

Case Law Update July 2008-September 2008

Exclusive Jurisdiction

Nicholas Anderson by his Next Friend, Crystal Anderson v. Ken Kauffman & Sons Excavating, L.L.C., Case No. WD66777 (Mo. App. W.D. 2008)

FACTS: On November 14, 2005, Brian Reeves, the father of Nicholas Anderson, died as the result of a work related injury. Nicholas Anderson, by and through his mother, filed a wrongful death claim against his father's employer, alleging they failed to take certain safety precautions. The employer filed a motion to dismiss due to lack of subject matter jurisdiction, asserting it was immune from civil liability because workers' compensation was the exclusive remedy. Following a briefing and hearing, the trial court entered a final judgment dismissing the wrongful death suit due to a lack of subject matter jurisdiction.

Nicholas Anderson appealed, asserting that the dismissal was erroneous because the wrongful death claim arose during the 108 day period from August 28, 2005 through December 14, 2005, where the exclusivity requirement was not in effect. The exclusivity provision was not included in the amended act, but was again amended to reintroduce the exclusivity provision in a special session in September 2005. This amended reintroduction did not include an emergency clause, so it did not take effect for ninety days.

HOLDING: When a statute's language is ambiguous or if its plain meaning would lead to an illogical result, extrinsic matters such as the statute's history, surrounding circumstances, and objectives to be accomplished through the statute may be considered. The amendment made during the special session was merely a drafting error correction. Therefore, the trial court did not misconstrue the workers' compensation statute, and exclusive jurisdiction remains with workers' compensation.

Larry Boshears and Jamie Baggett v. Saint-Gobain Calmar, Inc. and William T. Whitlow, Case No. WD67443 (Mo. App. W.D. 2008).

Marion Michael Distefano v. Saint-Gobain Calmar, Inc. and William T. Whitlow, Case No. WD67541 (Mo. App. W.D. 2008).

FACTS: Larry Boshears, Jamie Baggett and Marion Distefano sued Saint-Gobain Calmar for negligence due to injuries sustained while performing work on Calmar's premises.

Calmar is in the business of manufacturing liquid dispensing systems, such as trigger sprayers and lotion pumps. In March 2004, Calmar began a construction project to renovate one of its manufacturing plants. Calmar hired William Whitlow to serve as Plant Engineer. Seventy-five percent of Whitlow's duties were related to normal maintenance of the plant while the remaining

25% were related to remodel, construction and renovation.

Calmar hired outside contractors to perform the demotion and renovation work. Country Club Contractors was hired to remove gas lines and electrical lines. Country Club subcontracted with Docs Painting, which is where Boshears and Baggett worked. Calmar hired American Sprinkler, which is where Distefano worked.

On June 22, 2004, Boshears and Baggett were cutting a gas pipe when a fire erupted. Distefano noticed the blaze and helped remove the two men from the burning fire. When it was all over, each man had suffered burned to their faces, arms, shoulders and upper extremities. Whitlow, Calmar's plant engineer, admitted that he was supposed to turn off the gas line, which caused the fire; however, he had failed to do so.

Calmar does not dispute that Boshears, Baggett and Distefano suffered injuries. Instead, Calmar argues that it is their statutory employer, so Workers' Compensation is the exclusive remedy. In support of this argument, Calmar relies upon *West v. Posten Constr. Co.*, 804 S.W.2d 743, where an individual who was contemporaneously an owner and general contractor was liable to his independent contractor for Workers' Compensation benefits as a statutory employer.

A verdict was awarded against Calmar in Circuit Court, and from that, Calmar filed a Motion asserting that the Circuit Court lacked subject matter jurisdiction, because pursuant to RSMo 287.040.2, the matter fell within the exclusive remedy of Workers' Compensation since Calmar was the statutory employer of Boshears, Baggett and Distefano. The Circuit Court denied the Motion, and Calmar appealed.

The Court of Appeals noted that RSMo 287.040 holds an employer liable, under Workers' Compensation, to contractors, subcontractors, and their employees who are injured on the premises of the employer while doing work which is in the usual course of his business. Furthermore, if an owner serves a dual capacity as both owner and general contractor in renovations that are the regular part of the business then the owner is a statutory employer and Workers' Compensation is the exclusive remedy.

HOLDING: The Appeals Court noted that Calmar is unlike the owner in *West*. In *West* the owner had a dual role of contractor and owner, and was performing contracting work as a regular part of his business. Calmar, although the owner, was not renovating the manufacturing plant as a regular part of its fluid dispensing business. The Court held that the exception did not apply and that Calmar was not a statutory employer. In light of this, Workers' Compensation was not the exclusive remedy and the civil cases could move forward.

Jurisdiction to Appeal Temporary or Partial Awards

Kristen Norman v. Phelps County Regional Medical Center and Liberty Mutual Insurance Co., 256 S.W.3d 202 (Mo. App. S.D. 2008).

FACTS: The claimant alleged a post 2005 amendment work related injury, and at a hearing, the ALJ denied all benefits. The claimant appealed to the Commission, at which time a temporary or partial award finding the claimant sustained a compensable injury that entitled her to workers' compensation benefits was issued. The employer and insurer then appealed.

Typically, only final awards are appealable and temporary or partial awards are not. There are two exceptions for appealing temporary or partial awards in workers' compensation. The first, which was created by statute, states that a temporary or partial award of permanent total disability may be appealed. The second is a judicially created exception and allows for limited review where an employer claims it is not liable for paying any compensation and is disputing all liability. This judicially created exception came into existence before the 2005 law change. The Court noted that the 2005 amendments changed the rule construction in that, reviewing courts shall construe the provisions of this chapter strictly.®

HOLDING: Application of the prior judicially created exception would be in violation of the clear legislative intent to limit the appellate review of the Commission. In compliance with the recent amendments to the workers' compensation law, the Court of Appeals found that it was without jurisdiction to hear an appeal from a temporary or partial award of the Commission.

Motor Control Specialties, Inc. and The Ohio Casualty Insurance Company v. Stephen M. Petelik and Labor and Industrial Relations Commission, Case No. WD68210 & WD68753 (Mo. App. W.D. 2008).

FACTS: Stephen Petelik filed a claim for Worker's Compensation benefits alleging injuries to his left arm and lower back. Motor Control Specialties and their insurer stipulated that the arm injury was related to the work accident, however, denied that the back injury was related.

At a hearing, an ALJ issued a temporary award and found that Petelik's back injury was related and ordered Motor to pay past and future medical bills, as well as, TTD benefits. Motor asked the Commission to review the temporary award and argued that it was not liable for the payment of any compensation. The Commission dismissed the appeal stating that it lacked jurisdiction to review a temporary award. From that, Motor appealed to the Eastern District. The Eastern District also dismissed the appeal for lack of jurisdiction.

From the Eastern Districts dismissal, Motor filed a Declaratory Judgement with the Circuit Court in the Western District arguing that 8 CSR 20 -3.040 (2), which concerns the appeals' procedures for temporary awards, violated the United States Constitution and Missouri's Bill of Rights in that it abars the employer/insurer's right to a timely review of adverse decisions and therefore constitutes a deprivation of property without due process of law.® Basically, Motor argued that it

was unfair that it risked penalties if it did not comply with payment of the temporary order, before a final award or judicial review. Petelik filed a Motion to Dismiss the Declaratory Action, which the court granted. In granting Petelik's motion, the court held that it lacked jurisdiction to declare 8 CSR 20-3.040 unconstitutional, because the hearing before the ALJ was sufficient to satisfy due process.

From the Western District's dismissal, Motor appeals.

HOLDING: The Court of Appeals for the Western District held that the Circuit Court's decision finding that 8 CSR 20 - 3.040, the appeals process for temporary awards, was constitutional was inconsistent with its decision to dismiss the declaratory action for lack of subject matter jurisdiction.

The Court noted that Motor challenged the validity of the appeals process for temporary awards and not the actual manner in which the regulation was applied to their case. Since the statute itself was challenged using valid constitutional principles, then the Western District could not dismiss the Declaratory Action for lack of subject matter jurisdiction. The Appeals Court remanded the case back to the Circuit Court for the Western District to make a ruling on the merits of Motor's petition regarding the constitutionality of 8 CSR 20-3.040 as it applies to the appeals process for temporary awards.

James R. Doerr v. Teton Transportation, Inc., Case No. SD 28686 & 28698 (Mo. App. S.D. 2008).

FACTS: James Doerr is an over the road truck driver for Teton Transportation. Doerr alleges that on August 6, 2005, while exiting his truck in Dalton, Georgia, he stepped in a pot hole and twisted his right ankle. Teton denied the claim, because Doerr did not follow the accepted route and was actually 50-75 miles off course when he injured his ankle in Dalton, Georgia.

At a hearing before an ALJ, a temporary award was issued which found his ankle injury compensable and awarded past and future medical expenses, TTD benefits and attorney fees and costs. Teton filed an application to review of the temporary award with the Commission. The Commission modified the temporary award and reversed the award of costs. From that, Doerr appeals and argues that the Commission did not have jurisdiction to modify a temporary award. Teton cross-appealed and argued that the Commission erred in finding it liable for Doerr's injuries.

HOLDING: The Court of Appeals held that the Doerr's argument lacked jurisdiction. The court noted that Section 287.495 authorizes an appeal from a final award of the Commission. If the award is not final, then an appeal may be heard if it concerns the issue of the employer's liability. The Appeals Court noted that Doerr's arguments do not concern the employer's liability, but instead involve a temporary award reversing costs. In light of that, Doerr's appeal lacked jurisdiction.

With regard to Teton's argument, the Court of Appeals held that it was able to review the Commission's decision since it regarded the employer's liability. In reviewing the Commission's decision the Court noted that it will only reverse or set aside an award if there is not sufficient competent evidence to support the award. The court held that the evidence supported that Doerr, an over the road truck driver, would reasonably travel through Dalton, Georgia to complete his route. Therefore, an injury sustained in Dalton, although not part of the planned route, was within the course and scope of the employment and was compensable.

Jurisdiction of the Commission

Sachs Electric Co. and TIG Insurance Co. v. Robert Mapes, deceased, and Anna Mapes, 254 S.W.3d 900 (Mo. App. W.D. 2008).

FACTS: Sachs Electric Co. employed the claimant in October 1987, prior to his death from exposure to asbestos. In 1994, the Division ordered the employer to pay the claimant's widow \$269.81 per week, and the amount was affirmed by the Commission. In 2007, the employer and insurer filed an appeal with the Commission pursuant to section 287.470, which states that an appeal can be made at any time due to a change in condition, requesting a review of the death benefit award. They requested the review due to an unspecified 1999 third-party recovery that resulted in an overpayment of \$4,184.80.

The Commission dismissed the application because the employer and insurer could not show a change in physical condition of the claimant had occurred. Therefore, the Commission stated it had no statutory authority to review the matter. The Court of Appeals noted that Missouri courts have consistently interpreted the Achange of condition@ language in section 287.470 to mean a change in physical condition. The employer and insurer argued that section 287.470 did not offer employers and insurers any relief in situations where final awards of the Commission need to be altered to correct past or future errors.

HOLDING: Without a change in physical condition, the Commission did not have jurisdiction to hear the employer and insurer's appeal. Decades of case law have denied the Commission any more authority than in the statute. Legislation alone can increase the jurisdiction of the Commission.

Causation

Norman Heiskell, deceased, Paula Heiskell, Dependent Spouse, and Charissa Heiskell and Aaron Heiskell, Dependent Children v. Golden City Foundry and Traveler's Casualty and Surety Co., Case No. 29054 (Mo. App. S.D. 2008).

FACTS: On November 19, 2003, the claimant passed away at home from a pulmonary

embolism. The claimant had been employed by Golden City Foundry for thirteen years, and co-owned the business with his cousin. On August 19, 2004, the claimant's wife and children filed a claim for compensation, alleging the claimant's death resulted from work related blunt force trauma sustained on October 31, 2003 at approximately 12:00 a.m. No other information was noted with respect to the injury.

A hearing was held, during which the claimant's father testified that he saw the claimant limping real bad but the father could not recall which leg was injured. The claimant's father stated that the claimant told him he had broken his leg while at work when he was loading something or moving something. He thought that something that weighed about 500 pounds fell off of something and hit the claimant in the leg. The claimant told his father he would be all right and did not seek medical treatment. The claimant's father also testified that, three days before his death, the claimant and the father were preparing to go hunting when the claimant passed out. The claimant was taken to a hospital where a doctor told the claimant he needed to be admitted for at least 48 hours so tests could be performed. However, the claimant did not want to stay and left the hospital.

The claimant's daughter testified that, about three to four weeks before his death, her father asked her for Asports cream for an upper thigh injury, and that her father told her a pallet had hit him in the thigh. The claimant's son testified that about three weeks before he passed away, the claimant told him that he was messing with a pallet, it started to fall, the claimant went to catch it and it landed on his lower abdominal area and his leg.

The claimant's wife testified that the claimant was diabetic, but only sometimes took the prescribed medication. She further testified that she was not aware of a work accident, but stated the claimant wouldn't have told her about an accident because she would have made him go to the doctor and he hated doctors. George Nichols, a friend of the claimant, testified that he saw the claimant limping and the claimant stated that he hurt himself a little. Mr. Peterson, the claimant's cousin with whom the claimant co-owned the business, testified that he worked closely with the claimant and never saw him limping during the applicable time period.

Dr. Koprovica testified that, based solely upon the father's testimony, the claimant's work injury caused deep vein thrombosis that embolized causing the pulmonary embolism. The claimant's personal doctor noted that the claimant had followed up with him after his hospital visit and made no mention of a work injury. There was no mention of the claimant's leg, or any leg pain, at all in the personal physician's records. Dr. Boulware testified that numerous things could have caused the claimant's pulmonary embolism and he could not conclusively state the specific cause of the embolism. He also testified that there was no medical evidence to support a work related injury.

An ALJ found that the claimant's pulmonary embolism was caused by a work related injury, and ordered the employer and insurer to pay medical benefits in the amount of \$1,511.15 and funeral expenses in the amount of \$5,000.00. On appeal, the Commission ruled that the claimant's death

was not the result of a work related injury and denied death benefits on the grounds that the claimant's dependents had not met their burden of proof that the claimant sustained a work related accident and therefore failed to satisfy the burden of proof that the claimant's death was due to a work related accident.

The claimant's dependent's appealed, alleging the Commission applied the wrong legal standard, in that the Commission used a post 2005 standard in a pre 2005 case. They also alleged the Commission's finding applied the wrong law because the applicable law to this case is that all doubts must be resolved in favor of the [Employee] and in favor of coverage. They also alleged that the Commission improperly disregarded the testimony of the father, the claimant's children, and Mr. Nichols.

HOLDING: On review of the Commission's award, the Court of Appeals noted that all law cited by the Commission was pre 2005 law, so there was no indication that the Commission applied the wrong law. With respect to the second argument, the Court of Appeals noted that there was never any requirement that Commission accept all the claimant's evidence as true. In this case, after evaluating all the evidence, the Commission determined that the opinion of Dr. Boulware was more credible than Dr. Koprova. The Commission is the sole judge of credibility. The Commission did not exclude the testimony of the father, the claimant's children and Mr. Nichols. Rather, the Commission found their testimony to not be credible in that their testimony was based upon singular statements made by the claimant. The Commission further found their remarks inherently biased because they were family members, particularly when corroborating evidence was lacking.

Elaine Casteel v. General Council of the Assemblies of God and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund, 257 S.W.3d 160 (Mo. App. S.D. 2008).

FACTS: The claimant alleged two work related injuries. The first was an accident claim for injuries to the neck and shoulders. The second was an occupational disease claim for the same body parts.

At a trial, the ALJ awarded the claimant 22% of the right shoulder, 15% of the left shoulder and 10% of the body as whole referable to the neck in the accident case. The ALJ determined that the evidence did not support a finding of an occupational disease. The ALJ specifically found the employer and insurer's expert, Dr. Woodward, to be more persuasive.

On Appeal, the claimant argued that Dr. Woodward's opinions lacked foundation because the doctor relied upon a video that did not depict all of the claimant's job duties and did not examine the claimant or take a history relating to the occupational disease claim. While the video failed to depict the breaking process, the claimant admitted that breaking projects occurred only four to five times a year. The claimant further argued that the Commission exceeded its powers in admitting Dr. Woodward's inadmissible opinions, and that the record cannot support the award without them.

HOLDING: Dr. Woodward did not rely solely on the video. He was the treating physician following the claimant's fall at work and had examined and taken or updated the claimant's medical history multiple times during the fifteen-month treatment period. Finally, when the video was presented as evidence, the claimant made only the foundational objections from the video, but not the other objections she was now asserting. The video was properly introduced, the claimant's objection was properly ruled upon, and the Commission was within its discretion to rely on the opinions from Dr. Woodward.

Stanley Roberts v. City of St. Louis and Treasurer of the State of Missouri as Custodian of the Second Injury Fund, Case No. ED 90150 (Mo. App. E.D. 2008).

FACTS: Stanley Roberts was an employee for the City of St. Louis. In October 2002 he was involved in an automobile accident, while engaged in the course of his employment for the City, subsequently, he filed a formal claim for compensation.

On April 25, 2006, the parties involved tried the matter before an ALJ. Shortly after the end of the trial, the parties agreed to a settlement, which included a \$200,000 lump sum payment and the set-up and funding of a Medicare set-aside trust. The agreement was not reduced to writing, because the amount of money needed to fund the trust was yet to be determined. In light of the agreement, the parties went before the ALJ and requested additional time to determine the monetary requirements to fund the trust.

On August 2, 2006, before the parties reduced their agreement to writing, the ALJ issued an award, which concluded that the employee was not permanently and totally disabled as a result of the primary work injury. In light of the award, the claimant filed an application with the Commission to enforce the oral settlement agreement. The Commission agreed with the claimant and ordered the City to pay a lump sum of \$200,000. From that, the City appeals.

The Court of Appeals held that there was not sufficient and competent evidence to support the Commission's determination that the City agreed to fund the Medicare Trust. The Court based its decision upon standard rules of contract, which require meeting of the minds between all parties, before an agreement is reached.

HOLDING: In this case, the court noted that neither party knew the exact numbers that were to be placed in the stipulation, because the issue with the funding of the Medicare trust had yet to be decided. The court reasoned that since there was no meeting of the minds regarding the exact amount of the settlement, then the agreement was not enforceable.

Accident

Susan Van Winkle v. Lewellens Professional Cleaning, Inc. and Treasurer of the State of Missouri as Custodian of the Second Injury Fund, Case No. WD68669 (Mo. App. W.D. 2008).

FACTS: One of the claimant's specific job duties was to clean patient rooms, which required her

to strip the beds of their sheets, clean the bed, and then put clean sheets on the bed. While cleaning a patient room on April 4, 2003, she retrieved clean bedding from the hallway, which she then placed in a chair. When she was ready for it she turned to the chair in order to pick up the bedding. When doing so, the claimant felt a pop in her left hip, and, shortly thereafter, a severe burning sensation and sharp pains in the left leg. The claimant reported the incident to her supervisor, filled out paperwork, and was taken to the office of Dr. Jones, where she received treatment.

The claimant continued to receive treatment, and after an MRI and CAT scan, pre-existing cysts were found on the claimant's spine. The claimant then began treating with Dr. Oh, who performed two surgeries to remove the cysts. After the surgeries, the claimant continued to have significant complaints, at which time Dr. Oh stated that the claimant's complaints were not related to the cysts, but to a musculoskeletal strain.

The claimant then filed a claim, alleging PPD, and, in the alternative, PTD. At a hearing, an ALJ determined that the claimant did not sustain a compensable injury or accident and denied all benefits. The Commission agreed with the ALJ.

HOLDING: This is an 2003 case, and was decided based upon the old law. The Court of Appeals determined that the claimant was involved in an accident, because the claimant identified an event, @ the hip pop and pain. This event was not disputed by the employer and insurer. The claimant could have sustained an injury, despite the fact that she was performing actions that she performed outside of work in her daily life, because those actions were an integral part of her job. The Court of Appeals remanded the case for further proceedings to determine whether her job duties caused her injury, need for medical treatment, and disability.

Past Medical Expenses

Andrew Meyers v. Wildcat Materials, Inc. and Zurich Insurance Co., Case No. 28744 (Mo. App. S.D. 2008).

FACTS: The claimant had a job that required him to load, deliver and unload sheet rock and other building materials that frequently involved lifting more than 100 pounds alone or with a helper. In August 2003, the claimant began to experience leg numbness, and medical records indicated no recent trauma but that the claimant did a lot of pulling and lifting at work. In January 2004, the claimant sought emergency treatment for left leg pain, was given orders to remain out of work. At that time, the claimant completed a disability insurance application indicating his back complaints were not work related. The claimant was then informed that he required surgery. He notified his employer of the upcoming surgery and the employer consented to the claimant being off of work. After the surgery, the claimant was returned to work with a 50-pound lifting restriction.

The claimant and the employer testified that they did not know repetitive back injuries were

compensable under workers' compensation. Therefore, the claimant never requested medical treatment, or submitted medical bills to the employer, before his surgery.

At trial, an ALJ determined the claimant's back injury was compensable and ordered the employer and insurer to reimburse the claimant for past medical expenses, in addition to other workers' compensation benefits. The Commission adopted the ALJ's award.

The employer and insurer appealed, arguing that the Commission erred when ordering that they reimburse the claimant for past medical expenses because the claimant obtained the medical treatment on his own without affording the employer and insurer the opportunity to authorize medical treatment.

The facts of this case were unique because neither the claimant nor the employer were aware that the claimant suffered a work related injury at the time the claimant sought and was provided appropriate medical treatment. The Commission found that the employer and insurer did not suffer any prejudice as a result of the claimant's medical treatment. The Court of Appeals noted that there is no assumption that the employer's right to direct medical treatment trumps the claimant's right to receive medical treatment.

HOLDING: The Court of Appeals found that, if a claimant seeks medical treatment for a work condition without knowledge at the time of that treatment that the condition was work related, and the employer is not prejudiced by that treatment then a liberal construction requires the employer and insurer reimburse the claimant for that treatment even though the employer and insurer did not have the opportunity to select treatment. There would be likely be a different result if this was a new law case, because the new law must be Astrictly construed.@

Employer/Employee Relationship

Phillip Hurn v. Schoen Equipment Inc., 253 S.W.3d 587 (Mo. App. S.D. 2008).

FACTS: The claimant approached the business manager of Schoen Equipment about a job. The claimant heard that Schoen was looking for someone to paint some buildings, and the business manager told the claimant they would discuss permanent employment after the painting was complete. The claimant was paid \$8.00 and hour and did not purchase any of the paint or supplies needed to paint the buildings. The claimant did not work a set schedule, but kept track of the hours he did work. He was told he could work during or after business hours, and was paid in cash by Mr. Schoen at Mr. Schoen's office at Schoen Equipment.

The claimant fell from a ladder while painting a building, injuring his right knee. He required surgery and rehabilitation. The claimant filed a claim, and Schoen denied the claimant was an employee. After a hearing, the ALJ determined the claimant suffered a compensable injury and Schoen and its insurer were liable for benefits. Schoen and its insurer were ordered to pay past medical bills, 21 weeks of TTD, 17.5% of the left knee. The employer and insurer appealed,

arguing that the Commission erred in determining that the claimant was an employee of Schoen.

HOLDING: The employer and insurer's brief did not comply with Rule 84.04(d)(2)(C) because the points relied on did not explain why the evidence was insufficient, and therefore presented nothing for appeal. The case could have been dismissed for this reason. However, the Court of Appeals reviewed the record and determined that the Commission's decision was supported by competent and substantial evidence.

Permanent and Total Disability Benefits

Wanda Farmer v. Advanced Circuitry Division of Litton, Consitution State Services Co. and Treasurer of the State of Missouri as Custodian of the Second Injury Fund. 257 SW3d 192 (Mo. App. S.D. 2008).

FACTS: The claimant had a history of back injuries. In 1975, she injured her back while working for a different employer, and underwent surgery in 1977. In 1983, the claimant injured her back again, while working for this employer. She underwent a second back surgery following that injury. Since her second back surgery in 1983, the claimant has not been able to return to work for the employer, but has been able to run a babysitting service out of her home.

In June 1992 the claimant filed a claim pertaining to the 1983 back injury, requesting benefits from the employer and the Second Injury Fund. At a hearing, an ALJ awarded the claimant 35% of the body as a whole for her back condition, as well as future medical treatment. This decision took into account the fact that the claimant was earning income through her babysitting service. The Commission adopted the ALJ's ruling.

On appeal, the claimant argued that the Commission should have found her permanently and totally disabled. On cross appeal, the employer argued that they should not be required to provide future medical treatment. The employer presented evidence that, in the more than 20 year period since the claimant's 1983 injury, she had slipped and fallen on ice three times, was in a car accident, and slipped on wet grass and Adid the splits.@ However, two doctors, Dr. Volarich and Dr. Harmon, enumerated that the incidences did not cause any new back injury.

HOLDING: The claimant was currently employed in the open labor market by virtue of her babysitting business. Therefore, she is not permanently and totally disabled. There was sufficient and competent evidence to support an award of future medical treatment.

Michael Strait, Natural Father and Legal Guardian of Joshua Neal Strait and Mick Tyler Strait v. Treasurer of the State of Missouri as Custodian of the Second Injury Fund, 257 S.W.3d 600

(2008) (en banc).

FACTS: Rosalyn Strait was injured on the job and awarded permanent total disability benefits. After the award, but within the 30-day period while the case was subject to review, the claimant died of injuries unrelated to her work injury. The Second Injury Fund filed a timely appeal.

On appeal, the court of appeals substituted Michael Strait, Rosalyn's former husband and father of her minor dependent children on behalf of the claimant, and affirmed the award. After the appeal, Michael Strait moved the Commission substitute the children as recipient's of their deceased mother's benefits, in light of the initial Schoemehl opinion provided by the Missouri Supreme Court. This opinion provided that permanent and total disability benefits were to be paid to the claimant's dependents, even when the claimant's death was not caused by the work related injury. The Schoemehl opinion was handed down during the 30-day period during which any party in the Strait case could have filed an appeal. The Commission held it had no jurisdiction and denied the motion.

HOLDING: Strait's claim was still pending at the time of her death because the 30-day period when the matter was still under review and could be appealed had not yet elapsed. Therefore, Schoemehl applied to the Strait case and the Commission must follow it. The case was remanded to the Commission to grant benefits to the minor children as of the date of their mother's death.

Failure to Carry Workers' Compensation Insurance

State of Missouri v. Robert Salter, Case No. SC88274 (2008).

FACTS: Mr. Salter was convicted for failure to insure workers' compensation liability. He appealed, alleging the statute is unconstitutional. Because the appeal involves the validity of a state statute, the Supreme Court has exclusive jurisdiction.

RSMo section 287.128.5 states that any employer failing to insure his liability under workers' compensation is guilty of a class A misdemeanor, and, in addition, shall pay the state of Missouri a penalty in an amount equal to twice the annual premium the employer would have been paid had they been insured or twenty-five thousand dollars, whichever amount is greater. This section goes on to state that anyone who has previously plead guilty or has been found guilty of violating these provisions shall be guilty of a class D felony.

The claimant was charged with a class D felony for failure to carry workers' compensation insurance since February 2003, although it was required to do so because it had more than five employees in 2003 and 2004. At trial the claimant was found guilty, sentenced to one year in prison and fined \$5,000.00. The court also imposed a further penalty of \$25,000.00.

Mr. Salter alleged RSMo section 287.128.5 violated the Missouri Constitution because it

violated the single subject and clear title requirements of article III, section 23 of the Missouri Constitution. He further argued that the trial court erred in overruling his motions for judgment of acquittal and in entering judgment against him because there was insufficient evidence to support that judgment. He argued that the trial court also erred in denying his application for a continuance of the trial filed on the day of the trial, and that the trial court also erred in refusing to prevent the state from cross-examining him about the nature of his prior conviction for failure to carry workers' compensation insurance for another company in which he was involved. Mr. Salter further argued that the trial court erred in providing jury instructions other than those requested by him with respect to independent contractor status. Finally, Mr. Salter argued that the State violated the Brady rule of disclosure, which states due process is violated when the prosecutor suppresses evidence that is favorable to the defendant and material to either guilt or punishment, when Mr. Salter was unable to discover a 2003 report in the Attorney General's possession from a separate prosecution of Mr. Salter.

HOLDING: RSMo section 287.128.5 fairly relates to its title line, does not contain more than one subject, and fully apprises the public and legislature of the subject matter it contains. The trial court did not err in entering judgment against Mr. Salter because there was sufficient evidence for a reasonable juror to have found Mr. Salter guilty beyond a reasonable doubt. The trial court did not abuse its discretion in denying Mr. Salter's request for a continuance on the day of trial due to the unavailability of a witness because Mr. Salter knew about the trial date for forty days but did not contact the witness until three days before the trial. The trial court did not err in refusing to bar the State from cross-examining Mr. Salter about his prior conviction for failure to carry workers' compensation insurance. Although Mr. Salter did not testify at trial because of this ruling, so he would not be subject to impeachment, the court did not deny him of his right to testify, and he failed to show that the court's ruling resulted in manifest injustice or a miscarriage of justice. Finally, the 2003 report in possession of the Attorney General's office is not covered by the Brady rule because, at the time of his trial, Mr. Salter was already aware that this report existed. Additionally, the report's use to rebut the State's impeachment of a witness was not reasonably likely to change the outcome of the case, as other evidence supported the jury's decision, so the report was not material in the case.

Workers Compensation Fraud Conviction of Claimant

Sate of Missouri v. Billie Coulter, Case No. WD67730 (Mo. App. W.D. 2008).

FACTS: On January 25, 2004, Ms. Coulter slipped and fell on some ice, landing on her back and leg, causing pain in her back, right leg and neck. Ms. Coulter informed her employer that she was emptying trash, as a part of her job, when she fell. She filed a workers' compensation claim, and a doctor determined that she could not work. On January 29, 2004, Ms. Coulter began receiving TTD benefits in the amount of \$180.00 per week. An MRI was performed in march that showed an annular tear and degenerative disc disease at L4-5, with a mild disc bulge. It was noted that such findings could be consistent with significant pain and disability. The claimant then began physical therapy.

On June 18, 2004, the claimant cancelled her physical therapy appointment because she was too sore. That same day, the insurance company had an investigator conducting video surveillance at the claimant's home, where she conducted a garage sale. Ms. Coulter was observed on her feet most of the day, walking unassisted, bending, and picking up items. Shortly thereafter, the claimant underwent two authorized epidural injections.

When the employer and insurer deposed the claimant approximately two months after her garage sale, on August 10, 2004, the claimant testified several times that she was unable to Astoop@ or bend at the waist, and she had been unable to do so since her injury. She also testified that she has difficulty walking without assistance before her first epidural shot. Less than one week later Ms. Coulter's benefits were terminated. She had received a total of \$5,245.71 in TTD payments.

In May 2005, Ms. Coulter was charged with two counts of worker's compensation fraud for making false statements in order to obtain a benefit. Count I alleged, Aon or about August 10, 2004 . . . defendant knowingly made a false material statement for the purpose of obtaining a benefit, to wit: stating during a deposition that she was unable to bend at the waist and needed assistance to walk.@ Count II charged the claimant with knowingly making a false statement, that she was unable to walk on the treadmill, to the physical therapist for the purpose of obtaining a benefit on June 16, 2004.

Following a two-day trial, the jury found the claimant guilty of Count I, but not guilty of Count II. She was sentenced to seven days in the Buchanan County Jail.

The claimant appealed, arguing that the judge should have granted her request for a mistrial when the prosecutor, in closing arguments, made an impermissible direct and/or indirect reference to her decision not to testify, that the trial court denied her the right to confront the witnesses against her because they allowed in the notes of the physical therapist, who was not present or available for her cross examination, and claimed that the evidence was insufficient to support the verdict.

HOLDING: A mistrial is not warranted every time an improper comment, direct or indirect, is made about a defendant's failure to testify. The court admonished the jury to disregard the comment, and the Court of Appeals must assume the jury followed that instruction. The statements of the physical therapist were admissible. The physical therapist's notes were not prepared in preparation for trial or as evidence. Their primary purpose was to document treatment and therapy issues. This is especially true because the physical therapist had no prior indication, at the time the notes were prepared, that there was a likelihood of criminal prosecution. In addition, it was clear the jury did not rely on those notes because they found the claimant not guilty of Count II. Finally, the Court of Appeals found that the videotape, taken on June 18, 2004, was not too remote in time to the August 10, 2004 deposition in order for the claimant to have knowingly made false statements at that deposition in order to obtain a benefit. The claimant's arguments that the videotape should not have been admitted because it was not authenticated ignored the fact that the videotape was presented at trial by the individual who

personally made the tape and was able to testify to its authenticity.

Commission Trends:

Over the last three months, the Commission has ruled on 47 cases and reversed or modified only six of those cases. Of those, five were changed regarding liability against the employer and insurer.

In *Stephen Johnson v. Jefferson City Public Schools, Missouri Retailers Insurance Trust and Treasurer of Missouri as Custodian of the Second Injury Fund*, Inj. No. 04-140515, the ALJ found that the claimant failed to establish the need for future medical treatment for his hip. The Commission held that a claimant does not need to show certainty but rather must show a reasonable need for future treatment. In this case, the claimant had a hip replacement with a life expectancy of 15 years. Since the claimant was a younger person, it was reasonable to expect that the hip replacement would need to be replaced.

In *Jennifer Leavitt v. Borders Group, Inc., Liberty Mutual Insurance and Treasurer of Missouri as Custodian of the Second Injury Fund*, Inj. No. 05-065639, the ALJ denied past and future medical treatment based upon the employer's witness. The Commission held that it found the claimant's witness more credible, therefore, it reversed the ALJ's decision and awarded future medical benefits. With regard to the past medical bills, the Commission noted that the claimant presented evidence that proved her bills were related to the cost to make her whole from her work-related injury; therefore, she was entitled to reimbursement.

In *Elbert Hicks v. Wire Rope Corporation of America and Missouri Private Sector Individual Self-Insurers Guaranty Corporation* Inj. No. 01-154605, the ALJ denied reimbursement of medical bills in the amount of \$32,697.58. The Commission held that the claimant properly offered evidence that his bills pertained to medical treatment related to his work-related injury; therefore, he was entitled to reimbursement.

In *Robert Thonsberry v. Thonsberry Investments, Inc./Lebanon Livestock Auctions, Inc. and Grinnell Mutual Reinsurance/AIG Claim Services*, Inj. No. 06-004874, the ALJ awarded the claimant TTD benefits until June 2, 2006, which was when he was released from physical therapy. The Commission reversed the decision and noted that the release from physical therapy did not indicate that date was the date the claimant reached maximum medical improvement; therefore, benefits were denied.

In *Tim Nolan v. DeGussa Admixtures Inc. and Ace American Insurance Company*, Inj. No. 05-083237, the Commission ordered that the employer/insurer had reasonable grounds for withholding benefits and denying liability since the employee's drug test revealed that he was positive for methamphetamine and marijuana (in violation of company policy) on the day he was injured. In light of that, it reversed costs awarded by the ALJ against the employer and insurer.

MISSOURI WORKERS' COMPENSATION STATISTICS

Missouri Lawyers Weekly, Volume 22, Number 38, September 22, 2008, pg.4

The number of workers' compensation claims in Missouri has dropped since the 2005 amendments. Premiums for businesses have declined as well, by 2.2% in 2006 and 3.6% in 2007. Payments to injured workers declined by 3.8% from 2006 to 2006. However, the state auditor determined that injured employees may be at a disadvantage because the 2005 amendments did away with legal advisors, which the auditor stated leaves claimants either uninformed or causes them to hire an attorney.