

WHAT'S NEW WITH THE NEW LAW?

A REVIEW OF WORKERS' COMPENSATION APPELLATE DECISIONS

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Only two cases interpreting the new law have made their way to the Court of Appeals since the legislature made significant changes to the Workers' Compensation Act in 2005. Neither of those cases interpreted the substantive provisions of the act; rather, they both dealt with procedural issues.

The original legislation passed as Senate Bill 1 in 2005 had a drafting error in Section 287.120 that, as written, potentially abrogated the entire Workers' Compensation Act. Although the legislature quickly amended the law to fix the error, there was a question about whether injuries sustained during that gap abrogate the Workers Compensation Act so as to expose employers to tort liability for injuries covered by the act. In *Garza v. Valley Crest Landscape Maintenance, Inc.*, 224 S.W.3d 61 (MoApp. 2007), the Eastern District Court of Appeals held that this was not the legislature's intent, and denied the plaintiff's tort claim against his employer.

In *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, (Mo.App. 2007), legislative changes to the definition of accident were found to be substantive and thus were not applied retroactively. Further, legislative statements abrogating prior case law did not evidence legislative intent that the changes were to be made retroactively.

There have only been a handful of decisions from the Labor and Industrial Relations Commission interpreting the 2005 changes to the Workers' Compensation Act. None of those decisions have made their way to the Court of Appeals. The decisions from the Commission that interpret or discuss the legislative changes are discussed below.

Perhaps the most important case to come from the Commission regarding the new Act is *Kristen Norman v. Phelps County Regional Medical Center, Injury No.: 06-00182*. In this case, the claimant was required to put on shoe covers and scrubs before entering an operating room. While bending down to cover her shoes, the claimant's knee popped and dislocated. The treating physician concluded that the act of putting on the shoe covering was the primary factor in causing her medical condition and resulting disability, and the real issue at trial was whether the new definition of accident applied. Specifically, Section 287.020.2 defines an accident as "an unexpected traumatic event or unusual

strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.” The employer argued, and the Administrative Law Judge found, that the act of leaning over to cover her shoes did not meet the first requirement of the definition: “Raising one’s knee to place something on one’s foot -- such as a sock, shoe, or bootie -- is not an unusual strain or traumatic event.” A majority of the Commission disagreed, finding that because the employer required its employees to wear the shoe covers it met the requirement. Commissioner Bartlett disagreed, agreeing with the Administrative Law Judge below.

Another case affected by the new Act is *Joyce Bivins v. St. John’s Regional Health Center*, Injury No.: 06-095060. The Commission found that by specifically abrogating earlier case law interpretations of the meaning of accident, arising out of, and in the course of employment, the legislature effectively eliminated those cases where it was difficult, or impossible, to ascertain where or if the employment subjected the employee to the same risk or hazard greater than that which an employee regularly experiences in everyday life. In other words, there was no rational connection between the employment and the injury. Thus, in *Bivins*, the Commission found the Claimant did not suffer an injury arising out of and in the course of her employment with the employer because she simply fell while walking. The employee presented with an unexplained fall, with no proof of a rational connection between the accident, the injury, and her employment. She was simply walking in a hallway on the premises of the employer when she “just fell.” Accordingly, the Commission denied benefits without incorporating the decision of the Administrative Law Judge. Commissioner Hickey dissented.

In *Jason Gamet v. Dollar General Corp.*, Injury No.: 06-064607, the claimant was injured as he bent over to pick up a pallet. The employer argued that bending over is an activity that the claimant performs in his non-employment daily life. Although the Administrative Law Judge agreed, he further found that 90% of the claimant’s job required bending, lifting, and stooping. Therefore, the claimant was not equally exposed to the activity of bending in his non-employment daily life. The Administrative Law Judge awarded benefits to the claimant. This decision was affirmed by the Commission.

In *Brenda James v. GGNSC Dexter LLC*, Injury No.: 06-062787, the issues were medical causation and accident. Although the Administrative Law Judge identified the legislative changes as the applicable law relevant to the resolution of the claim, those changes were not reached because the Judge found the claimant’s testimony incredible. As such, the issues of the definition of “accident” and “injury” were moot and they were not addressed. Similarly, in *Darren Ottobre v. Timberlake Nursing Home Insurance Trust*, Docket No.: 05-105298, identified issues pertaining to the new law were not reached because the claimant was again found to be incredible.

Another case where the new law provisions were addressed but determined to be moot was *Eric Betzold v. The Renaissance Guild, LLC, Injury No.: 06-020192*. In this case, the claimant clearly sustained an injury to his knee, but the case was denied when the Administrative Law Judge determined that the claimant was not at a place he was supposed to be when he was supposed to be there. Commissioner Hickey authored a lengthy dissent, first disagreeing with the majority on the issues of credibility of the witnesses. Commissioner Hickey then stated his opinion that the new act created a “blank slate” and that any cases interpreting the statute prior to the effective date of the legislation are no longer relevant. Finally, he discussed the new definition of accident, and found the statutory description confusing and consisting of “doublespeak.”

In *Gary Ahern v. P & H, LLC, Injury No.: 06-010408*, Section 287.020.3(3) was addressed, which provides that “an injury resulting directly or indirectly from idiopathic causes is not compensable.” The parties agreed that the claimant fell approximately 30 feet after suffering a seizure that stemmed from a traumatic brain injury from a motorcycle accident suffered several years before. They also agreed that under the old law, this clearly would have been a compensable case. Neither the Administrative Law Judge nor a majority of the Commission had any trouble finding that the new law precluded an award of benefits. Commissioner Hickey, however, disagreed. In his dissent, he found that the exclusion did not apply because, in his opinion, the facts of this case did not fit the definition of “idiopathic.” According to Commissioner Hickey, only those events stemming from “unknown or obscure causes” meet the statutory definition of idiopathic.

In *Joseph Leal v. City Wide Transportation, Inc., Injury No.: 06-010724*, the claimant suffered a slip and fall during the course of his employment with City Wide. The evidence was uncontroverted that a meniscus removal, cartilage disappearance, bone collapse, and severe arthritis were preexisting conditions unrelated to the claimant’s work-related accident. The Administrative Law Judge found that the fall was nothing more than a substantial factor in Claimant’s present medical condition and resulting disability, and not the prevailing factor. As such, the Administrative Law Judge found that the claimant did not sustain a compensable injury by accident and denied benefits. A majority of the Commission agreed. Commissioner Hickey disagreed with the Administrative Law Judge, and once again then stated his opinion that the new act created a “blank slate” and that any cases interpreting the statute prior to the effective date of the legislation are no longer relevant.

One case that does discuss the definition of “prevailing factor” in the context of repetitive trauma injuries is *James T. Johnson v. Hertz Corporation, Injury No.: 05-140664*, although the discussion is brief. One issue was whether the claimant’s work was the prevailing factor in causing his injuries. The treating physician, a board certified hand specialist, testified that the injuries were the “direct result” of the claimant’s work, and that was enough to convince the Administrative Law Judge that it was the prevailing factor in causing the

condition. The Administrative Law Judge also referenced old case law on the subject of when a condition rises to the level of a disability. Although not necessary for the resolution of this case, the language may be important when trying to determine the date of accident under the new law, which requires “evidence of disability.”

In *John Bennett v. Yellow Transportation, Inc.*, Injury No.: 05-119892, the Commission affirmed a Temporary Award of an Administrative Law Judge in which the Administrative Law Judge determined that the employee did sustain an injury which arose out of the scope and course of his employment when he fell at work injuring his left shoulder. The Administrative Law Judge determined that even though the employee could not remember who helped him up after he fell, or who the dispatcher was on duty that he signed out with the evening of his fall, that the employee was otherwise a credible witness. Thus, the Administrative Law Judge felt that the employee met his burden in showing that an accident occurred in the scope and course of his employment. The Administrative Law Judge also found that the employee provided proper notice to his employer of this accident. The employee was injured on September 18, 2005, and on September 23, 2005, the employee mentioned to his supervisor that a scheduled surgery had been cancelled because he had injured his left shoulder. The Administrative Law Judge further noted that even if this conversation had not taken place, and that the employee did not provide his employer notice of his accident within 30 days, that the employer has not shown that it was prejudiced by failing to receive notice in that within a month or two of the employee’s injury, written notice was given to the employer, who had an opportunity to investigate the matter.

In *Jerri Courtney v. Skaggs Community Hospital*, Injury No.: 05-127622, the Commission affirmed the Administrative Law Judge’s ordering compensation for a Certified Nurses’ Assistant who injured her back while lifting a patient. Notably, the Commission adopted the Administrative Law Judge’s finding that the new law did little if anything to change the underlying purpose of the thirty day written notice requirement who is to enable the employer to conduct an accurate and through investigation of an employee’s injury as well as to insure that the employer has the opportunity to minimize the employee’s injury by providing prompt medical treatment. However, the Administrative Law Judge noted that as in the past, failure to give timely notice may be excused if 1.) good cause is found not to have given notice, and 2.) the failure to provide timely notice did not prejudice the employer. In this case, on the date of her accident, the employee notified her supervisor of her accident within 15 minutes. The employee was instructed to fill out an incident report at the nurses’ station, which she did, and returned to her supervisor, and her supervisor forwarded the form to the Risk Management Safety Provider. Due to some internal confusion, it was later determined that the employee did not fill out the correct incident form used by her employer, and failed to fill out the correct form until well after the thirty day notice requirement, and thus denied the employee treatment. The Administrative Law

Judge determined that although the employee failed to fill out the correct report of injury form, that she did report her injury in writing within the thirty day notice requirement, and that her employer had all the necessary information on the day of the employee's injury to investigate the injury as well as to begin the process of authorizing treatment and providing care. The Administrative Law Judge further noted that Missouri Workers' Compensation Law does not require an employee to use a specific report when notifying an employer of his or her injury, thus as long as the employee provides the employer with the requisite information needed to proceed in an investigation and authorize treatment, that the employee has satisfied the notice requirement.

In *Roger Patterson v. Midstate Painting & Drywall, Injury No.: 06-077430*, the thirty day notice requirement was once again addressed. In this case, the claimant failed to provide his employer with written notice of his injury within thirty days of his diagnosis. The Administrative Law Judge found that the employer was prejudiced by the failure to notify in that the employer lost the ability to control the claimant's medical treatment. Therefore, the Administrative Law Judge denied the claimant's claim for compensation for failure to provide the required written notice. This decision was affirmed by a majority of the Commission. Commissioner Hickey dissented based on the testimony from the claimant that he had verbally reported his injury to his employer. Commissioner Hickey stated that the employer was provided actual notice, and was therefore not prejudiced by claimant's failure to give written notice.

In *Gerald Gordon v. City of Ellisville, Injury No.: 05-123969*, the Commission affirmed the Administrative Law Judge's denial of compensation for an employee's rotator cuff tear. While working, the employee fell on his outstretched arm and injured his shoulder, and it was discovered that the employee had a massive rip and rotator cuff tear as well as impingement syndrome. The Employee had a previous rotator cuff repair in 1993, and was released to work with restrictions. The Administrative Law Judge determined that the employee's condition was chronic in nature, and found that although the employee sustained a shoulder injury in the course and scope of his employment when he fell at work, that his work fall was not the prevailing factor in causing the rotator cuff tear. The Commission adopted the Administrative Law Judge's Award, denying the employee workers compensation benefits. Commissioner Hickey filed a lengthy dissent in which he rationalized that the employee's work fall was the prevailing factor in the employee's need for rotator cuff surgery in that prior to the employee's fall, he was not in pain and could use his arm and that following the employee's fall, that he was in pain and could not use his arm.

In *Christopher Hultz v. C & R Market, Injury No.: 06-081063*, the Commission modified an Administrative Law Judge's Award to designate the Award as temporary or partial. Prior to issuing the Award, the Administrative Law Judge held an evidentiary hearing, and prior to the starting the hearing, the Administrative Law Judge and counsel for the employer/insurer agreed that

matter was taken up for a temporary hearing, and the employer/insurer did not request that a final award be issued. The Administrative Law Judge concluded that the employee had established that he sustained an accident in the course and scope of his employment, and that the employee provided actual notice to the employer. The Commission affirmed both of these findings. However, the Administrative Law Judge also concluded that the employee failed to prove that his current conditions are medically causally related to his work-related accident, and issued a final award denying compensation. The Commission noted that recently the Missouri Appellate Courts have found that the Commission has exceeded its powers when addressing issues not stipulated for hearing by the parties. The Commission determined that because no party was seeking a final disposition that the Administrative Law Judge acted in error by entering a final award. Thus, the Commission designated the Award as Temporary, subject to further order, to be kept open until a final award could be made.

In *Randy Johnson v. Town & Country Supermarkets, Inc.*, Injury No.: 06-078999, the Commission affirmed the Award of an Administrative Law Judge denying compensation, finding that the employee's injury was not the result of an accident that arose out of and in the course of the employee's employment. The employee claimed that while walking through a grocery aisle, he injured his right lower extremity when he "stepped wrong" and his foot "rolled towards the ground." The employee admitted that nothing was on the floor to cause his foot to roll, and that he was not sure of what caused the accident. The employee did not slip, trip or stumble. The employee's treating podiatrist noted that the event/trauma to the employee's foot could have occurred anywhere. The Commission noted that historically under Missouri Workers' Compensation Law, all risks causing injury to an employee can be brought in three categories: 1.) risks distinctly associated with employment, 2.) risks personal to the employee, and 3.) "neutral risks" that have no particular employment or personal nature. The Commission determined that in this case, the employee's injury was an inversion-type injury that resulted from a misstep, and that there was not other contributing factor. The Commission also emphasized the fact that the Claimant's podiatrist determined that this type of injury could have occurred anywhere, and that the injury did not result from a hazard or risk related to the employee's employment. The Commission noted that in 2005, the legislature required that proof greater than the fact that the conditions of an employee's employment placed the employee in the position in which he or she was injured, and that an employee must show some rational connection between his work and his injury. The Commission determined that the employee in this case failed to show such a connection, finding that the employee's injury did not arise out of and in the course of the employee's employment, and denied compensation.

Attached to these materials is an Award, not yet published, in which the Administrative Law Judge found that the reduction in benefits imposed for an employee's failure to obey the employer's policies relating to the use of drug or alcohol in the workplace does apply to medical bills. However, the Administrative

Law Judge further found that the Employer may only seek the penalty from the employee, and may not apply the penalty to the healthcare provider.

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