

**MISSOURI WORKERS' COMPENSATION CASE  
LAW UPDATE**

**April 2008 - June 2008**

## TABLE OF CONTENTS

### I. PROCEDURAL

#### Jurisdiction of Commission

John Cox, deceased, and Betty Cox v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. ED89751-01 (Mo.App. E. D. 2008)..... 1

James Winberry, Deceased, Barbara Winberry, Jacob Winberry, Joshua Winberry, Hannah Winberry, John Winberry, Heather Winberry, and James Winberry, Jr. V. Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. ED89770-01 (Mo.App. E. D. 2008)..... 1

Cynthia Phelan v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. WD68023 (Mo.App. W. D. 2008)..... 2

Robert Stonecipher v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. SD28658 (Mo.App. S. D. 2008)..... 3

### II. EVIDENCE

#### A. Credibility of Witnesses

Linda Cardwell v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. ED90226 (Mo.App. E. D. 2008)..... 5

Deann Henley v. Fairgrove R-10 School District, Case No. SD28565 (Mo.App. S. D. 2008)..... 7

Jackie Lingerfelt v. Elite Logistics, Inc., and Treasurer of the State of Missouri, as Custodian of Second Injury Fund, Case No. SD28506 (Mo.App. S. D. 2008)..... 9

John Richardson v. Missouri State Treasurer, Custodian of the Second Injury Fund, Case No. ED90619 (Mo.App. E. D. 2008) ..... 10

**B. Idiopathic Injuries**

Gary Ahern v. P&H, LLC and American Family Mutual Insurance Company, Case No. ED90314 (Mo.App. E D. 2008)..... 11

**C. Arising out of Employment**

Timothy Miles v. Lear Corporation, and Zurich North America Insurance Company, Case No ED89961 (Mo.App. E. D. 2008)..... 13

**III. COMMISSION TRENDS**

.....

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## I. PROCEDURAL

### Jurisdiction of Commission

**John Cox, deceased, and Betty Cox v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. ED89751-01 (Mo.App. E. D. 2008).**

**James Winberry, Deceased, Barbara Winberry, Jacob Winberry, Joshua Winberry, Hannah Winberry, John Winberry, Heather Winberry, and James Winberry, Jr. V. Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. ED89770-01 (Mo.App. E. D. 2008)**

**FACTS:** In *Cox*, John Cox was awarded permanent and total disability benefits against the Second Injury Fund after a hearing on July 11, 2003. When Mr. Cox passed away on February 25, 2006, the Second Injury Fund ceased paying benefits. Mr. Cox's wife requested that the benefits continue, however, the Treasurer asserted that the claimant's death terminated its responsibility of payment. The Commission said that it did not have jurisdiction to hear the case.

In *Winberry*, James Winberry was awarded permanent and total disability benefits against the Second Injury Fund on January 7, 1998. James Winberry passed away on February 16, 2006, and payments of disability benefits ceased. On January 21, 2007, in *Schoemehl v. Treasurer of the State of Missouri*, the Missouri Supreme Court ruled that permanent and total disability benefits were to be paid to a claimant's dependents after his death (See our January 2007-March 2007 Quarterly). Based upon the ruling in *Schoemehl*, the Winberrys filed a Motion to Substitute Parties and requested the permanent and total disability payments resume. The Commission determined that it had no statutory authority to review the permanent and total disability award because it lacked jurisdiction.

In *Cox* and *Winberry*, the claimant's dependants appealed to the Court of Appeals. The Appellate Court found that the public interest and importance of the issues concerning the application of *Schoemehl* regarding the continuation of permanent and total disability benefits to dependents was important and transferred the cases to the Missouri Supreme Court.

Pursuant to Rule 83.02, the cases were retransferred from the Missouri Supreme Court back down to the Missouri Court of Appeals for the Eastern District to issue new opinions regarding the interpretation of *Schoemehl*.

The Court of Appeals noted that in general, its review is limited to what is prescribed by statute; however, it is not bound by the Commission's interpretation and application of the law. In light of that, the Court was not bound to the Commission's interpretation of whether or not the holding in *Schoemehl* would allow for the reinstatement of current total disability benefits for a surviving dependent.

The Court discussed the rules set forth in *Schoemehl* that apply when a claimant dies of causes unrelated to his work injury and is survived by dependents. In *Schoemehl*, the injured employee's case was still pending when he died and, although he had begun receiving TTD benefits, no final award was issued against the Second Injury Fund for permanent total disability. And, no decision was made, prior to his death, as to whether he had dependants.

**HOLDING:** The Court of Appeals noted that the *Cox* and *Winberry* matters were factually different than *Schoemehl*; thus, it opined that the new cases before it would have a different result. It held that the awards in *Cox* and *Winberry* were both final prior to the employee's death; therefore, the Commission did not have statutory authority to reopen and review those awards. In light of that, the Court affirmed the Commission's dismissal for lack of jurisdiction.

**Cynthia Phelan v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. WD68023 (Mo.App. W. D. 2008)**

**FACTS:** Cynthia Phelan filed a Second Injury Fund claim for permanent partial disability in August 2001, which was amended in March 2006 to allege permanent total disability. On July 20, 2006 Phelan received a show cause notice indicating that the Division of Workers' Compensation (Division) had placed her claim on the dismissal docket for September 15, 2006.

Phelan's counsel sent a letter to the Division, which was received on August 2, 2006, that requested removal of the case from the dismissal docket, because depositions were scheduled for October 2006 and medical evidence was still being collected. On October 19, 2006, the ALJ entered an Order to dismiss Phelan's claim for "failure to prosecute", which could be appealed if Application for Review was filed with the Commission in 20 days.

Notice of the dismissal was not mailed to Phelan's counsel. However, the Division mailed a copy of the Order directly to Phelan on November 20, 2006. On that same day, her counsel filed an Application for Review with the Commission asking that the dismissal Order be set aside since the Division failed to send him notice of the Order.

The Commission dismissed the Application for Review for lack of jurisdiction, because it was not timely filed within 20 days of the Division's dismissal.

The claimant challenged the Commission's decision, contending: (1) her Application for Review was timely filed because it was filed within 20 days of her counsel receiving

notice of the ALJ's dismissal; and (2) that the Commission erred in dismissing her claim, because the Division provided insufficient notice of the dismissal.

The Court noted that in general an Application for Review must be filed within 20 days of dismissal and that the time period begins to run when the Commission has served notice of the ALJ's decision in accordance with the statutory procedures. There are two ways to properly send notice of a dismissal for failure to prosecute. The first option is to send notice directly to a party by certified mail. In the second option, notice must be mailed by regular mail to both the party and the party's counsel.

In this case, the Court of Appeals noted that there was no dispute Phelen's counsel did not receive notice of the dismissal Order from the Division. The question then became whether the notice that was mailed directly to Phelen was sent via certified mail.

**HOLDING:** Since the record did not indicate that Phelen was served notice via certified mail, the Court of Appeals held that notice was insufficient. The Court reversed and remanded the decision back to the Commission to consider the date and method of service and whether the Application for Review was timely filed.

**Robert Stonecipher v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. SD28658 (Mo.App. S. D. 2008)**

**FACTS:** The claimant was injured on the job and sought workers' compensation benefits from his employer and the Second Injury Fund (Fund). An ALJ ruled that, as a result of the accident, the claimant sustained 35% PPD, which equated to 140 weeks of compensation that were owed to him by the employer. The ALJ also found that the claimant's current and prior disabilities combined rendered him permanently and totally disabled, which resulted in liability against the Fund beginning March 19, 2003.

The ALJ's award specifically provided that beginning March 19, 2003, the employer should pay 140 weeks of PPD, at a rate of \$329.42 per week, for a total of \$46,118.80. The Fund was ordered to pay permanent total disability at the rate of \$338.87 per week; however, for the first 140 weeks of disability, it was only liable for the difference of the PPD and PTD rates, which amounted to \$9.45 per week. Beginning November 2005, the Fund would then pay the entire amount of permanent total disability of \$338.87 per week. On appeal, the Commission reduced the employer's PPD liability from 140 weeks to 40 weeks. On appeal, the Fund refused to seek relief or participate in the proceedings; however, the Commission also set aside the PPD award against the Fund and absolved it of all liability.

The claimant appealed the Commission's Award, arguing that it exceeded its power in setting aside the Fund's liability without giving the claimant appropriate notice and opportunity to be heard. In a prior decision, the Court of Appeals vacated the Commission's award that absolved the Fund of all liability and remanded the case for further proceedings.

To clear up the confusion, in a March 2007 Order, the Commission affirmed the ALJ's award of PTD benefits against the Fund. However, the March Order did not explain when those benefits were to begin and neither party appealed that order. Subsequently, the employer paid 40 weeks of PPD and the Fund began to tender PTD benefits at the \$9.45 differential rate for 140 weeks and the full \$338.87 PTD rate thereafter. The claimant argued that the Fund should begin paying the full PTD rate after the employer's 40 weeks of PPD benefits ended and requested that the Commission enter an Order regarding the same. The Commission dismissed the claimant's motion for lack of jurisdiction.

The Court of Appeals noted that the Commission correctly held that the claimant requested that it enforce an award, which is a judicial function that the Commission cannot perform. However, with respect to the award, the Appeals Court found that it is the Commission's duty to rule upon every issue presented regarding the determination of liability in a workers' compensation claim.

The Court opined that liability is not fixed "until it is determined from whom the employee is entitled to recover." When the Commission entered its last final award, it was incomplete on its face, because it did not properly refer to the earlier award. In addition, the Commission's initial award adopted parts of the ALJ's award and modified others, so it became unclear what parts of the last and final award were modified.

**HOLDING:** The Court of Appeals remanded this case back to the Commission to state with particularity whether the Fund is required to pay PTD benefits from the date that the PPD benefits from the employer cease.

## **II. EVIDENCE**

### **A. Credibility of Witnesses**

#### **Linda Cardwell v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. ED90226 (Mo.App. E. D. 2008)**

**FACTS:** The claimant filed two formal Claims for Compensation for injuries that she sustained, on separate occasions, after she fell at work and injured her lower back. The first injury occurred in 2001, and as a result she was referred to Dr. Scodary who performed a hemilaminotomy and discectomy to treat a right herniated disc. After that surgery, she was released to return to work without any medical restrictions.

On April 4, 2002 she reinjured her back. She continued to work until July 2003 when she underwent a second surgery, an L4-5 and L5-S1 anterior lumbar interbody fusion with BAK cages, which was performed by Dr. Scodary in July 2003. She was then released to return to work with restrictions of lifting and bending.

Almost two years later, on March 21, 2005, Dr. Scodary performed a third lumbar surgery, including an L4-5 and L5-S1 decompressive laminectomy and post-lateral fusion with stabilization screws and rods. Dr. Scodary noted that this procedure was necessary to treat pseudoarthrosis from the fusion performed in July 2003.

The claimant settled her claims with the employer and then proceeded against the Fund. At a hearing, she testified that in the time leading up to her May 2001 injury, she was working full duty without medical restrictions for any condition. She also testified that she attributed her difficulties with daily living activities such as driving a car, lifting, and going to the grocery store to her last injury of April 4, 2002.

Dr. Jerome Levy testified on behalf of the claimant and opined that she had a 20% PPD referable to her May 2001 lower back injury of which 5% was pre-existing. Following the third surgery, he opined that she had a 55% PPD of her low back of which 30% was due to the April 2002 injury. Dr. Levy's final report regarding the claimant's PPD ratings was issued on October 21, 2005.

Dr. Wayne Stillings issued a report on behalf of the claimant, which provided that the claimant had a 50% PPD due to psychiatric factors of which 25% were related to a pain disorder and 25% related to a mood disorder. In his report, Dr. Stillings opined that of those ratings, 10% were pre-existing relative to the April 4, 2002 injury.

James England also testified and provided a report on the claimant's behalf, which concluded that the claimant was permanently and totally disabled and could not compete in the open labor market due to her age, education, work experience, and medical conditions.

The ALJ issued an award finding the claimant was entitled to 21 weeks of PPD benefits from the Fund arising from the May 2001 injury. With regard to the April 4, 2002 injury, the ALJ found that the claimant was permanently and totally disabled due to a combination of her impairments and awarded lifetime benefits to begin August 23, 2009. Based upon the date of Dr. Levy's final report, the ALJ found that the claimant reached MMI on October 21, 2005 and since the employer settled his liability for 200 weeks, that placed the Fund's liability beginning August 22, 2009.

The Commission affirmed the ALJ's decision.

**HOLDING:** The Court of Appeals upheld the Commission's decision and addressed each of the claimant's arguments for appeal separately.

The claimant's first argument alleged that the Commission erred in finding that the May 2001 injury and her pre-existing injuries did not meet the Fund threshold. The Court disagreed with this and noted that the determination of a specific amount or percentage of disability awarded to a claimant is a finding of fact within the unique province of the Commission. In determining the percentage of disability, the Commission is not bound by the percentage estimates of medical experts and it may consider all the evidence, including the testimony of the employee.

The Appeals Court noted that the Commission stated that it found the claimant generally credible with regard to her testimony that she had no pre-existing problems before the May 2001 incident. And, the Commission's finding that it did "not think the extent of the disabilities [rose] to the levels opined by Dr. Stillings or Dr. Levy" was a judgement call regarding the credibility of experts that the Commission was free to make.

The claimant's second argument alleged that the Commission erred with regard to the decision that she reached maximum medical improvement on October 21, 2005 from her April 2002 injury. The claimant contended that the Commission's decision was incorrect because it (1) precludes payments of PPD benefits until MMI is reached; and (2) is based upon the eligibility for TTD benefits from the employer when the claimant never received those benefits.

The Commission held that the claimant's argument was without merit. In reaching this conclusion, the Court noted that TTD benefits are due from the date of the injury occurs through the date the condition reaches the point where further progress is not expected. After reaching the point where no further progress is expected, it is then determined whether there is a permanent partial or permanent total disability. The claimant's argument that her PPD benefits should be calculated from the date of injury since she did not receive TTD benefits from her employer is without merit since the date that the benefits would normally be calculated begins once an individual reaches MMI or when TTD benefits conclude.

Her third argument stated that the date of MMI should have been March 24, 2005 instead of October 21, 2005. With regard to that argument, the Court of Appeals held that the Commission properly used the claimant's own physician's rating report to establish the date she reached MMI. The Court held that the claimant's suggestion that she reached MMI on March 24, 2005, which is three days after her third surgery, is not supported by any medical evidence and does not take into account recovery time.

The Court of Appeals upheld the Commission's decision in regard to all points on appeal. **Deann Henley v. Fairgrove R-10 School District, Case No. SD28565 (Mo.App. S. D. 2008)**

**FACTS:** The claimant worked as an elementary school teacher for Fairgrove R-10 School District for one school year starting in August 2001. At the start of her employment, access to her classroom was delayed due in part to water being on the floor. Once she was able to access the classroom, the claimant noted that it was "dank" and "smelled very mildewy."

After teaching in her classroom for approximately two months, she began to experience difficulty breathing and reported itchy eyes, a runny nose, and a cough. The problems progressively became worse and by November 2001, she treated with her physician, Dr. Scott Ellis, for viral bronchitis. Dr. Ellis noted that his treatment had improved the claimant's symptoms, but that the problems did not go away.

In November 2001, in response to her complaints, she was removed from her classroom and placed in another room. The employer conducted air-quality testing, on five occasions, which revealed no indication of active fungal amplification.

On July 1, 2002 she filed a formal Claim for Compensation, and at a hearing before an ALJ, the employer submitted deposition testimony from Dr. Gerald Kerby. In his report, Dr. Kerby noted that the air samples taken from the school indicated that the levels found inside the building were lower than levels of similar mold detected in the outside air. He further stated that the claimant's skin tests were negative for the presence of mold antibodies and that her chest x-rays were normal, which led him to believe that she "probably had an acute inflammatory bronchitis in 2001 which was most likely viral in nature."

Dr. Oscar Schwartz testified via deposition on behalf of the claimant. In response to the claimant's complaints, Dr. Schwartz recommended an allergic bronchopulmonary aspergillosis panel in order to detect any reaction to fungi, such as respiratory problems. In this test, the doctor noted the claimant was allergic to *Aspergillus niger*, which he admitted was a "very common" mold associated with the decomposition of organic material such as plants and paper.

After all the evidence was presented, the ALJ found that the claimant's condition was not compensable and denied benefits. On appeal, the Commission affirmed the ALJ's decision. From that, the claimant appeals arguing that the Commission erred by holding that her mold allergy was due to exposure to mold outside the classroom when there existed no evidence indicating anything other than occupational exposure.

The Appeals Court noted that in order to support an award in a claimant's favor, a medical expert in an occupational disease case must establish (1) the probability that the disease was caused by conditions in the work place; and (2) a direct causal connection between the conditions under which the work is performed and the occupational disease. The Appeals Court held that the Commission is the ultimate trier of fact and with regard to causation and work-relatedness, the question of fact is solely for the Commission's determination. To determine whether the claimant's condition is the result of hazards of everyday life or to a risk or hazard inherent in her work depended upon the acceptance or rejection of conflicting medical opinions or theories, and therefore it is the duty of the Commission to either accept or reject those opinions.

In its decision, the Commission noted that the claimant's argument failed because her own expert, Dr. Schwartz, stated that that *Aspergillus niger* is a "very common mold" and that finding was confirmed by the employer's expert, Dr. Kerby, who testified that "*Aspergillus niger* is a ubiquitous fungus, it's everywhere."

**HOLDING:** The Appeals Court held that the Commission properly concluded that Dr. Kerby's testimony was more credible and consistent with the entire medical testimony

and the environmental air samples; therefore, it was supported by competent and substantial evidence and was affirmed.

**Jackie Lingerfelt v. Elite Logistics, Inc., and Treasurer of the State of Missouri, as Custodian of Second Injury Fund, Case No. SD28506 (Mo.App. S. D. 2008)**

**FACTS:** On May 19, 2001, the claimant was operating a one person vehicle used to move trailers around a warehouse facility when he ran over a 3 foot by 15" deep hole causing him to bounce out his seat and hit his head on the top of the vehicle, which jammed his neck and back. He was able to finish his shift that day. On June 9, 2001, he informed his employer that he could not continue to work due to his injuries from that incident.

He subsequently underwent a cervical discectomy and arthrodesis at C5-6 and C6-7 and bone grafting and plating from C5 to C7, which was performed by Dr. Ceola on November 9, 2001. After the surgery, the claimant indicated that he experienced almost 100% improvement in the pain in his neck, however, he did note a fair amount of muscle spasm in that area.

On December 11, 2001, the claimant saw Dr. Ceola for a routine follow-up and noted that he developed stroke like symptoms approximately two weeks following the surgery. In light of that, he was referred to a neurologist, Dr. Wong.

Dr. Wong examined the claimant on January 18, 2002 and concluded that his symptoms were the result of small vessel strokes related to his pre-existing heart condition, which was a patent foramen ovale and paroxysmal atrial fibrillation. In his report, Dr. Wong stated that it was with reasonable certainty that the claimant's May 19, 2001 accident and cervical surgery were not related to the multiple strokes and resulting symptoms, since the hole in the claimant's heart had most likely been present since birth.

The ALJ found that the claimant's cervical condition was work related but not the stroke symptoms. In reaching that conclusion, the ALJ noted that the opinions of Drs. Ceola and Schwartz confirmed those of Dr. Wong and were more credible than the claimant's testimony and therefore gave them more weight.

On appeal, the Commission adopted the findings of the ALJ and awarded compensation against the employer for 20% of the body as a whole, referable to the claimant's cervical injury. With respect to the claim against the Second Injury Fund, the Commission found that it was not liable because the claimant testified that he was in good health prior to the date of his injury and that his pre-existing conditions of pain, depression, Hepatitis and his heart problems were not symptomatic prior to that time.

From that, the claimant appeals the Commission's decision to deny his request for permanent total disability benefits against the Second Injury Fund.

**HOLDING:** The claimant's first argument stated that the Commission erred in determining he did not have pre-existing disabilities, which would meet the threshold for Fund liability. The claimant stated that the Commission did not consider his testimony to make its decision; however, the Appeals Court noted that this argument failed to consider all the medical testimony presented and only relied upon a few brief portions that appeared favorable to his claim. The Court opined that the issue is one of credibility and that the weight to be given to each witness rests with the Commission alone.

The claimant's second argument alleges that the Commission erred in finding that there was no causal connection between the claimant's stroke and his lumbar spine condition. To support his argument, the claimant relies upon the physicians notes that described his sensitivity to medications that he received during surgery. Again, the Court noted that the Commission based its findings on the medical opinions of Drs. Ceola, Wong, and Schwartz. The Court held that the findings were based upon competent and substantial evidence of the whole record and denied the claimant's second point of appeal.

With regard to the claimant's third point, he argued that the Commission erred by not finding that the claimant was permanently and totally disabled as a result of the stroke. Again, point three was denied because the Court held that the Commission found that the medical testimony from Drs. Ceola, Wong and Schwartz were ultimately more credible, and therefore the decision was supported by substantial and competent evidence of the whole record.

**John Richardson v. Missouri State Treasurer, Custodian of the Second Injury Fund, Case No. ED90619 (Mo.App. E. D. 2008)**

**FACTS:** The claimant filed a Claim for Compensation alleging injuries to his neck, cervical spine, shoulders, thoracic spine, arms, hands, low back, knees and feet. The claim against the employer was settled and a hearing was held before an ALJ regarding Second Injury Fund liability.

The ALJ found that the claimant failed to "persuade" that the combination of his pre-existing disability and his last injury rendered him unemployable on the open labor market; therefore, his claim against the Fund was denied. On appeal, the Commission affirmed the ALJ's award, noting that it was supported by competent and substantial evidence.

From that, the claimant appeals, arguing the ALJ completely disregarded the opinion of his expert, Mr. England, because it was "flawed."

The claimant's argument states that his case is nearly identical to *Highley v. Von Weise Gear*, 247 SW3d 52 (Mo.App. 2008), where the Commission found that the fund was not liable for PTD based upon the uncontradicted testimony of Mr. England. (See January 2008-March 2008 Quarterly). The Appeals Court disagreed with the factual similarities between the claimant's case and those presented in *Highley*. The Court noted that in *Highley*, Mr. England's opinion regarding PTD was uncontradicted. However, in the

case at bar, there were several conflicting opinions with regard to whether the claimant was capable of employment.

In addition, although the Commission did determine that Mr. England's opinion was "flawed to the extent that it fails to take into consideration all of the expert medical opinions in the matter related to work restrictions", this Court held that the Commission did not completely disregard Mr. England's testimony in making its decision.

**HOLDING:** The Appeals Court held that the Commission properly commented upon the credibility of Mr. England's testimony and opinion and was free to reject that opinion in favor of those from the other testifying doctors and witnesses.

## **B. Idiopathic Injuries**

### **Gary Ahern v. P&H, LLC and American Family Mutual Insurance Company, Case No. ED90314 (Mo.App. E D. 2008)**

**FACTS:** In February 2006, the claimant fell from a roof while working as a carpenter and injured his shoulder. The claimant alleged that his fall was due to a seizure caused by a prior motor vehicle accident. In a hearing before an ALJ, the claimant's claim was denied because the injury resulted directly or indirectly from an idiopathic cause. The Commission affirmed the ALJ's award, and from that, the claimant appeals.

In his first point of appeal, the claimant argues that the Commission erred in defining "idiopathic" to mean "peculiar to the individual, innate" because the Commission relied on abrogated case law for the definition. He further argued that the correct definition for "idiopathic" is a dictionary definition that states "other disease or injury whose cause is unknown."

The Court of Appeals disagreed with the claimant's first argument and noted that in 2005, the Legislature amended RSMo § 287.020.3, which deals with definitions, by adding subsection (3) that reads, "an injury resulting directly or indirectly from idiopathic causes is not compensable." In addition, the Legislature further amended RSMo § 287.020 by adding "it is the intent of the Legislature to reject and abrogate earlier case law interpretations on the meaning or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of employment' . . ."

The claimant then argued that the Commission erred in relying on *Alexander v. D.L. Sutton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993) for its definition of "idiopathic." To support this argument, he stated that RSMo § 287.020 abrogated *Alexander*; therefore, the definition of idiopathic was abrogated as well.

In response to this argument, the Court of Appeals held that the definition of idiopathic has traditionally been defined through case law and unless a statute clearly abrogates common law by express statement or implication then the common law would stand. Upon review, RSMo § 287.020 neither expressly nor implicitly abrogates either case law

interpretations of the definition of idiopathic; therefore, the Commission did not err in using this definition.

In his next point, the claimant suggests that the Commission erred in applying RSMo § 287.020.3(3), because the statute specifically states that “[a]n injury resulting directly or indirectly from idiopathic causes is not compensable. The claimant basically argues that the injury must result from multiple idiopathic causes, not just one, before it is not considered compensable. The Appeals Court held that it interprets the Section to indicate that there are a vast number of idiopathic causes that exists, any one of which would render a resultant injury non compensable. Therefore, that point was denied. Then the claimant argued that the Commission erred in applying RSMo § 287.020.3(3), because a causal connection existed between the claimant’s injury and his work since his work place contributed to an increased risk of the accident. The claimant further stated that the facts of his case were similar to those found in *Alexander v. D.L. Sutton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993), wherein the employee became dizzy and fell from a raised platform on which he was required to work. The Court held that the definition of “arising out of” as set forth in *Alexander* would not apply, because the Legislature’s 2005 amendment of Section 287.020 rejected earlier case law defining “arising out of”.

The claimant then argued that the Commission erred in defining idiopathic, because it resulted in a conflict between RSMo § 287.020 and the American Disabilities Act. The Court of Appeals dismissed this argument and held that the claimant failed to show that the denial of compensation for injuries related to idiopathic causes is more likely than not due to a disability. To the contrary, the Court noted that the decision to award compensation based on an injury’s relation to an idiopathic, or innate, cause is, instead, a question of causation. Accordingly, denying causation when the claimant’s injury results directly or indirectly from idiopathic causes did not violate the ADA.

The claimant’s next argument stated that the Commission erred in defining idiopathic, because the definition rendered RSMo § 287.020 in violation of the Open Court’s provision of the Missouri Constitution. The Appeals Court noted that the Open Court’s provision prohibits any law that unreasonably or arbitrarily bars individuals and classes of individuals from accessing the Courts in order to enforce recognizable causes of action. Since the claimant was not barred from enforcing a recognized cause of action, the Commission’s definition of an idiopathic did not violate the open Court’s provision. In his final point, the claimant asserted that the Commission erred in defining idiopathic because such definition would violate the equal protection clause of the United States and Missouri Constitutions. In reaching its decision, the Appeals Court noted that the purpose of the workers’ compensation act is to place upon the employer the losses sustained by employees resulting from injuries “arising out of and in the course of employment.” Injuries resulting directly or indirectly from idiopathic conditions are not wholly work-related.

The Court noted that the State has a legitimate interest in making sure that employees are compensated for work related injuries. In light of that, it is acceptable to distinguish between those injuries that are idiopathic (and unrelated to work) and those that are strictly work related. The claimant's final point was denied.

**HOLDING:** Affirmed. The claimant's injuries resulted from an idiopathic cause and are not compensable.

### **C. Arising out of Employment**

#### **Timothy Miles v. Lear Corporation, and Zurich North America Insurance Company, Case No ED89961 (Mo.App. E. D. 2008)**

**FACTS:** The claimant was hired as a union employee at Lear's Wentzville plant in February 2000. The collective bargaining agreement provided for one 30 minute unpaid break, during which employees were free to leave the premises, and two 15 minute paid breaks during which they were required to remain on site in order to resume work promptly. While on breaks, some employees and managers often played basketball on a court that was located just outside the building, but on Lear property. On February 19, 2004, Miles injured his knee while playing basketball during a paid break.

The Commission concluded that Miles' injury was compensable because (1) it arose out of and in the course of his employment and the basketball games were the regular incident of employment; and (2) although Miles was engaged in a voluntary recreational activity for which benefits are generally forfeited, his injury fell within an exception to that rule because he was paid while participating.

The Court of Appeals noted that RSMo § 287.120.1 holds an employer liable, regardless of fault, when an employee sustains an injury "arising out of and in the course of his employment." An injury arises out of employment if it is a "natural and reasonable incident thereof." When an employee sustains an injury during participation of a recreational activity, benefits are payable when the employee is paid compensation while participating in the activity.

**HOLDING:** Affirmed. the Appeals Court held that since the claimant's injury occurred during his paid 15 minute break, it was therefore compensable.

### **III. COMMISSION TRENDS**

Over the last three months, the Commission has ruled on 30 cases and reversed or modified only seven of those cases. Of those seven cases, only five were changed regarding liability against the employer and insurer.

In *Roger Bock v. City of Columbia, and Treasurer of Missouri, as Custodian of the Second Injury Fund*, Inj. No. 05-072941, the Commission determined that the employee

failed to offer medical evidence expert testimony with regard to the nature and extent of his disability; therefore, the ALJ's award was reversed and compensation was denied. In *Norman Heiskell v. Golden City Foundry, Inc., c/o Travelers Casualty & Surety*, Inj. No. 03-144610, the Commission determined that the employee failed to prove that the pulmonary embolism that he sustained was caused by his work; therefore, the ALJ's award was reversed and benefits were denied.

The Commission modified the ALJ's award in *Elbert Hicks v. Wire Rope Corporation of America, c/o Missouri Private Sector Individual Self-Insurers Guaranty Corporation*, Inj. No. 01-154605. The Commission determined that the award should have included benefits for past medical care in the amount of \$32,697.58.

The Commission modified a temporary award in *Mark McCulloch v. Tasco Construction c/o Transportation Insurance Company, and Treasurer of Missouri, as Custodian of the Second Injury Fund*, Inj. No. 02-111874. The Commission affirmed all findings and conclusions of the Administrative Law Judge except for its analysis and award concerning temporary total disability owed to the employee. In its review, the Commission noted that it could not reconcile the totals that the ALJ arrived at with regard to the TTD benefits. In light of that, it reviewed the proposed award and stated that the employee should have received TTD benefits from October 16, 2002 through April 14, 2005.

In *Floyd L. Wilcut, deceased and Sharon Wilcut, widow v. Innovating Warehousing, c/o American Manufacturers Mutual Insurance Company*, Inj. No. 00-041020, the Commission issued an Order in accordance with the Missouri Court of Appeals for the Eastern District's opinion that was delivered on January 15, 2008. The Commission directed the employer/insurer to pay Sharon Wilcut, widow, death benefits in the amount of \$292.04, commencing May 1, 2002 and continuing until Sharon Wilcut loses her status as dependent under Section 287.240.