

**IN THE  
MISSOURI SUPREME COURT**

MICHAEL STRAIT, natural Father     )  
and Legal Guardian of JOSHUA NEAL   )  
STRAIT and MICK TYLER STRAIT     )

Appellants,                             )

v.   )

No. SC89078

TREASURER OF THE STATE OF     )  
MISSOURI, as Custodian of       )  
The Second Injury Fund,         )

Respondent.                           )

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**BRIEF OF RESPONDENT, TREASURER OF THE  
STATE OF MISSOURI, AS CUSTODIAN OF THE SECOND INJURY FUND**

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SECOND INJURY FUND

## **TABLE OF CONTENTS**

<b>TABLE OF AUTHORITIES.....</b>	<b>2</b>
<b>ARGUMENT .....</b>	<b>3</b>
<b>CONCLUSION .....</b>	<b>8</b>
<b>CERTIFICATE OF COMPLIANCE AND SERVICE .....</b>	<b>8</b>

### **APPENDIX**

## TABLE OF AUTHORITIES

### Cases

<i>Cox v. Treasurer of the State of Missouri</i> , SC 88992.....	3
<i>Falk v. Barry, Inc.</i> , 158 S.W.3d 327 (Mo.App. W.D. 2005).....	3, 4
<i>Farmer v. Barlow Truck Lines</i> , 979 S.W.2d 169 (Mo. banc 1998) .....	3
<i>Greenlee v. Duke’s Plastering Service</i> , 75 S.W.3d 273 (Mo.banc 2002) .....	5, 6, 7
<i>Smith v. Ozark Lead Co.</i> , 741 S.W.2d 802 (Mo.App. S.D. 1987).....	3
<i>Winberry v. Treasurer of the State of Missouri</i> , SC 88979.....	3

### Statutes

§ 287.140 Rev. Stat. Mo. (2000) .....	3
§287.200 Rev. Stat. Mo. (2000) .....	3
§287.470 Rev. Stat. Mo. (2000) .....	3, 6
§287.495 Rev. Stat. Mo. (2000) .....	4

## ARGUMENT

The only issue presented here is that of the jurisdiction of the Labor and Industrial Relations Commission. Its authority is narrow and does not permit it to afford Appellant the relief he seeks.

The Commission is a creature of statute and has only the authority granted to it by specific statutory authority. *Farmer v. Barlow Truck Lines*, 979 S.W.2d 169, 170 (Mo.

banc 1998). The Court of Appeals, Western District, has held that post-award proceedings, such as ones to interpret or enforce an award, are not within the Commission's jurisdiction, but within the jurisdiction of the circuit court. *Falk v. Barry, Inc.*, 158 S.W.3d 327, 329 (Mo.App. W.D. 2005). That is true in every case – except one in which there is specific statutory authority for the Commission to revisit a past award. In *Smith v. Ozark Lead Co.*, 741 S.W.2d 802, 810 (Mo.App. S.D. 1987), the Southern District spoke (in dicta) of post-final modification by the Commission, indicating that the Commission can only occur pursuant to specific statutory authority, and giving as examples §§ 287.140, 287.200(2), and 287.470. Despite appellant's many arguments, he can cite to absolutely no authority within the workers' compensation statutes that allows for a decision that is final, outside these three exceptions, to be re-opened. Without such authority, appellant cannot prevail.

In this case, the award became final when the Eastern District issued its mandate; substituting the parties does not change this fact. Substituting parties simply changes who the award will be paid out to and cannot extend jurisdiction.

Appellant argues that it is important to understand the timing of events in this case, so as to distinguish it from *Winberry v. Treasurer of the State of Missouri*, Missouri Supreme Court Case No. SC 88979 and *Cox v. Treasurer of the State of Missouri*, Missouri Supreme Court Case No. SC 88992. Appellant's Brief p. 10 & 11. According to Appellant, the important distinction between the instant case and both *Winberry* and *Cox* is that Rosalyn Strait died while the Labor and Industrial Relations Commission had jurisdiction. While this fact is correct, the distinction is irrelevant. Regardless of when

the Employee died, the Commission lost its jurisdiction over this case once the Court of Appeals obtained jurisdiction. And without specific statutory authority, or a remand from the Court of Appeals, there is no way for the Commission to regain that jurisdiction.

Appellant takes issue with the fact that while the Commission relied heavily on *Falk* in its ruling to deny Appellant's motion to amend the final award, the Commission 'overlooked' an important qualifier in the holding. Specifically, he argues that they overlook the section that states "the Commission properly concluded that it was without authority to amend the Award **because the time for appeal of the award had expired.**" Appellant's Brief p. 11 & 12 (emphasis added). Apparently, the appellant believes this to be pertinent in that the time for appeal had not expired as of the time of Rosalyn Strait's death. However, this fact still does not give the Commission jurisdiction now.

In *Falk*, the Commission issued its final award on June 23, 1986. 158 S.W.2d at 328. That award was not appealed to the Court of Appeals, and therefore became final 30 days later. §287.495.1, RSMo. In December 2003, Mrs. Falk wrote to the Commission requesting a hearing because the benefits awarded in 1986 had stopped being paid. 158 S.W.2d at 328. The Commission ruled that it had no jurisdiction because the time for appeal had expired. *Id.* at 328. This was an important point only because the Commission retained jurisdiction during the 30 days following its award – if Mrs. Falk had brought a motion during that time the Commission may have been able to review it. But, once that 30-day time frame for appeal elapsed, there was no way for the Commission to "get back" jurisdiction because it had no statutory authority to do so.

The same is true in this case. The Commission lost its jurisdiction over this case

when the case was appealed to the Court of Appeals. The only way for the Commission to “get back” jurisdiction once lost is if the Court of Appeals remands the case back to the Commission, or if there is specific statutory authority granting the Commission authority to review a final award. In this case the Court of Appeals did not remand the case back to the Commission, and the case does not fall under any of the specific statutory scenarios.

Appellant goes on to speculate about what *could have* happened in this case if the Court of Appeals had reversed the Commissions decision and found Ms. Strait to be only permanently and partially disabled. Appellant’s Brief p. 12. He asserts that the Commission would have had to subsequently determine to whom the compensation would be paid. *Id.* at 12. This is true, but irrelevant. In that particular situation, the Commission would have regained jurisdiction because the Court of Appeals would have remanded the case back to them. Unlike this case, the case would not have been final after the Court of Appeals decision.

The Appellant also asserts that the findings in *Greenlee v. Duke’s Plastering Service*, 75 S.W.3d 273 (Mo.banc 2002), supports his position that the Commission retains jurisdiction because the claimant died while the appeal was pending. Appellant’s Brief p. 13 & 14. It does not.

In *Greenlee*, the claimant sustained a severe work injury in 1989. 75 S.W.3d at 274-275. While his case was still pending, the claimant died from a self inflicted gunshot wound on May 20, 1995. *Id.* at 275. On January 9, 1996 the Commission issued its award for permanent total disability benefits. *Id.* at 275. After this award was handed

down, the widow filed a second separate claim for workers' compensation based on the death of her husband – she claimed her husband committed suicide as a proximate result of the depression he suffered after his 1989 work accident. *Id.* at 275. A separate claim for death benefits was heard and decided by an administrative law judge. *Id.* at 275. However, the judge's award was withdrawn pursuant to an agreement by the parties and an application was made to the Commission to review the jurisdiction of the administrative law judge. *Id.* at 275. The Commission determined that since the claim was still pending at the time of his death, the correct avenue to pursue death benefits was through a motion to modify the Commission's prior award and not through a new separate claim. *Id.* at 275. Following the Commission's instructions, the widow moved to modify the Commission's final award to ask for death benefits. *Id.* at 275. Nowhere in the *Greenlee* award is the issue of the Commission's jurisdiction to hear that motion discussed. *Greenlee* simply does not support Appellant here.

Appellant asserts that there is no plausible reason why the Commission exercised jurisdiction after a final award in *Greenlee*, but refuses to exercise jurisdiction in the instant case. Appellant's Brief p. 14. Actually, there is a perfectly plausible explanation why the Commission exercised jurisdiction in *Greenlee*. The circumstances in *Greenlee* fall within one of the narrow statutory provisions that allows the Commission to review previously final awards. Per statute, the Commission, upon the application of any party can review any award on the ground of a change of condition and may make an award ending, diminishing or increasing the compensation previously awarded. §287.470 RSMo. In *Greenlee*, the widow was looking to increase the award due to a change of

circumstances – specifically changing the award from permanent total disability benefits to one for death benefits.

The facts in this case do not fall within §287.470. The Appellant is not alleging a change in circumstance that could make the Commission end, diminish, or increase previously awarded compensation. That is why the Commission “got back” jurisdiction in *Greenlee*, but not in this case.

Finally, Appellant argues that he does not need to reopen the record or introduce new evidence before the Commission concerning the issue of dependency because that issue was decided the Court of Appeals when it granted the substitution of party.

Appellant’s Brief p. 15. The Respondent does not agree with this assertion. But it is irrelevant in any event because the Commission lacks jurisdiction.



## **CONCLUSION**

Because the Commission lacked jurisdiction to entertain Appellant's request, the Commission's decision should be affirmed.

Respectfully submitted,

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SECOND INJURY FUND

## **CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06 (b)(c) 360 of this Court and contains 1,629 words, excluding the cover, this certification and the appendix, as determined by Word software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That two (2) true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 6<sup>th</sup> day of March, 2008, to:

Mr. James Krispin  
Attorney at Law  
8000 Maryland, Suite 750  
Clayton, MO 63105

4. That an original and nine (9) true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were hand-delivered, this 6<sup>th</sup> day of March, 2008, to:

Clerk of the Supreme Court  
State of Missouri  
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## **APPENDIX**

<b>287.140 Rev. Stat. Mo. (2000).....</b>	<b>A-1</b>
<b>287.200 Rev. Stat. Mo. (2000).....</b>	<b>A-6</b>
<b>287.470 Rev. Stat. Mo. (2000).....</b>	<b>A-8</b>
<b>287.495 Rev. Stat. Mo. (2000).....</b>	<b>A-9</b>

## VERNON'S ANNOTATED MISSOURI STATUTES



### TITLE XVIII. LABOR AND INDUSTRIAL RELATIONS

#### CHAPTER 287. WORKERS' COMPENSATION LAW

→**287.140.** Employer to provide medical and other services, transportation, artificial devices--duties of health care providers--refusal of treatment, effect--medical evidence--division, commission responsibilities--dispute resolution

1. In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. Where the requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities. Regardless of whether the health care provider is selected by the employer or is selected by the employee at the employee's expense, the health care provider shall have the affirmative duty to communicate fully with the employee regarding the nature of the employee's injury and recommended treatment exclusive of any evaluation for a permanent disability rating. Failure to perform such duty to communicate shall constitute a disciplinary violation by the provider subject to the provisions of chapter 620, RSMo. When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the State of Missouri and who is employed by an employer located in Missouri shall have the option of selecting the location of services provided in this section either at a location within one hundred miles of the injured employee's residence, place of injury or place of hire by the employer. The choice of provider within the location selected shall continue to be made by the employer. In case of a medical examination if a dispute arises as to what expenses shall be paid by the employer, the matter shall be presented to the legal advisor, the administrative law judge or the commission, who shall set the sum to be paid and same shall be paid by the employer prior to the medical examination. In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

2. If it be shown to the division or the commission that the requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, the division or the

commission may order a change in the physician, surgeon, hospital or other requirement.

3. All fees and charges under this chapter shall be fair and reasonable, shall be subject to regulation by the division or the commission, or the board of rehabilitation in rehabilitation cases. A health care provider shall not charge a fee for treatment and care which is governed by the provisions of this chapter greater than the usual and customary fee the provider receives for the same treatment or service when the payor for such treatment or service is a private individual or a private health insurance carrier. The division or the commission, or the board of rehabilitation in rehabilitation cases, shall also have jurisdiction to hear and determine all disputes as to such charges. A health care provider is bound by the determination upon the reasonableness of health care bills.

4. The division shall, by regulation, establish methods to resolve disputes concerning the reasonableness of medical charges, services, or aids. This regulation shall govern resolution of disputes between employers and medical providers over fees charged, whether or not paid, and shall be in lieu of any other administrative procedure under this chapter. The employee shall not be a party to a dispute over medical charges, nor shall the employee's recovery in any way be jeopardized because of such dispute.

5. No compensation shall be payable for the death or disability of an employee, if and insofar as the death or disability may be caused, continued or aggravated by any unreasonable refusal to submit to any medical or surgical treatment or operation, the risk of which is, in the opinion of the division or the commission, inconsiderable in view of the seriousness of the injury. If the employee dies as a result of an operation made necessary by the injury, the death shall be deemed to be caused by the injury.

6. The testimony of any physician or chiropractic physician who treated the employee shall be admissible in evidence in any proceedings for compensation under this chapter, subject to all of the provisions of [section 287.210](#).

7. Every hospital or other person furnishing the employee with medical aid shall permit its record to be copied by and shall furnish full information to the division or the commission, the employer, the employee or his dependents and any other party to any proceedings for compensation under this chapter, and certified copies of the records shall be admissible in evidence in any such proceedings.

8. The employer may be required by the division or the commission to furnish an injured employee with artificial legs, arms, hands, surgical orthopedic joints, or eyes, or braces, as needed, for life whenever the division or the commission shall find that the injured employee may be partially or wholly relieved of the effects of a permanent injury by the use thereof. The director of the division shall establish a procedure whereby a claim for compensation may be reactivated after settlement of such claim is completed. The claim shall be reactivated only after the claimant can show good cause for the reactivation of

this claim and the claim shall be made only for the payment of medical procedures involving life-threatening surgical procedures or if the claimant requires the use of a new, or the modification, alteration or exchange of an existing, prosthetic device. For the purpose of this subsection, "**life threatening**" shall mean a situation or condition which, if not treated immediately, will likely result in the death of the injured worker.

9. Nothing in this chapter shall prevent an employee being provided treatment for his injuries by prayer or spiritual means if the employer does not object to the treatment.

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

11. Any physician or other health care provider who orders, directs or refers a patient for treatment, testing, therapy or rehabilitation at any institution or facility shall, at or prior to the time of the referral, disclose in writing if such health care provider, any of his partners or his employer has a financial interest in the institution or facility to which the patient is being referred, to the following:

- (1) The patient;
- (2) The employer of the patient with workers' compensation liability for the injury or disease being treated;
- (3) The workers' compensation insurer of such employer; and
- (4) The workers' compensation adjusting company for such insurer.

12. Violation of subsection 11 of this section is a class A misdemeanor.

13. (1) No hospital, physician or other health care provider, other than a hospital, physician or health care provider selected by the employee at his own expense pursuant to subsection 1 of this section, shall bill or attempt to collect any fee or any portion of a fee for services rendered to an employee due to a work-related injury or report to any credit reporting agency any failure of the employee to make such payment, when an injury covered by this chapter has occurred and such hospital, physician or health care provider has received actual notice given in writing by the employee, the employer or the employer's insurer. Actual notice shall be deemed received by the hospital, physician or health care provider five days after mailing by certified mail by the employer or insurer to the hospital, physician or health care provider.

(2) The notice shall include:

(a) The name of the employer;

(b) The name of the insurer, if known;

(c) The name of the employee receiving the services;

(d) The general nature of the injury, if known; and

(e) Where a claim has been filed, the claim number, if known.

(3) When an injury is found to be noncompensable under this chapter, the hospital, physician or other health care provider shall be entitled to pursue the employee for any unpaid portion of the fee or other charges for authorized services provided to the employee. Any applicable statute of limitations for an action for such fees or other charges shall be tolled from the time notice is given to the division by a hospital, physician or other health care provider pursuant to subdivision (6) of this subsection, until a determination of noncompensability in regard to the injury which is the basis of such services is made, or in the event there is an appeal to the labor and industrial relations commission, until a decision is rendered by that commission.

(4) If a hospital, physician or other health care provider or a debt collector on behalf of such hospital, physician or other health care provider pursues any action to collect from an employee after such notice is properly given, the employee shall have a cause of action against the hospital, physician or other health care provider for actual damages sustained plus up to one thousand dollars in additional damages, costs and reasonable attorney's fees.

(5) If an employer or insurer fails to make payment for authorized services provided to the employee by a hospital, physician or other health care provider pursuant to this chapter, the hospital, physician or other health care provider may proceed pursuant to subsection 4 of this section with a dispute against the employer or insurer for any fees or other charges for services provided.

(6) A hospital, physician or other health care provider whose services have been authorized in advance by the employer or insurer may give notice to the division of any claim for fees or other charges for services provided for a work-related injury that is covered by this chapter, with copies of the notice to the employee, employer and the employer's insurer. Where such notice has been filed, the administrative law judge may order direct payment from the proceeds of any settlement or award to the hospital, physician or other health care provider for such fees as are determined by the division. The notice shall be on a form prescribed by the division.

14. The employer may allow or require an employee to use any of the employee's accumulated paid leave, personal leave, or medical or sick leave to attend to medical treatment, physical rehabilitation, or medical evaluations during work time. The intent of this subsection is to specifically supercede and abrogate any case law that contradicts the express language of this section.



VERNON'S ANNOTATED MISSOURI STATUTES

**TITLE XVIII. LABOR AND INDUSTRIAL RELATIONS**

**CHAPTER 287. WORKERS' COMPENSATION LAW**

→**287.200.** Permanent total disability, amount to be paid--suspension of payments,  
when

1. Compensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the injury for which compensation is being made. The amount of such compensation shall be computed as follows:

(1) For all injuries occurring on or after September 28, 1983, but before September 28, 1986, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings during the year immediately preceding the injury, as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to seventy percent of the state average weekly wage, as such wage is determined by the division of employment security, as of the July first immediately preceding the date of injury;

(2) For all injuries occurring on or after September 28, 1986, but before August 28, 1990, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings during the year immediately preceding the injury, as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to seventy-five percent of the state average weekly wage, as such wage is determined by the division of employment security, as of the July first immediately preceding the date of injury;

(3) For all injuries occurring on or after August 28, 1990, but before August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred percent of the state average weekly wage;

(4) For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage;

(5) For all injuries occurring on or after September 28, 1981, the weekly compensation

shall in no event be less than forty dollars per week.

2. All claims for permanent total disability shall be determined in accordance with the facts. When an injured employee receives an award for permanent total disability but by the use of glasses, prosthetic appliances, or physical rehabilitation the employee is restored to his regular work or its equivalent, the life payment mentioned in subsection 1 of this section shall be suspended during the time in which the employee is restored to his regular work or its equivalent. The employer and the division shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability. In any case where the life payment is suspended under this subsection, the commission may at reasonable times review the case and either the employee or the employer may request an informal conference with the commission relative to the resumption of the employee's weekly life payment in the case.

VERNON'S ANNOTATED MISSOURI STATUTES

**TITLE XVIII. LABOR AND INDUSTRIAL RELATIONS**

**CHAPTER 287. WORKERS' COMPENSATION LAW**

**→287.470. Commission may review and change award**

Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the commission may at any time upon a rehearing after due notice to the parties interested review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall immediately send to the parties and the employer's insurer a copy of the award. No such review shall affect such award as regards any moneys paid.

VERNON'S ANNOTATED MISSOURI STATUTES

TITLE XVIII. LABOR AND INDUSTRIAL RELATIONS

CHAPTER 287. WORKERS' COMPENSATION LAW

**→287.495. Final award conclusive unless an appeal is taken--grounds for setting aside--disputes governed by this section, claims arising on or after August 13, 1980**

1. The final award of the commission shall be conclusive and binding unless either party to the dispute shall, within thirty days from the date of the final award, appeal the award to the appellate court. The appellate court shall have jurisdiction to review all decisions of the commission pursuant to this chapter where the division has original jurisdiction over the case. Venue as established by subsection 2 of [section 287.640](#) shall determine the appellate court which hears the appeal. Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall, under its certificate, return to the court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause. Upon appeal no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the commission within its powers shall be conclusive and binding. The court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:

- (1) That the commission acted without or in excess of its powers;
  - (2) That the award was procured by fraud;
  - (3) That the facts found by the commission do not support the award;
  - (4) That there was not sufficient competent evidence in the record to warrant the making of the award.
2. The provisions of this section shall apply to all disputes based on claims arising on or after August 13, 1980.