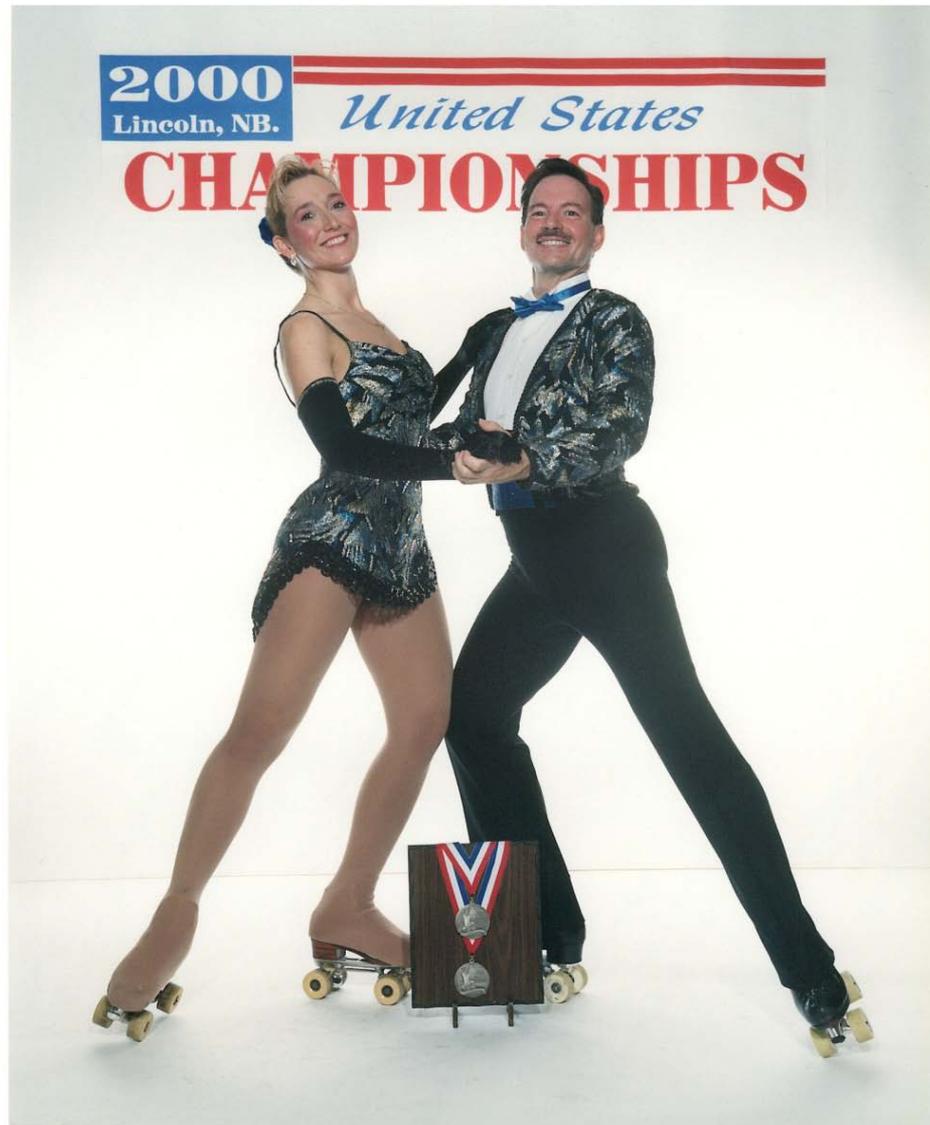


Lyman v. Missouri
Employers Mutual –
A study of who controls
medical care in Missouri

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Challenges...We all have them.



Some we overcome, some we don't.



Lyman v. MO Employers Mutual

407 S.W. 3d 130 (Mo. App. 2013)

Facts: Construction guy falls from ladder, PTD. LIRC rules employer/insurer obligated to provide additional medical care.

After a dispute arose over what medical claimant should receive, Claimant filed a petition asking the trial court to declare the insurer liable for medical expenses.

Insurer filed counter petition that claimed the insurer had the right to direct medical treatment.

Lyman v. MO Employers Mutual 407 S.W. 3d 130 (Mo. App. 2013)

Trial court, based on the factual proposition that employer was no longer in business, ruled in favor of insurer and declared:

1. that claimant has no right to receive unauthorized and non approved post award medical benefits;
2. that insurer has the statutory and other right to direct, control, pre-approve, and/or authorize post-award medical compensation benefits; and
3. insurer has no legal liability for medical expenses and mileage previously submitted to it by claimant not directed, controlled, pre-approved and/or authorized by insurer and no legal liability for future medical not directed by insurer.

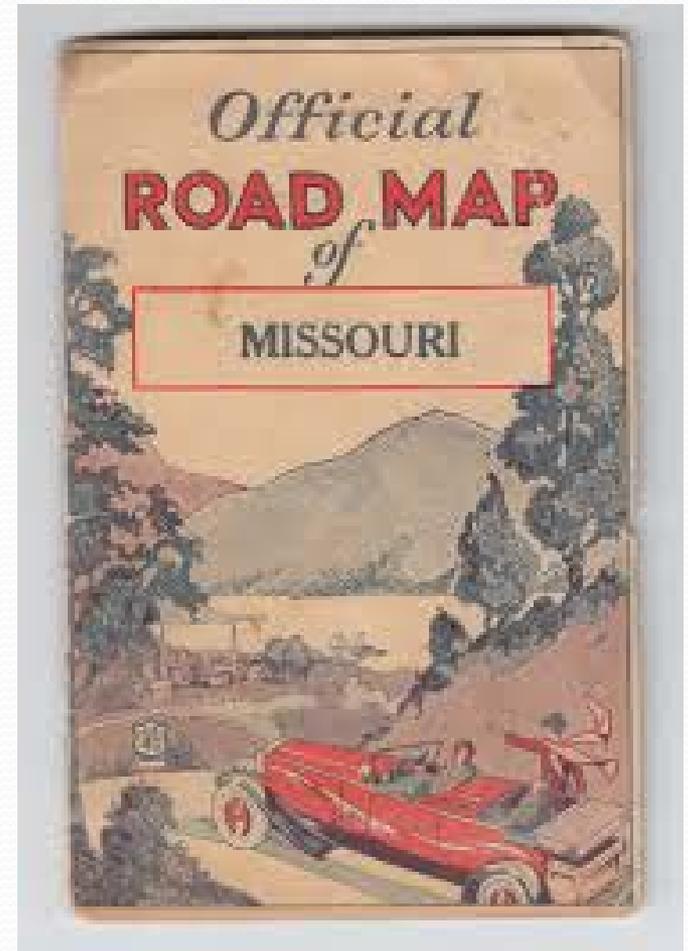
Lyman v. MO Employers Mutual 407 S.W. 3d 130 (Mo. App. 2013)

Southern District Court of Appeals

1. This court recited 287.140.10, that employer shall select providers in conjunction with 287.030.2 and argued that as a matter of law, insurer is not entitled to direct care.
2. This court also argued, 287.140.1, which says claimant shall have the right to select providers at his own expense, but only when employer has notice and/or has been demanded to provide treatment and has refused.
3. Ruling of the court: Remanded to discover whether employer is capable of directing care.
4. The fascinating question left unanswered, “Who has the right to pick a claimant’s medical providers if the employer is unable to do so?”

Road Map

1. What is the insurer's right to control medical?
2. What is the employer's right to control medical?
3. What is the claimant's right to control medical?



A. Insurer's right to control medical

1. When does the insurer control medical?

a. Most always.

b. Statute section 287.140.1 provides that the employer shall provide medical care and statute section 287.030.2 says any reference to employer shall include the insurer. (This was until 1980).

c. 1980 amendment added: Statute section 187.140.10, which specifically says right to select providers is that of the employer and that 287.030.2 does not apply. So now, never.

d. Employers are not typically interested. It's not what their business does. Employers don't have experience making medical decisions or managing claims whatsoever.

A. Insurer's right to control medical

2. What if there is a conflict between what the employer and the insurer want to authorize?
 - a. Prior to 1980 the employer and insurer shared control and presently there are few, if any, disputes.
 - b. One answer, is employer chooses and insurer is obligated to pay.
 - c. Are there contract provisions in the policy between the employer and insurer that delegate the right to choose providers? If so, are those provisions contrary to the statute? Is that legal? Is this what led to the 1980 amendments?
 - d. I called a handful of my own clients...
 - e. I considered my own policy...

My Workers' Compensation Policy

F. Payments You Must Make

You are responsible for any payments in excess of the benefits regularly provided by the workers' compensation law including those required because:

1. of your serious and willful misconduct;
2. you knowingly employ an employee in violation of law;
3. you fail to comply with a health or safety law or regulation; or
4. you discharge, coerce or otherwise discriminate against any employee in violation of the workers' compensation law.

If we make any payments in excess of the benefits regularly provided by the workers' compensation law on your behalf, you will reimburse us promptly.

G. Recovery From Others

We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.

H. Statutory Provisions

These statements apply where they are required by law.

1. As between an injured worker and us, we have notice of the injury when you have notice.
2. Your default or the bankruptcy or insolvency of you or your estate will not relieve us of our duties under this insurance after an injury occurs.
3. We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an agency authorized by law. Enforcement may be against us or against you and us.
4. Jurisdiction over you is jurisdiction over us for purposes of the workers' compensation law. We are bound by decisions against you under that law, subject to the provisions of this policy that are not in conflict with that law.
5. This insurance conforms to the parts of the workers' compensation law that apply to:
 - a. benefits payable by this insurance;
 - b. special taxes, payments into security or other special funds, and assessments payable by us under that law.
6. Terms of this insurance that conflict with the workers' compensation law are changed by this statement to conform to that law.

Nothing in these paragraphs relieves you of your duties under this policy.

My Workers' Compensation Policy

PART FOUR—YOUR DUTIES IF INJURY OCCURS

Tell us at once if injury occurs that may be covered by this policy. Your other duties are listed here.

1. Provide for immediate medical and other services required by the workers' compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.
4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

PART FIVE—PREMIUM

A. Our Manuals

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. Remuneration

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the

D. Premium Payments

You will pay all premium when due. You will pay the premium even if part or all of a workers' compensation law is not valid.

E. Final Premium

The premium shown on the Information Page, Schedules and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

If this policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise.

1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not



A. Insurer's right to control medical

3. What happens when the insurer is gone? Bankrupt or insolvent?
 - a. RSMo 375.772 creates the Missouri Property and Casualty Insurance Guaranty Association, ("MIGA") whose members include insurers transacting insurance in this state.
 - b. MIGA will cover workers' compensation claims when
 1. the insurer becomes insolvent, and
 2. the employer's net worth is less than \$25 million.
 - c. MIGA is deemed the insurer only to the extent of its obligations on the covered claims and shall have the rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent, including rights to subrogation.
 - d. MIGA becomes the insurer, not the employer.

B. Employer's right to control medical

1. When does the employer control medical?

a. Always and exclusively since the 1980 amendment

b. RSMo 287.140.10 provides that the employer shall have the right to select providers and RSMo 287.030.2 does not apply to 287.140.10.

c. But, the exception does not apply to 287.140.1.

d. Result? Everyone seems to agree, employer has exclusive right to select medical providers.

B. Employer's right to control medical

2. But why did the statute have to change?

a. Poor drafting? Oversight? Mistake?

Any ideas?

b. One suggestion made to me was fraud and abuse on behalf of the insurer.

Seriously, insurers?

c. Consider *Teale v. American Mfg Mutual Ins.*, 687 S.W. 2d 218 (Mo. App. WD 1984).

B. Employer's right to control medical



Teale v. American Mfg Mutual Ins.,
687 S.W. 2d 218 (Mo. App. WD 1984).

Facts: Teale is chiropractor who was authorized by employer to provide care to claimant between October 8, 1982 and October 27, 1982. Insurer said no thank you and directed claimant to another provider.

Teale sued insurer for tortious interference with the contractual and business relationship between doctor and patient resulting in \$564 actual damages.

Trial court dismissed Teale's petition.

Teale v. American Mfg Mutual Ins.,
687 S.W. 2d 218 (Mo. App. WD 1984).

Analysis: The court cited the 287.140 amendments and wrote,

“There can be no doubt that the sole purpose of the change in the statute was to deny insurers any voice in directing workers to particular doctors or classes of doctors for treatment of job-related injuries.”

Ruling: Trial court's order dismissing Teale's petition was reversed.

B. Employer's right to control medical

Janes v. Ins. Co. of North America

Unpublished, Mo. App.

WD 1989, Lexis 1291



Facts: Claimant worked as a security guard and suffered a back injury after falling down a flight of stairs.

She was unable to move after the fall and an ambulance took her to the emergency room.

The next day, her supervisor told her to “go see a doctor” and claimant chose Dr. Janes, a chiropractor.

Dangers of Security Guard Work



B. Employer's right to control medical

Janes v. Ins. Co. of North America Unpublished, Mo. App. WD 1989, Lexis 1291

Dr. Janes evaluated claimant on August 12, 1985 and on August 21, 1985 was sent correspondence from insurer that treatment was no longer authorized.

Dr. Janes sued the insurer for tortious interference with contractual and business relationship. Jury awarded actual damages of \$860.00 and punitive damages of \$7,500,000.00.

Trial court granted a new trial on limited issues both actual and punitive damages, but let the verdict of liability stand. Both parties appealed.

B. Employer's right to control medical

Janes v. Ins. Co. of North America

Unpublished, Mo. App. WD 1989, Lexis 1291

- This court argued, contrary to Dr. Janes' assertion, insurer is not prohibited from discussing with employer the reasonable medical needs of the claimant. But in the event of a difference of opinion, employer's decision prevails.
- The employer testified he didn't have any choice but to go with the insurer's recommended provider, that the insurer advised him what to do and just followed the insurer's procedure.

B. Employer's right to control medical

Janes v. Ins. Co. of North America

Unpublished, Mo. App. WD 1989, Lexis 1291

On the issue of punitive damages, the court concluded insurer's selection of providers may have been wrongful, but it was not outrageous because:

1. no evidence of evil motive or reckless disregard for the rights of Dr. Janes, and
2. insurer's position/actions were not outrageous considering the type of injury and medical needs of the claimant.

Judgment of trial court was reversed and new trial was ordered on issues of liability for actual damages, if any. Judgment entered in favor of insurer for punitive damages.

B. Employer's right to control medical

3. What happens with the employer is gone?

a. Lyman v. Mo. Employers Mut. Ins. Co., 407 S.W.3d 130 (Mo. App. , 2013).

1) To date, no certain answer.

2) But I can tell you what the parties ended up doing.

a) Claimant filed motion for summary judgment and insurer found owner of dissolved employer.

b) Insurer had employer prepare affidavit and claimant deposed the guy, who said he didn't care where claimant treated.

c) Case settled and judgment entered June 4, 2014, claimant will direct care, 45 days to review bills and arbitration if disagreement.

B. Employer's right to control medical

b. If employer is self insured and is gone, what happens?

1) RSMo 287.860 provides for “Missouri Private Sector Individual Self-Insurers Guaranty Corporation.”

2) members must post collateral to cover claims in the event of default

3) the fund then has obligation to pay claims arising during self insurance period

4) the fund uses the collateral to pay claims

5) and has procedures to return excess collateral after all claims have been satisfied.

Proof an employer is really gone!



C. Claimant's right to control medical

1. When does claimant have the right to control medical?
 - a. Per statute section 287.140, if claimant desires, he shall have the right to select his own providers at his own expense. (What happens to co-pays, TTD and PPD)?
 - b. When the employer has notice and/or demand for treatment and refuses to provide treatment, waiver.
 - c. When the claimant is also the employer.

Demore v. America First Insurance, SC93640

Facts: Demore Enterprises is comprised of 4 family members, 3 of which were injured June 2009. Doris Demore suffered significant physical and mental injuries.

Insurer denied compensability based on to and from work auto accident, arising out of, course and scope.

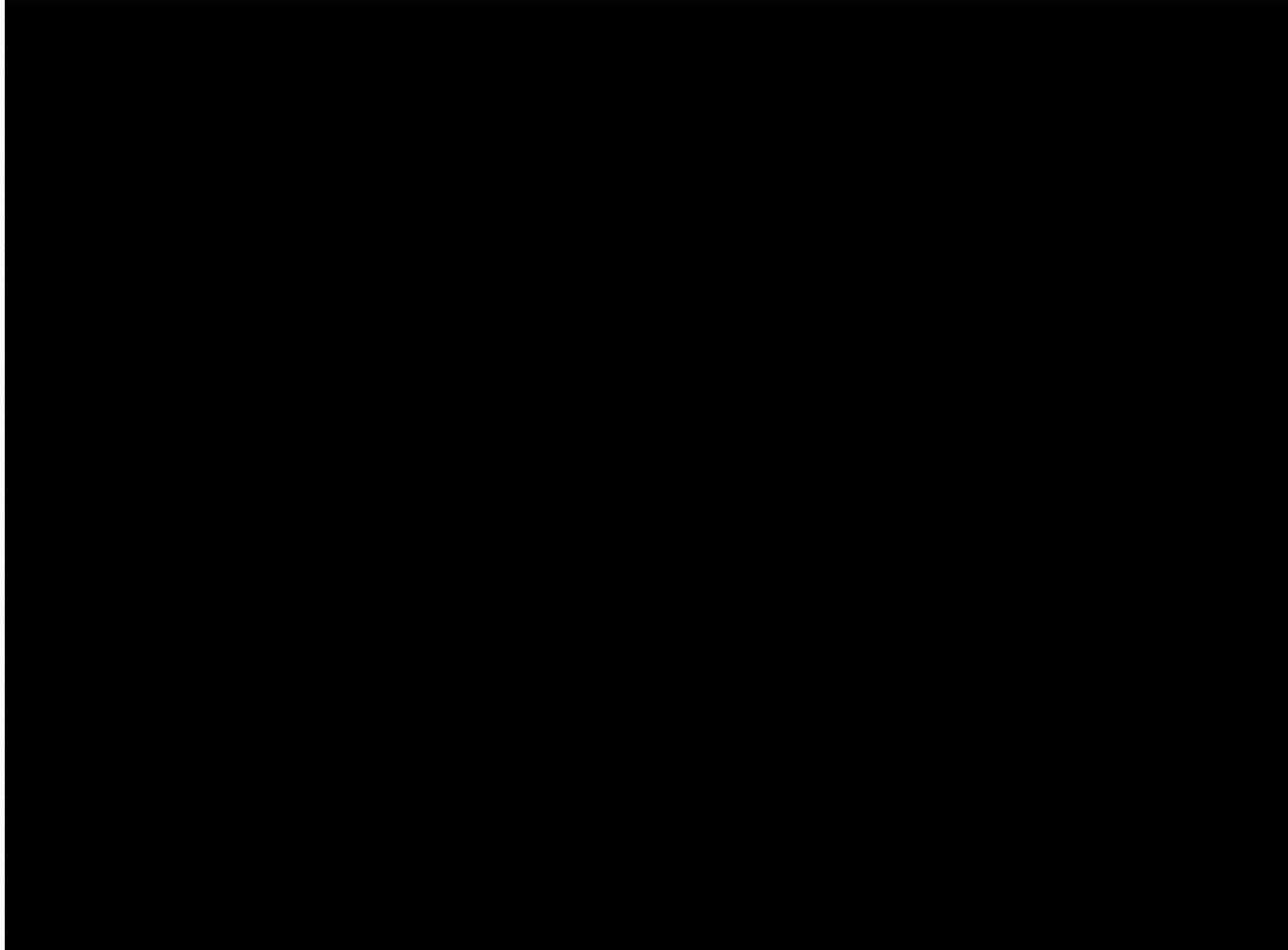
Claimant filed claim and employer and insurer filed separate answers.

C. Claimant's right to control medical, *Demore v. America First*

The Division's Final Award, January 30, 2012:

1. Employer failed or neglected to provide care,
2. Employer and insurer shall provide medical selected by claimant, and
3. Defense was not reasonable in that employer and insurer had 2 ½ years to figure out compensability. Employer/insurer ordered costs.

Reasonableness is relevant in “to and from” work injuries...



Insurer appealed to the LIRC, employer and claimant did not.

The LIRC's Order dated September 28, 2012,

1. reversed the claimant's right to select providers;
2. ruled employer/insurer only waived right to select past medical providers, not future; and
3. the basis for denying treatment was not egregious or unreasonable, (citing 2005 amendments to "arising out of" and "in the course of" employment) and reversed costs against insurer.

C. Claimant's right to control medical, *Demore v. America First*

The Southern District Order, dated July 15, 2013, affirmed the Commission, except

1. they reversed insurer's right to select providers;
2. they held the employer was entitled to select providers, not the insurer; and
3. they denied claimant's costs and fees.

C. Claimant's right to control medical, *Demore v. America First*

Supreme Court sustained Claimant's Application for Review, briefs submitted and oral arguments held April 23, 2014.

Claimant's brief:

1. Insurer has no right to select providers; Statutory amendment from 1980; Case law including *Teale*; Strict construction, insurer deliberately excluded
2. Employer is a separate party in this case; the ALJ ordered claimant would select providers, contrary to employer's right, who did not appeal and Insurer therefore has no standing to appeal
3. Once an employer waives its right to control medical there is no "reset button" restoring right to select providers for future care

C. Claimant's right to control medical, *Demore v. America First*

Insurer's brief

1. LIRC properly found employer is to control medical, not claimant. Insurer concedes it does not have right and requests affirmation that claimant does not.
2. Insurer certainly has standing to appeal selection of providers because of contractual relationship with employer.
3. Employer did not waive any right to select providers
 1. Nothing in statute that allows employer to waive, only case law interpretation
 2. Nothing in statute prohibits employer from selecting providers regarding future treatment.

Finally:

1. Ways to protect your clients going forward...
 - a. Employers/insurers trying PTD cases or drafting settlement contracts with open medical should carefully consider whether to reserve the employer's right to direct medical care, and contingency plans if the employer is no longer around.
 - b. Insurers should send correspondence to employer asking them to choose medical providers.
 - c. At trial, claimant's stipulate the employer as a separate party with exact name, separate from insurer.
2. What's your answer to Lyman?

3. Anyone need some roller derby gear?

