IN THE SUPREME COURT OF MISSOURI

Case No. SC98168

LUCILLE SCHOEN,
Appellant,

v.

MID-MISSOURI MENTAL HEALTH,
Respondent,

and

SECOND INJURY FUND,
Respondent.

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Appellant Lucille Schoen filed a Claim for Compensation with the Missouri Division of Workers Compensation alleging that she was injured in Boone County, Missouri while in the scope of and arising out of her employment with Respondent Mid Missouri Mental Health. The Administrative Law Judge ("ALJ") entered an award on her claim, to which the employer applied to the Labor and Industrial Relations Commission (Commission) for review. The Commission entered an Award reversing the ALJ's award denying all compensation.

Upon Appellant's/Claimant's appeal the Western District Court of Appeals, the Western District rendered its decision holding that going to the exam room was a part of treatment and reversed and remanded this case to the Commission for determination of the unresolved issues. Respondent/Employer filed a motion for rehearing and/or transfer to the Supreme Court which the Western District denied. Respondent/Employer filed a motion for transfer directly with the Supreme Court which accepted Respondent/Employer's Motion and this proceedings follows.

STATEMENT OF FACTS[1]

Procedural History

This case involves a work exposure to Cypermethrin which was accepted as compensable. While obtaining authorized treatment for respiratory injury for this exposure and while being escorted to the exam room to complete the examination, the treating doctor kicked Employee who tripped and fell resulting in orthopedic injuries and disability. The case was tried and a final award entered by the ALJ in favor of Appellant/Employee concluding that Employee was permanently and totally disabled because of chemical exposure in combination with the orthopedic injuries. The ALJ further concluded that the last injury alone was sufficient in and of itself to render Appellant unemployable without regard to any preexisting conditions. The Award assessed liability entirely against the Employer/Respondent and found no liability against Respondent/Second Injury Fund. The Employer appealed the ALJ's determination to the Labor and Industrial Relations Commission which reversed the ALJ's determination because: 1) that the orthopedic injuries did not result from receipt of medical care for a work related injury and did not aggravate the original injury; 2) the trip and fall/orthopedic injuries did not result from a risk "inherent in her employment"; and 3) that the Second Injury Fund had no liability because Appellant did not have any permanent partial disability as a result of the chemical exposure. (Legal File, Pages 45-71).

[1]Citations in the transcript shall refer to the page and line numbers (e.g. TR. Vol.1, 5:19-20) or merely to page numbers only (e.g. TR., Vol. 1, 5-6.)

The ALJ found facts and resolved disputes which the Commission did not address in its award because it ruled that Employee was not entitled to any benefits. The facts which are necessary to deciding the appropriateness of the Commission's denial are not in dispute and are limited to the above stated facts. These facts are fewer than those necessary to address all issues raised by this claim. Both opposing parties endorsed the ALJ's finding of facts in their briefs to the Commission.

Background

Lucille Schoen ("Employee") spent the majority of her career working as a registered nurse for multiple hospitals in the Mid-Missouri area. (TR. Vol. 1, 11-12) In 2001, Employee began taking shifts with State of Missouri Mid-Missouri Mental Health Center ("Employer") on a "PRN" basis. (TR. Vol. 7, 1126; 1129) Employee maintained her status as a PRN psychiatric nurse through the period of the alleged work injuries in 2009 and ultimately resigned in October of 2013. (TR. Vol. 7, 1172) During her time as a PRN nurse, Employee would work a few hours some weeks and longer hours other weeks, taking shifts as long as 14 hours. (TR. Vol. 1, 117; Vol. 5, 753) The ALJ found Employee's work hours were reduced by 80% after the injury and that she averaged only six hours per week from 2010 to 2013. (Legal File, Page 66)

Alleged Primary Injury and Subsequent Treatment

On May 8, 2009, Employee was exposed to Cypermethrin, an insect spray for ants, when it was applied around the air conditioning units at Employee's work area. (TR. Vol. 1, 103). Shortly thereafter, Employee complained of throat and eye irritation, as well as coughing and wheezing. (TR. Vol. 1, 103). After initially going to

the emergency room on May 11, 2009, Employee was returned to work without limitation. (TR. Vol. 2, 211-a). Based on continued complaints, Employee was sent by Employer to Dr. Eddie Runde for additional treatment. (TR. Vol. 1, 92). Employee appeared at the appointed time on May 22, 2009, and was sent to another office in the complex to obtain an x-ray. Upon returning to Dr. Runde's office, Employee was again escorted to the patient care area by staff to finish the exam. Dr. Runde kicked Employee as he was kicking at a small dog belonging to another patient which was running loose in the office. (TR. Vol. 1, 93) Dr. Runde's kick caused Employee to trip and to fall forward approximately 10 feet before hitting the floor. In order to avoid falling on her face, Employee twisted or turned her upper torso which resulted in Employee jamming her shoulder, twisting her neck and injuring both knees, left shoulder, left hip, lumbar spine and neck. (TR. Vol. 7, 1149-1150).

As a result of the trip and fall, Dr. Runde reported Employee had some initial discomfort in her knees. (TR. Vol. 1, 93). In his discharge summary, Dr. Runde noted that Employee had some mild knee erythema, full range of motion, and was able to walk with normal gait. (TR. Vol. 1, 93).

Dr. Runde released Employee to regular duty with no restrictions and further noted that no permanent disability would be expected as a result of the May 8, 2009, exposure. (TR. Vol. 1, 93). In Dr. Runde's findings he noted shortness of breath and his exam noted wheezing in Employee's lungs. (TR. Vol. 1, 93). He prescribed an inhaler. (TR. Vol. 1, 93). Dr. Runde scheduled Employee for a one week follow-up regarding the respiratory

symptoms or sooner if needed. (TR. Vol. 1, 93) Dr. Runde advised Employee to follow up with her personal physician regarding the fall.

On June 10, 2009, Employee was referred to Dr. Lawrence Lampton. (TR. Vol. 1, 98). Dr. Lampton explained to Employee that her cough and sinusitis were likely related to her allergies or asthma. (TR. Vol. 1, 98) He ordered a pulmonary function test, which was reviewed and determined to be within normal limits. TR. Vol. 1, 101).

Employer never returned Employee to Dr. Runde, but rather Employer sent Employee to Dr. Hyers for an IME in August 2009 regarding the ant spray exposure. (TR. Vol. 1, 103).

Dr. Hyers took a history from the Employee, reviewed records and performed a physical examination. Dr. Hyers assessed transient bronchitis and upper airway irritation. (TR. Vol. 1, 104). Dr. Hyers opined that those conditions were not chronic or permanent and were limited to the date of exposure and several days after. (TR. Vol. 1, 104). He placed Employee at maximum medical improvement ("MMI"), assessed no permanent disability, and reported Employee was mainly concerned about developing chronic asthma similar to her mother's condition. (TR. Vol. 1, 104). He told Employee that she would not develop chronic asthma as a result of the exposure (TR. Vol. 1, 104). Employee complained of symptoms of shortness of breath at final hearing and has been prescribed inhalers, prednisone, Nasacort, and Mucinex, related to the Cypermethrin exposure. TR. Vol. 1, 103; TR. Vol. 7, 1147).

Because of Employee's knee and shoulder complaints, Employer sent her to Dr. Haupt on September 10, 2009. (TR. Vol. 1, 122). X-rays of the knees were performed

and revealed chondrocalcinosis on both knees at the medial and lateral menisci, bilateral degenerative changes, and a left knee hinging osteophyte. (TR. Vol. 1, 123). Dr. Haupt also noted some flexion contracture and bilateral knee contusion, but instructed Employee to maintain her full duty work status. (TR. Vol. 1, 123). Dr. Haupt prescribed physical therapy. (TR. Vol. 1, 125). At that time, Employee's main complaint was headaches which began approximately one month prior. (TR. Vol. 1, 125). On September 30, 2009, Dr. Haupt noted improvement in the left knee flexion contracture and full strength in both shoulders. (TR. Vol. 1, 125). He released Employee to full duty work status at MMI. (TR. Vol. 1, 126). Dr. Haupt opined that Employee's permanent ratable disability was 0% at the level of the left shoulder and both knees. (TR. Vol. 1, 128). He believed that the bilateral knee contusions and that the development and/or worsening of the left knee flexion contracture was likely related to the fall. (TR. Vol. 1, 124).

Employee was still undergoing the authorized physical therapy prescribed by Dr. Haupt when he released Employee from care. (TR. Vol. 1, 126). The physical therapist recommended additional physical therapy for Employee's injuries. (TR. Vol. 1, 120-a). However, Employer did not send Employee back to Dr. Haupt, authorize this treatment or provide any other treatment after physical therapy was ended on October 14, 2009. (TR. Vol. 1, 18). Employer has not provided any additional treatment for the original injury or orthopedic injuries. (TR. Vol. 1, 18).

Employee requested Employer to provide additional treatment for her injuries, which Employer denied or otherwise declined to provide. (TR. Vol. 1, 18). After being

denied treatment by Employer, Employee obtained additional treatment on her own. (TR. Vol. 1, 19).

Dr. Bynum saw Employee for her left knee about three months later on December 11, 2009. (TR. Vol. 2, 233). Employee presented with left knee pain and also complained of some irritated back pain. (TR. Vol. 2, 233). A x-ray of the left shoulder and an MRI of the left knee were taken. (TR. Vol. 2, 235). The left knee MRI revealed knee effusion, tricompartmental degenerative changes, osteophytic bone spurring, cysts, edema, chondromalacia, and cartilage loss. (TR. Vol. 2, 236). A partial tear of the medial meniscus was also identified. (TR. Vol. 2, 237). Dr. Connors impressions were moderate tricompartmental osteoarthritic degenerative changes and chondromalacia in the left knee, underlying marrow edema, cysts (possibly related to a small tear), and tears in the menisci. (TR. Vol. 2, 237-38).

Employee was referred to Dr. Thomas Aleto, Jr. who performed a cortisone injection in the left knee on December 22, 2009. (TR. Vol. 2, 242-43). Employee continued to see Dr. Aleto who provided only conservative care but opined that Employee would need a knee replacement to address her complaints regarding her knee. (TR. Vol. 2, 242-52).

Dr. Aleto also referred Employee to Dr. George Varghese for further treatment related to back and hip pain. (TR. Vol. 2, 260).

Employee saw Dr. Varghese on May 3, 2010. (TR. Vol. 2, 260). Dr. Varghese noted a history of back problems dating back to 1996 and ordered a series of diagnostic imaging, including x-rays and MRI of the lower back. (TR. Vol. 2, 260). A translaminar

epidural steroid injection ("ESI") was administered and a follow-up appointment was scheduled. (TR. Vol. 2, 262). Employee continued to receive pain management with Dr. Varghese including additional injections and multiple radiofrequency ablations. (TR. Vol. 2, 262-78; 297-301; 312-14).

Dr. Volarich evaluated Employee on her behalf. (TR. Vol. 5, 751). Dr. Volarich took a history from Employee, reviewed medical records and performed a physical evaluation. (TR. Vol. 5, 751-69). He provided a diagnosis and disability ratings for the primary respiratory injury from Cypermethrin of upper airways and pulmonary irritation with residual non-productive cough and assigned 5% permanent partial disability body as a whole because of her shortness of breath and need for various pulmonary medication including prescription inhalers, prednisone, Nasacort, and Mucinex. (TR. Vol. 5, 765). He addressed the orthopedic injuries from the trip and fall along with pre-existing conditions ultimately concluding that Employee was permanently and totally disabled as a result of the Cypermethrin exposure and orthopedic injuries from the trip and fall and preexisting conditions. (TR. Vol. 5, 765-766).

STANDARD OF REVIEW

Article V, Section 18, provides for judicial review of the Commission's award to determine whether it is "supported by competent and substantial evidence upon the whole record." *See also*, *Kliethermes v. ABB Power T&D*, 264 S.W.3d 626, 629-30 (Mo. App. W.D. 2008). Courts review only questions of law and may modify, reverse, remand for hearing, or set aside the Commission's award only if it is found (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; or (4) that there was not sufficient competent evidence in the record to warrant the making of the award. Section 287.495.1, RSMo. As to any question involving interpretation of law, no deference to the Commission's award is warranted.

In determining whether the facts found by the Commission support the award, while an appellate court cannot substitute its judgment for that of the Commission on disputed fact questions, the Court must determine whether the Commission reasonably could have made its findings and reached its result based upon all of the evidence before it." *Fitzwater v. Dept. of Public Safety*, 198 S.W.3d 623, 627 (Mo. App. W.D. 2006).

Considering the constitutional provision and Section 287.495.1, RSMo, "A court must examine the whole record to determine if it contains sufficient competent and substantial evidence to support the award, i.e., whether the award is contrary to the overwhelming weight of the evidence. Whether the award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. An award that is contrary to the overwhelming weight of the evidence is, in

context, not supported by competent and substantial evidence." *Hampton v. Big Boy Steel Erection*, 121 S.W.3d, 220 at 222-23 (Mo. banc 2003). Judicial review is to be conducted objectively, without viewing the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award. *Id.* at 223. The examination of the record is a one-step process of determining whether "considering the whole record, there is sufficient competent and substantial evidence to support the award." *Id.* Thus, the Court looks to the whole record in reviewing the Commission's decision, not merely to the evidence that supports its decision. *Id. Kliethermes* at 629-30.

Regarding the credibility of witnesses, the Commission may not arbitrarily disregard and ignore competent, substantial, and undisputed evidence of witnesses who are not shown by the record to have been impeached, and the Commission may not base its findings upon conjecture or its own mere personal opinion unsupported by sufficient and competent evidence. Thus, where the record is wholly silent concerning the Commission's weighing of credibility, the Commission may not arbitrarily disregard or ignore competent, substantial, and undisputed evidence of witnesses. *Bond v. Site Line Surveying*, 322 S.W.3d 165, 171 (Mo. App. W.D. 2010).

POINTS RELIED ON

POINT I

The Commission erred in denying Employee's claim and ruling that the orthopedic injuries caused by the authorized treating physician during her receipt of medical treatment was not compensable, because the Commission's ruling that the additional orthopedic injuries were not an aggravation of the original injury itself and was not caused by the administration of medical treatment itself is contrary to the evidence and the ruling is based on an incorrect application of the law, in that the evidence establishes a causal connection between the original injury and the additional orthopedic injuries occurring as a consequence of Employee receiving medical care for treatment of the original injury.

Lahue v. Treasurer, 820 S.W.2d 561 (Mo. App. W.D. 1991)

Manley v. American Packing Co., 820 S.W.2d 561 (Mo. App. W.D. 1991)

POINT II

The Commission erred in denying Employee's claim and ruling that the orthopedic injuries caused by the authorized treating physician during her receipt of medical treatment was not compensable because the Commission's ruling that the injuries did not arise out of her employment is contrary to the evidence and the ruling is based on an incorrect application of the law, in that the evidence establishes a causal connection between the original chemical exposure injury and the additional orthopedic injuries as the natural and legitimate consequence flowing from the original injury and a risk source inherent in employment is not required regarding the additional injury once it is successfully found in the original injury.

Lahue v. Treasurer, 820 S.W.2d 561 (Mo. App. W.D. 1991)

Manley v. American Packing Co., 820 S.W.2d 561 (Mo. App. W.D. 1991)

Pace v. City of St. Joseph, 367 S.W.3d 137, 147 (Mo. App. W.D. 2012)

Wilson v. Emery Bird Thayer Co., 403 S.W.2d 953, 958 (Mo. App. K.C. 1966)

POINT III

The Commission erred in denying Employee's claim and ruling that the orthopedic injuries caused by the authorized treating physician during her receipt of medical treatment was not compensable, because the Commission's ruling that the injuries did not arise out of any risk source inherent in her employment is contrary to the evidence and the ruling is based on an incorrect application of the law, in that the evidence establishes Employee was not equally exposed to the risk in non-employment life and the risk source need only be a condition of employment and not necessarily inherent in employment.

287.020.3(2)(b) RSMo.

Lahue v. Treasurer, 820 S.W.2d 561 (Mo. App. W.D. 1991)

Manley v. American Packing Co., 820 S.W.2d 561 (Mo. App. W.D. 1991)

POINT IV

The Commission erred in denying Employee's claim and ruling that the claim filed against the SIF was moot, because its finding that the original injury and the orthopedic injuries caused by the authorized treating physician during her receipt of medical treatment did not cause Employee to sustain any permanent disability is contrary to the evidence and the ruling is based on an incorrect application of the law, in that the evidence establishes a causal connection between the original injury and the additional orthopedic injuries occurring as a consequence of Employee receiving medical care for treatment of the original injury, and Employee sustained permanent disability referable to her orthopedic injuries, as well as to her pulmonary condition.

Lahue v. Treasurer, 820 S.W.2d 561 (Mo. App. W.D. 1991)

Manley v. American Packing Co., 820 S.W.2d 561 (Mo. App. W.D. 1991)

ARGUMENT

POINT I

The Commission erred in denying Employee's claim and ruling that the orthopedic injuries caused by the authorized treating physician during her receipt of medical treatment was not compensable, because the Commission's ruling that the additional orthopedic injuries were not an aggravation of the original injury itself and was not caused by the administration of medical treatment itself is contrary to the evidence and the ruling is based on an incorrect application of the law, in that the evidence establishes a causal connection between the original injury and the additional orthopedic injuries occurring as a consequence of Employee receiving medical care for treatment of the original injury.

The Commission acknowledges case law that additional injuries and disability occurring as a consequence of an employee obtaining medical treatment for an original work injury is compensable. Yet, the Commission impermissibly endeavors to change this existing case law by enunciating a narrower rule by concluding that the additional injury must be an aggravation of the original injury itself, and this additional injury must be caused directly by the medical treatment itself. (Legal File, Page 48) The Commission thus concludes:

> "The injuries employee allegedly sustained while visiting Dr. Runde's office were clearly not the direct result of any necessary medical treatment for her primary injury. We conclude there is no causal connection between the alleged disabilities relating to employee's left knee pain, left shoulder

> pain, low back pain and neck pain with headaches and her Cypermethrin exposure at work on May 8, 2009. . . . This unfortunate mishap though taking place in the doctor's office, was not part of the course of any medical treatment employee was undergoing due to her ant spray exposure and did not arise out of any risk source inherent in her employment." (Legal File, P. 48).

As the Western District noted, cooperating with the doctor's directive on how and where the process of diagnosis and medical procedures will take place is necessary for the provision of proper medical treatment. Western District Opinion, p. 13. As the Western District pointed out, neither the Commission's ruling, the Employer's briefing, nor the Western District's independent research identified a single case in which a Missouri court has ruled that an employee's injuries sustained while at the medical facility for employer-directed and authorized treatment are not compensable. Western District Opinion, p. 10.

The injury did not occur while Employee was simply in the physician's office. It occurred while she was in the **middle** of the examination. It is clear that getting an x-ray is part of evaluation and treatment. After the x-ray, Employee was going to the exam room to complete the examination when the kick and trip occurred. Separating what happens in the exam room from getting an x-ray is dissecting what treatment involves far too precisely. Separating diagnostic procedures such as an x-ray and a clinical examination from the act of administering an injection as treatment is a further dissection. If a worker is at authorized treatment and in the process of obtaining treatment an

additional injury occurs in this process and not from an independent intervening event, that injury flows from the original injury and is compensable as the natural and legitimate consequence of the original injury.

State ex. rel. Blond v. Stubbs, 485 S.W.2d 152, 155 (Mo. App. K.C. 1972) is a personal injury case which cites the rule that the negligence of a physician who treats a person on behalf of the tortfeasor is a part of the original injury and that the "employment of a physician is to be regarded as flowing from and a natural consequence of the original wrong, because the necessity for such employment was imposed on the injured party by the fault of the original wrongdoer." *See also State ex. rel. Smith v. Weinstein*, 398 S.W.2d 41 (Mo. App. 1965).

The Commission's determination in this case would result in a denial of any injury caused by the doctor himself or staff such as accidentally causing the employee to fall off the exam table during the examination or if medical staff caused the employee to fall to the ground while being transferred from gurney to bed or bed to bathroom because it was not direct treatment.

There is no case which states that the subsequent injuries caused by the receipt of medical treatment must aggravate the original injury. There is no case which states that the subsequent injuries must be the result of direct medical treatment. There are cases which show a fact pattern of medical treatment that aggravates an original injury, but no case stands for the proposition that this fact pattern is required for a subsequent injury to be compensable. The following cases show a fact pattern inconsistent with the Commission's proposition:

Manley v. American Packing Co.

The Commission does not cite or discuss the 1952 Missouri Supreme Court decision *Manley v. American Packing Co*., 253 S.W.2d 165 (Mo. banc 1952) which enunciates the principle that the natural and legitimate consequence of the original injury is compensable. The *Manley* case involved an original work injury of an auto accident on April 24, 1947, in which Manley suffered a severe injury to the knee. *Id.* at 166. The second incident for which compensation was sought was a fall in an orchard on September 26, 1949, some two years and five months later because of the weakened knee from the 1947 vehicle accident. *Id.* at 168. On September 30, 1949, Manley was undergoing surgery to repair the additional injury to the knee from the fall in the orchard when he died from a pulmonary embolism for which death benefits were sought. *Id.* The court stated:

> . . . . the injuries sustained by Manley in the automobile accident seriously weakened and impaired the use of his right knee, rendering him unstable in walking and, without warning, frequently causing him to fall; that his fall in the orchard while walking on level, unplowed grassland, was due to the weakened and injured knee rather than to some external force; and that the fatal embolism which followed was, in fact, the culmination of a series of injuries, beginning with the original, each in sequence thereafter being the result of the one immediately preceding. The award is supported by competent and substantial evidence. *Id.* at 170.

In *Manley*, the Court held that a fall occurring approximately two years after the original injury, outside of the workplace and when Manley was not on the clock was compensable because the fall in the orchard resulted from the original injury of a weakened and injured knee, the primary injury in the original workers' compensation claim. *Id.* at 170. During surgery for the re-injury to the knee from the fall in the orchard, Manley suffered a fatal pulmonary emboli. *Id.* at 166. The embolism was not an aggravation of the original work injury to the knee, but was still compensable as the natural and legitimate consequence of the original knee injury. The re-injury to the knee in the orchard was not caused by direct medical treatment but was caused by the weakened knee and was compensable as the natural and legitimate consequence of the original knee injury. *Id.* at 166. The Supreme Court in *Manley* did not require the restrictive limitations on the compensability of the additional injuries, that is, the aggravation of the original injury or that the injury resulted from direct medical care.

Lahue v. Treasurer

Lahue v. Missouri State Treasurer, 820 S.W.2d 561 (Mo. App. W.D. 1991) is another case which does not impose the requirements that the additional injury be an aggravation of the initial injury or resulting from hands on treatment. Lahue injured her ankle in a compensable case and suffered additional injury to her hip and back when she fell off a chair **while undergoing whirlpool treatment for the original injury,** but not necessarily during hands on treatment. *Lahue*, at 562. (Emphasis added). Whirlpool treatment is not hands on treatment. The court did not believe it relevant to provide further detail of how the injury occurred other than that Lahue fell off a chair while

undergoing whirlpool therapy. If hands on treatment or injury by direct treatment is required the Court would have provided more detail regarding how falling off the chair was related to direct treatment. The facts provided in the decision were merely that Lahue was at therapy and fell off a chair. There is no record that the physical therapist was providing direct treatment or did something that caused Lahue to fall off the chair. *Id.*

This additional injury to the right hip and low back was compensable as the natural consequence of the original injury even though there is no link between direct administration of medical treatment and the falling off the chair. *Id.* It was sufficient that the additional injury occurred in the course of obtaining treatment for the initial injury. This case clearly shows that the additional injury **need not be an aggravation** of the original injury which was to the ankle because the fall off the chair injured the hip and back. The ankle injury and right hip and low back injuries are three distinct injuries and all compensable as the natural consequence of the original injury. *Id.*

In the instant case, Employee appeared at the appointed time on May 22, 2009, and was sent to another office in the complex to obtain an x-ray. Upon returning to Dr. Runde's office, Employee was being escorted to the patient care area by staff to finish the exam. Dr. Runde kicked Employee as he was kicking at a small dog that belonged to another patient which was running loose in the office. (TR. Vol. 1, 93) Dr. Runde's kick caused Employee to trip and to fall forward approximately 10 feet before hitting the floor. In order to avoid falling on her face, Employee twisted or turned her upper torso which

resulted in Employee jamming her shoulder, twisting her neck and injuring both knees, left shoulder, left hip, lumbar spine and neck. (TR. Vol. 7, 1149-1150)

At the time Employee sustained these additional orthopedic injuries, she was engaged in receipt of the medical care, even if not receiving direct administration of treatment itself. The Commission does not explain why *Lahue* is not directly on point. The Commission ignored the facts even in the cases it cited and draws a tortured distinction between injuries sustained by medical treatment itself and injuries sustained while receiving authorized and required treatment. Falling off a chair is no more treatment than being tripped and falling. Being at authorized whirlpool therapy is no better evidence of being in receipt of treatment than walking from an x-ray machine to the patient examination room.

The *Lahue* court did not impose the requirement that the injury had to occur while undergoing or performing actual physical therapy or treatment. The *Lahue* court did not impose a requirement that the primary or original injury is made worse by the secondary accident or medical condition. The Commission misstates the law and imposes improper requirements for Employee to prove. The Commission erred in imposing these alleged requirements for the trip and fall to be compensable. Such error is a matter of law.

The cases cited by the Commission do not support its conclusions. The parties do not dispute the holding or language in *Bear v. Anson Implement, Inc.,* 976 S.W.2d 553 (Mo. App. W.D. 1998). Employee agrees with the proposition that not all additional incidents attendant to being at the doctor's office to receive medical care are automatically compensable. The *Bear* opinion does contain the statement that not all

injuries incidental to receipt of medical care for a work injury are necessarily compensable. *Bear*, at 557. This statement is no more than a statement that not all injuries at work are necessarily compensable. Neither statement tells us what is in or what is out.

The *Bear* court did not go beyond this language that medical treatment did not sweep everything into the workers' compensation case. The court did not set forth what types of injuries would be connected to the original injury. The Commission's legal conclusion that the additional incident must occur directly from the provision of medical care and must aggravate the initial injury is not found in *Bear*. In *Bear*, the court said:

> In order to receive workers' compensation benefits, the claimant must show that his injury was caused by an accident "arising out of" and "in the course of his employment." *See* § 287.120.1, RSMo Supp. 1996; *Mann v. City of Pacific,* 860 S.W.2d 12, 15 (Mo. App. E.D. 1993). "Arising out of" the employment relationship requires a "causal connection between the conditions under which the work is required to be performed and the resulting injury." *Abel v. Mike Russell's Standard Serv.,* 924 S.W.2d 502, 503 (Mo. banc 1996) (quoting *Kloppenburg v. Queen Size Shoes, Inc.,* 704 S.W.2d 234, 236 (Mo. banc 1986). "An injury occurs in the course of employment, if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment.'" *Abel,* (quoting *Shinn v. General Binding Corp.,* 789 S.W.2d 230, 232 (Mo.App.1990).

In *Bear*, the employee attempted to avoid the coming and going to work exclusion and alleged that his going home from medical treatment for a work injury took his case out of the exclusion. *Bear*, at 558. The Court held that the injury going home from treatment was not compensable because it was the same as going home from work. *Id.* at 558-59.

The Commission's reliance on *Bear, supra* is misplaced. The facts presented in *Bear* do not support the proposition that the additional injury must be an aggravation of the original injury by medical treatment. In *Bear*, the employee was traveling home from an authorized neuropsychological visit. *Bear*, 976 S.W.2d at 555. Having completed treatment and en route home, the employee suffered a motor vehicle accident and injured his left leg and hip for which he filed a claim. *Id.* Rather than denying compensation because the motor vehicle accident did not aggravate the neuropsychological condition from the original work injury, the court found that the employee was not injured by a condition causally connected to work because he was injured while traveling home. *Id.* at 558-59. The court did not discuss the relationship between the neuropsychological injury and the left leg and hip or the lack of aggravation of the original injury nor did it discuss the absence of injury by direct treatment. Rather, the basis for the denial of compensation for the auto accident was the fact that Bear was traveling home after completing treatment at the time of his additional injury. *Id.* at 558-59.

In addition to *Manley* supra, *Lahue* supra, and *Bear*, supra, the Commission cited in support of its conclusions *Meinczinger v. Harrah's Casino*, 367 S.W.2d 666, 669 (Mo. App. E.D. 2012); *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552, 557 (Mo. App.

E.D. 2006); and *Martin v. Town and Country Supermarkets*, 220 S.W.3d 836, 847 (Mo. App. S.D. 2007). An examination of these cases is set forth below:

Meinczinger v. Harrah's Casino

The issue in *Meinczinger v. Harrah's Casino*, 367 S.W.2d 666, 668 (Mo. App. E.D. 2012) was whether the Commission lost jurisdiction over a 2007 claim, which was filed for an injury flowing from, or was the natural consequence of, a 2002 injury that was settled while the 2007 claim was pending. Claimant's 2007 claim alleged the injury in 2007 was the consequence of the 2002 injury. *Id.* The court held that the injury alleged in the 2007 claim was an injury flowing from and the consequence of the 2002 injury; therefore the Division lost jurisdiction of the 2007 claim by virtue of the settlement of the 2002 claim. *Id.* at 668-69. There is no discussion of what constitutes a consequence of the initial injury because the 2007 claim asserted the connection with the 2002 injury and therefore deals with a question of procedure.

Jennings v. Station Casino St. Charles

Jennings v. Station Casino St. Charles, 196 S.W.3d 552 (Mo. App. E.D. 2006) is cited by the Commission in a footnote. This case held that a discogram was causally related to a work related back injury and an aggravation of the back injury from an infection resulting from the discogram was compensable. *Jennings*, at 555-56. These facts fit the Commission's conclusion, but nowhere in *Jennings* is there language that limits compensability to these precise facts. *Jennings* does not support the conclusion that **only** aggravation of the original injury by treatment itself is the only natural and legitimate consequences of a work injury that are compensable.

Martin v. Town and Country Supermarkets

Martin v. Town and Country Supermarkets, 220 S.W.3d 836 (Mo. App. S.D. 2007) is a case that deals with the consequence of receiving medical care denied by the Employer/Insurer. In *Martin*, the employer Town and Country argued that the unauthorized medical care obtained by Martin was an independent intervening event attributable to Martin's own intentional conduct which terminated the employer's obligation for the work injury. *Martin*, at 847. The court rejected this allegation citing *Jennings*, and held that the additional injury and disability causally related to her receipt of medical treatment for the primary injury was compensable. *Id.* There is nothing in the *Martin* decision that provides authority for the Commission to require a narrower and more restrictive application of the natural and legitimate consequences principle enunciated in *Manley* and cases following.

A look at other cases shows a broader application of the natural consequences doctrine that additional injury may indeed be compensable without the medical treatment aggravating the original injury or direct treatment causing the injury. These cases show the issue is whether the additional injury is a natural and legitimate consequence which is causally linked to the original injury or whether there was an independent intervening event causing injury.

Wilson v. Emery Bird Thayer Company

This principle is similarly enunciated in *Wilson v. Emery Bird Thayer Company*, 403 S.W.2 953, 958 (Mo. App. D. 1966), and is premised on recognition that injuries sustained during authorized medical treatment of a prior compensable injury are the

natural and legitimate consequence of the compensable injury even if not an aggravation of the original injury. *Id.* at 958. In *Wilson* the employee had fallen and injured her arm, neck and shoulder in a compensable workers' compensation accident. *Id.* at 955. Treatment of these injuries included being placed in traction, which in turn caused an injury to her jaw. *Id.* The employer's doctors discharged her, without treatment of her jaw, and thereafter the insurer "cut off all medical treatment." *Id.* The employee therefore sought treatment for her jaw on her own, and she eventually received an award which found the employer and insurer liable for both the costs of the medical treatment and the increased disability to the jaw. *Id.* at 956-957.

Pace v. City of St. Joseph

In Pace v. City of St. Joseph, 367 S.W.3d 137 (Mo. App. W.D. 2012) the employee tore his right meniscus while performing a building inspection. *Pace*, at 140. The employee underwent surgery in 2003 and developed deep vein thrombosis and blood clot in right leg secondary to the surgery. *Id.* He later developed complex regional pain syndrome (CRPS). *Id.* After he returned to work, standing and walking aggravated the pain in the right knee, and made his right knee unstable resulting in his leg giving out and causing him to fall. *Id.* at 141-42. Pace subsequently fell five times for which separate claims were filed for three. *Id.* at 141-43.

The ALJ and Commission found that Pace sustained a compensable work injury on December 9, 2002, and this injury caused his right knee to become weak and unstable, and further caused his right knee to give out at times. *Id.* at 143. Also, the ALJ found that employee sustained additional compensable work injuries on November 2, 2004 and

December 10, 2004 and the three injuries resulted in permanent total disability. *Id.* However, the ALJ determined that the injuries sustained on Nov. 2, 2004 and December 10, 2004 were directly traceable and followed as the natural and legitimate consequences of the original accident on December 9, 2002; and these two subsequent injuries were not separate and distinct injuries from the December 9, 2002 injury. *Id.* Based on foregoing, the ALJ determined that Pace was totally disabled as a consequence of the December 9, 2002 work injury itself. *Id.*

In affirming this decision, the Court of Appeals notes that "when work is a substantial factor in causing the medical condition resulting from the original injury, "every natural consequence that flows from the injury, including a distinct disability in another area of the body, is compensable as a direct and natural result of the original injury." *Pace v. City of St. Joseph* at 147, quoting *Cahall v. Riddle Trucking, Inc*. 956 S.W.2d 315, 322 (Mo. App. 1997); *overruled on other grounds, by Hampton*, 121 S.W.3d at 226." The Court further explained that the original injury necessitated receipt of medical treatment which resulted in Pace suffering DVT and (CRPS), which together rendered the knee untrustworthy and the reason for his additional falls and additional injuries.

The Commission disregards the above settled law in Missouri by impermissibly narrowing the "natural and legitimate consequences" doctrine.

POINT II

The Commission erred in denying Employee's claim and ruling that the orthopedic injuries caused by the authorized treating physician during her receipt of medical treatment was not compensable because the Commission's ruling that the injuries did not arise out of her employment is contrary to the evidence and the ruling is based on an incorrect application of the law, in that the evidence establishes a causal connection between the original chemical exposure injury and the additional orthopedic injuries as the natural and legitimate consequence flowing from the original injury and a risk source inherent in employment is not required regarding the additional injury once it is successfully found in the original injury.

The inquiry regarding causation is different between the original injury and the additional injury. Both the original injury and the additional injury require causation but the original injury is required to meet the statutory requirement of prevailing factor and arising out of the course and scope of employment. Once the primary injury is shown to arise out of and in the course of employment, then the examination is whether there is a causal link between the additional injury and the original injury, i.e., does the additional injury flow from the original injury. A subsequent independent intervening event will break the chain of causation.

The Commission did not discuss the law regarding natural and legitimate consequence doctrine. The following is a short summary of this doctrine.

Pace v. City of St. Joseph, supra, was decided under the substantial factor test which preceded the prevailing factor test. In *Pace* the court stated:

> [w]hen work is a substantial factor in causing the medical condition resulting from the original injury, "every natural consequence that flows from the injury, including a distinct disability in another area of the body, is compensable as a direct and natural result of the primary injury or original injury." *Pace v. City of St. Joseph*, at 147.

The Court further explained that the original injury necessitated receipt of medical treatment which rendered the knee untrustworthy and the reason for his additional falls and additional injuries.

In *Wilson v. Emery Bird Thayer Company* which preceded the substantial factor test requirement, the Court stated:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct'. Thus, **'Where, without the fault of the employee, his original compensable injury is aggravated by medical or surgical treatment, there is such a causal connection between the original injury and the resulting disability or death as to make them compensable**…" (Emphasis added). *Wilson v. Emery Bird Thayer Co.*, 403 S.W.2d 953, 958 (Mo. App. K.C. 1966)

The additional injury is examined to see if there is a chain of causation between the original injury and the additional injury. In *Manley* the court stated:

> **The chain of causation means the original force and every subsequent force which it puts in motion**. If an accident causes an injury and that injury moves forward step by step, causing a series of other injuries, each injury accounting for the one following until the final result is reached, the accident which set the first injury or force in motion is responsible for the final result. It is immaterial that the final result might not ordinarily be expected. It is enough if the injury in a given case did produce the final injury or death.' Schneider on Workmen's Compensation, Vol. 6, p. 53, and cases cited in footnotes. (Emphasis added). *Manley v. American Packing Co*., 253 S.W.2d 165, 169 (Mo. 1952).

The law is well settled, that where a claimant sustains an injury arising out of and in the course of her employment, every natural consequence that flows from the injury, including a distinct disability in another area of the body is compensable as a direct and natural result of the primary or original injury." *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561, 563 (Mo. App. W.D. 1991).

Injuries sustained during authorized medical treatment of a prior compensable injury are the natural and probable consequence of the compensable injury and the employer is liable for all resulting disability." *Lahue* at 563, *citing Manley v. American Packing Co*., 363 Mo. 744, 253 S.W.2d 165 (1952); *Wilson v. Emery Bird Thayer Co*., 403 S.W.2d 953 (Mo. App. 1966); *Wilson v. Metropolitan Life Ins. Co*., 448 S.W.2d 295 (Mo. App. 1969); 1 K. Larson, Workers' Compensation Law § 13.11 (Rev.1990).

In *Manley*, the court continued:

> Injuries which follow as legitimate consequences of the original accident are compensable, and such accident need not have been the sole or direct cause of the condition complained of, it being sufficient if the it is an efficient, exciting, superinducing, concurring or contributing cause; thus it is immaterial whether or not a disability results directly from the injury or from a condition resulting from the injury. **The inquiry as to whether the result is the natural and probable, or normal or abnormal one, is immaterial**. (Emphasis added.) *Manley v. American Packing Co.*, 253 S.W.2d 165, 169 (Mo. 1952).

See also, *Wilson v. Emery Bird Thayer Co.*, 403 S.W.2d 953, 958 (Mo. App. K.C. 1966).

Missouri courts have held that Section 287.150 applies to the settlement of medical malpractice actions against medical professionals who aggravate an employee's original injury and add to the employer's liability through increased workers' compensation. *See Schumacher v. Leslie,* 360 Mo. 1238, 232 S.W.2d 913, 917-18 (1950); *Farmer-Cummings v. Future Foam, Inc.,* 44 S.W.3d 830, 837 (Mo. App. W.D. 2001). Significantly, these decisions are based on a determination that malpractice on the part of a physician which aggravates an employee's original physical injury is "not necessarily such an intervening act as to break the chain of causation between the original injury and the ultimate result, the aggravation being regarded as a probable consequence of the original injury." *ATS, Inc. v.*

Listenberger, 111 S.W.3d 495 (Mo. App. E.D. 2003), citing *Schumacher v. Leslie*, 232 S.W.2d 913, 917 (Mo. 1950). *See also Lowery v. ACF Industries, Inc.,* 428 S.W.2d 7 (Mo. App. E.D. 1968).

ATS, Inc, supra is a legal malpractice case which held that unlike medical malpractice cases, legal malpractice does not flow from the original injury, and it breaks the chain of causation.

Neither the 1993 substantial factor test nor the 2005 prevailing factor test apply to the additional injuries. While in the instant case, the doctor's kick can be identified as the risk source and meet the prevailing factor test in all regards, proving the chain of causation is sufficient. The chain of causation requires consideration of the original force and every subsequent force that it puts in motion. *Manley v. American Packing Co*., 253 S.W.2d 165, 169 (Mo. 1952)

The natural and legitimate consequence doctrine is applicable herein as the ALJ and Western District found. There is no dispute regarding the prevailing factor proof and that Employee sustained a chemical exposure injury. Once this original injury is established, the inquiry is whether the additional injuries flow from the original injury without an interruption of causation by an independent intervening event. *Pace v. City of St. Joseph*, 367 S.W.3d 137, 147 (Mo. App. W.D. 2012).

POINT III

The Commission erred in denying Employee's claim and ruling that the orthopedic injuries caused by the authorized treating physician during her receipt of medical treatment was not compensable, because the Commission's ruling that the injuries did not arise out of any risk source inherent in her employment is contrary to the evidence and the ruling is based on an incorrect application of the law, in that the evidence establishes Employee was not equally exposed to the risk in non-employment life and the risk source need only be a condition of employment and not necessarily inherent in employment.

Point III is an alternative argument if Point II is rejected. The Commission, while endeavoring to apply a legal standard, disregards case law and impermissibly creates the additional requirement that the risk source must be "inherent in employment." (Legal File, Page 48). The Commission did not discuss the issues of causal connection and equal exposure beyond its incorrect statement of "inherent employment risk" as above and its reliance upon *Bear v. Anson Implement, Inc.,* 976 S.W.2d 553 (Mo. App. W.D. 1998). The *Bear* court does not discuss inherent risk of employment. Neither the word nor the idea is contained in *Bear*.

Missouri Department of Social Services v. Beem, 478 S.W.3d 461 (Mo. App. W.D. 2015) recites that compensability is not limited strictly to injuries occurring while an employee is actively engaged in his or her duties. *Id.* at 465, *citing Scholastic Inc. v. Viley,* 452 S.W.3d 680 (Mo. App. W.D. 2014). In *Beem*, the Employee slipped and fell on ice in the Employer's parking lot while walking to her car on her break. *Beem*, at 463.

The *Beem* court indicated that the equal exposure consideration should center on whether the employee was injured because she was at work, rather than simply while he or she was at work. *Id* at 467. The court further stated, "The focus of the equal exposure analysis should be not on *what the employee was doing* when the injury occurred, but rather on whether the *risk source* of the injury was one to which the employee is exposed equally in his or her non-employment life." *Id*. (Emphasis in original). *See also Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 511 (Mo. banc. 2012). *Young v. Boone Electric Cooperative*, 462 S.W.3d 783, 790 n.9 (Mo. App. W.D. 2015).

The Court in *Beem* concluded that the employee proved that the hazard was related to her employment, insofar as her injury arose from the hazard of slipping on the ice that had refrozen on that particular parking lot. *Id. See also Duever v. All Outdoors, Inc.,* 371 S.W.3d 863 (Mo. App. E.D. 2012); *Dorris v. Stoddard County,* 436 S.W.3d 586 (Mo. App. S.D. 2014) *Wright v. Treasurer of Missouri*, 484 S.W.3d 56, 63 (Mo. App. E.D. 2015).

In the present case, Employee was required by her employer to go to Dr. Runde and receive medical care. Employee was unable to avoid being at Dr. Runde's office at that particular time. Employee was following the doctor's instructions precisely when she was tripped by Dr. Runde and fell. Employee was in the middle of the examination. She is not required to be performing work but only being where she can reasonably expect to be because of her employment. The risk was this particular doctor, and not doctors' offices in general. She was injured because she was there; not merely while she

was there. Therefore, Employee was in the scope and course of employment when receiving authorized treatment in Dr. Runde's office and was tripped.

There is no dispute in the instant case that Employee was exposed to ant spray for which she received authorized treatment and that she suffered orthopedic injuries from the trip and fall at the doctor's office while receiving authorized treatment for the ant spray. Therefore, the issue in this case regarding arising out of and in the course of employment is the same as in *Beem*. The *Beem* court stated:

> [Under Section 287.020.3(2)(b)], if Ms. Beem's injury did not come from a hazard or risk unrelated to the employment to which she would have been equally exposed outside of, and unrelated to, the employment in her non-employment life, then her injury arose out of and in the course of employment. *Id*. at 468.

See also Scholastic, Inc. v. Viley, 452 S.W.3d 680, 687 (Mo. App. W.D. 2014); *Young v. Boone Electric Cooperative*, 462 S.W.3d 783, (Mo. App. W.D. 2015); *Duever v. All Outdoors, Inc*. 371 S.W.3d 863 (Mo. App. E.D. 2012); *Dorris v. Stoddard County*, 436 S.W.3d 586 (Mo. App. S.D. 2014).

The *Beem* court cites *Young v. Boone Electric Cooperative* supra as follows:

> A claimant is not required to prove both that the hazard from which her injury arose was related to her employment and that the hazard was one which she was not equally exposed to in her non-employment life. Rather, the claimant has the burden of proving that her injury "was caused by [a] risk related to her employment activity

> *as opposed to* a risk to which she was equally exposed in her normal non-employment life.'" *Johme,* 366 S.W.3d at 512 (Emphasis added). Meaning, implicit in a finding that the claimant was exposed to the risk from which her injury arose *because* of her employment, is a finding that the claimant could have avoided the risk outside of her employment. *Id.* at 790, n.9.

Based on the foregoing, the court's analysis does not require identifying a risk inherent in employment. The focus is on whether the employee is where she is required to be, doing what is required of her and experiences an accident. It is sufficient to prove an accident occurred while in the course and scope of employment and was the prevailing factor and the employer may show that the alleged risk is one to which the employee is equally exposed in non-employment life. *Young v. Boone Electric Cooperative*, 462 S.W.3d 783 (Mo. App. W.D. 2015). The cases cited by the Commission do not support the use of the word "inherent." The courts have discussed compensability in terms of causal connection and equal exposure in non-employment life. This error by the Commission is a matter of law.

McDowell v. St. Luke's Hospital, 572 S.W.3d 127 (Mo. App. W.D. 2019) is the only case I have found using the word "inherent" in discussing arising out of and in the course of employment. In the same paragraph, the court uses the term "condition of employment." The court stated:

> There, [in Johme] nothing inherent to the workplace location or activity

> caused the employee to fall off her shoe. Here, the cause of McDowell's injury was predicated on a risk inherent to St. Luke's workplace—a congested exit's doorframe in which a wheel from McDowell's rolling cart was caught. Assuming all other requirements of the statute are satisfied, an injury may be deemed "arising out of employment" where the cause of the injury is due to some **"condition of employment"** *McDowell*, at 133. (Emphasis added.)

If one wants to use the term "inherent in employment" rather than a "condition of or incidental to employment" there is nothing more inherent in employment or a condition of employment more fundamental than following directives from the employer. A condition of employment is a broader term than inherent in employment and is the most common language and is consistent with the entire history of the Workers' Compensation Act to place on the Employer the cost of injuries to employees occurring while performing work and those occurring while engaged in activities incidental to or a condition of employment.

Employer asserts that the Western District's decision violates *Miller* and *Johme*. As noted above, if the risk source is applicable to the additional injuries, the risk source is in this case is identifiable and is a condition of employment. The doctor's kick is indeed the risk source and is resident in employment. Claimant was required to be in this particular doctor's office to be examined and treated. This is a condition of employment. Claimant was required to go to the exam room which is a condition of employment. Claimant was not voluntarily in this particular doctor's office or at this particular time.

Claimant did not have any discretion as to the doctor to see, the time of appointment, the path to the exam room or a choice of exam rooms. The employer picked the doctor and set the appointment time. She was being escorted by the doctor's staff to this particular room along this particular path. This journey was a condition of employment. The risk source is the trip by the doctor.

Employer cites *Miller v. Missouri Highway Transp. Com'n*, 287 S.W.3d 671 (Mo. banc. 2009) as being contrary to the Western District's decision because being directed to the place where the accident occurred is not sufficient causation. *Miller* held that a knee injury occurring on the job was not compensable because there was no contribution to the injury by work other than it occurred at work. *Id.* at 673. The *Miller* court identified various conditions all of which were absent which could have been the basis for rendering Miller's knee injury compensable. *Id.* at 672. Similarly, in *Johme*, supra, the employee solely decided the kind of shoes she wore and employment did not require or determine the type of foot wear the employee was to wear. For *Miller* or *Johme* to be applicable, Appellant/Employee would have had to be just walking and fall without any cause being identified as a condition of employment.

The court in *McDowell* clearly differentiates *Johme* and *Miller* from *McDowell* and states: "In *Johme*, the Supreme Court of Missouri made clear that it is irrelevant whether an injury occurs while the employee is engaged in a work-related activity, but instead the inquiry is whether the injury is **deemed to arise out of employment.** *McDowell*, at 133.

POINT IV

The Commission erred in denying Employee's claim and ruling that the claim filed against the SIF was moot, because its finding that the original injury and the orthopedic injuries caused by the authorized treating physician during her receipt of medical treatment did not cause Employee to sustain any permanent disability is contrary to the evidence and the ruling is based on an incorrect application of the law, in that the evidence establishes a causal connection between the original injury and the additional orthopedic injuries occurring as a consequence of Employee receiving medical care for treatment of the original injury, and Employee sustained permanent disability referable to her orthopedic injuries, as well as to her pulmonary condition.

The Commission incorrectly applied the law in finding that Employee had no permanent disability as a result of her Cypermethrin exposure, and in ruling that Employee had not sustained any permanent disability sufficient to support an award against the SIF. The latter ruling occurred because the Commission concluded that because the initial injury was not aggravated by the treatment itself that "there is no causal connection between alleged disabilities relating to employee's left knee pain, left shoulder pain, low back pain, and neck pain with headaches and her Cypermethrin exposure at work on May 8, 2009." Based on this ruling, the Commission failed to render an assessment of permanent disability referable to the additional orthopedic

injuries occurring as a consequence of Employee receiving medical care for treatment of the original injury.

Manley v. American Packing Co., 253 S.W.2d 165 (Mo. 1952) is precedent for the kick and the resulting injuries being legitimate consequences of the chemical exposure and are properly included in the assessment of disability. In *Manley*, the Employer argued that the original fall sustained by the Employee was not the immediate cause of the embolism that resulted in Employee's death and therefore broke the chain of causation from the original accident. The Employer argued that the second fall in the orchard was a "new, independent and intervening cause not arising out of or during the course of his employment." The Court rejected Employer's argument in *Manley* and stated:

> The chain of causation means the original force and every subsequent force which it puts in motion. If an accident causes an injury and that injury moves forward step by step, causing a series of other injuries, each injury accounting for the one following until the final result is reached, the accident which set the first injury or force in motion is responsible for the final result. ***It is immaterial that the final result might not ordinarily be expected***. It is enough if the injury in a given case did produce the final injury or death….(Emphasis added.) Thus injuries which follow as legitimate consequences of the original accident are compensable, and such accident need not have been the sole or direct cause of the condition

> complained of, it being sufficient if it is an efficient, exciting, superinducing, concurring, or contributing cause; thus it is immaterial whether or not a disability results directly from the injury or from a condition resulting from the injury. Also, if the resultant disability is directly traceable to the original accident, the intervention of other and aggravating causes by which the disability is increased will not bar recovery. *Id.* at 169.

The Court in *Lahue* offers similar analysis and support that an employee may suffer additional permanent disability attributable to additional injuries caused by receipt of medical treatment, and such injuries do not need a direct link between the administration of medical treatment itself and the additional injuries. In *Lahue*, the employee fell off a chair while at physical therapy for treatment of an ankle injury, and the additional injury provided additional disability referable to her right hip and low back.

Although the Commission denied the orthopedic injuries are compensable, the Commission did not find or conclude that Employee had not sustained any permanent disability referable to these orthopedic injuries. The evidence presented in the case establishes the occurrence of Employee sustaining additional permanent disability referable to her left knee pain, left shoulder pain, low back pain, and neck pain with headaches, causally related to Employee suffering Cypermethrin exposure at work on May 8, 2009 and the resulting medical treatment for this pulmonary exposure condition.

The orthopedic injuries as noted and considered above caused Employee to sustain permanent disability from the work injury sufficient to support the claim filed against the

Employer and SIF. The Commission's conclusion that Employee experienced no pulmonary permanent disability failed to consider any orthopedic disability. Therefore, the Commission committed error as a matter of law.

In addition, the Commission finding and ruling that that Employee did not sustain any permanent disability from the pulmonary injury is not supported by competent and substantial evidence. The Commission premised its decision on the choice of doctors, with the Commission crediting Dr. Runde and Dr. Hyers' opinions, while finding Dr. Volarich's disability opinion as "de minimis" and not persuasive. In rendering this decision, the Commission did not discuss the basis for crediting Dr. Runde or Dr. Hyers' opinions over Dr. Volarich other than to provide its characterization of Dr. Volarich's rating. In choosing Dr. Runde and Dr. Hyers' opinions, the Commission set no basis for crediting these opinions over Dr. Volarich other than Dr. Volarich's opinion was de minimus. (Legal File, Page 48). The Commission did not mention Dr. Haupt who did make a causal connection between the knee injury and the trip and fall. (Legal File, Page 26).

The fact that an injury is rated at 5% cannot be disregarded because it may be considered de minimis. There were not findings regarding Employee's testimony or history of use of medication subsequent to the chemical exposure. The Commission's logic excludes compensation for minor injuries that do rate a percentage of disability.

Dr. Volarich opined that as a consequence of Employee suffering an occupationally related Cypermethrin exposure, Employee sustained a respiratory injury from Cypermethrin of upper airways and pulmonary irritation with residual non-

productive cough. Dr. Volarich further opined that this pulmonary injury caused Employee to suffer residual shortness of breath and to present with need for various pulmonary medications including prescription inhalers, prednisone, Nasacort, and Mucinex. (TR. Vol. 5, 765)

Based on these residual effects, Dr. Volarich opined that Employee sustained a permanent partial disability of 5 percent to the body as a whole. This disability opinion is not de minimis but reflects the level of disability Dr. Volarich believes Employee incurred. The disability opinion provided by Dr. Volarich is not an excessive or exaggerated rating. If it is truly de minimis, then it should be accepted without objection.

In contrast, Dr. Runde merely offers a speculative opinion relative to likely disability. In his opinion, Dr. Runde expresses the belief that Employee suffered exposure to the bug poison and presented with local irritation with her lung examination having notable diffuse wheezes and some rhonchi. Based on his examination and findings, Dr. Runde found wheezing and irritation of the throat, and prescribed medication, including an inhaler, and scheduled a follow-up examination with understanding that Employee may continue to suffer from the local irritation. Although Dr. Runde permitted Employee to return to work, and expressed the belief that he did not anticipate Employee having permanent disability, he never saw Employee again to validate or confirm his anticipated result. As such, Dr. Runde does not negate the medical opinions provided by Dr. Volarich nor was he in a position to comment on the ultimate outcome.

The Employer did not permit Employee to return to Dr. Runde for follow-up care. Rather, the Employer sent Employee to Dr. Hyers for an IME. Based on this examination, Dr. Hyers acknowledged that Employee sustained a work injury due to her occupational exposure to Cypermethrin, and appears to credit Employee's complaints and recognize Dr. Runde's findings. Further, Dr. Hyers diagnosed this injury to be in the nature of transient bronchitis with upper airway irritation. In referring to this injury as a transient condition, Dr. Hyers provided an opinion that Employee had not sustained any permanent disability, suggesting that Employee's condition would resolve in a few days after the exposure.

Although we do not have a definition of "a few days," Employee presented to Dr. Runde two weeks after the exposure and still had symptoms. Further, as acknowledged by Dr. Hyers, Employee was continuing to be symptomatic relative to her work injury when she was examined by Dr. Hyers, approximately three months removed from the exposure. And since the Employer authorized Employee to see Dr. Hyers this one time, Dr. Hyers did not see Employee again so he was unable to validate or confirm his anticipation that the condition was only temporary.

Dr. Volarich was the only doctor to be in a position to have medical records, question Employee, and look back to determine the course of the pulmonary condition excited by the Cypermethrin exposure. Temporary complaints do sometimes become permanent and Dr. Volarich alone had the opportunity to assess this. The Commission erred in dismissing Dr. Volarich's opinion and relying on doctors' opinions that were not based on any actual examination but only anticipation.

CONCLUSION

The Commission erred in reversing the decision of the Administrative Law Judge and in not finding and concluding that Employee sustained additional orthopedic injuries to her left knee, left shoulder, low back pain and neck with headaches while undergoing authorized medical treatment for the original and compensable pulmonary injury. As the natural and legitimate consequence of the pulmonary injury, these additional injuries and disabilities are causally related to the original work injury. Further, the Commission erred in reversing the decision of the Administrative Law Judge and in not finding and concluding that the injury of May 8, 2009, inclusive of the additional orthopedic injuries and disabilities, considered in isolation renders Employee permanently and totally disabled.

Appellant prays this case be remanded with instructions that an award be entered which finds that the trip and fall by Dr. Runde and its sequellae are medically causally connected with the respiratory injury which occurred on May 8, 2009; to reconsider the issues of whether Employee is entitled to reimbursement for past and future medical expenses related to the fall; and to reconsider the nature and extent of Employee's disability including whether Employee is permanently and totally disabled against the employer or the Fund.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellant's Brief complies with the limitations set forth in Rule 84.06(b), contains 11,842 words, as counted by the word-processing software used, Microsoft Word 2013, the typeface are size 13 Times New Roman. The signature block of the foregoing brief contains the information required by Rule 55.03.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of this brief to all attorneys of record electronically via Missouri's eFile system this 9th day of December, 2019.

/s/ Truman E. Allen
Truman E. Allen