFICATE OF COMPLIANCE

This Brief complies with Special Rule 1 and contains **17,336** words. To the best of my knowledge and belief the enclosed disc has been scanned and is virus-free.

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