

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No.: 08-118155

Employee: Ivan Fall  
Employer: Matt Miller Co., Inc.  
d/b/a Red Door Construction  
Insurer: Carolina Casualty Insurance Co.

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

*Employee's motion for costs*

The parties asked the administrative law judge to resolve the following issues: (1) whether employee sustained an accident or incident of occupational disease on or about April 11, 2008, and if so whether this accident or incident of occupational disease arose out of and in the course of employment; (2) whether the employee gave employer proper notice of the injury pursuant to § 287.420 RSMo; (3) whether the alleged accident or incident of occupational disease caused the injuries and disabilities for which benefits are claimed; (4) whether the employer is obligated to pay for certain past medical care and expenses; (5) whether the employee has sustained injuries that will require additional or future medical care to cure and relieve the employee from the effects of the injuries; (6) whether the employee sustained any permanent disability as a consequence of the claimed accident or incident of occupational disease, and if so, what is the nature and extent of any disability; and (7) whether employee is entitled to costs, including attorney's fees, under § 287.560 RSMo.

The administrative law judge rendered the following findings and conclusions: (1) on or about April 11, 2008, employee sustained an incident of occupational disease which arose out of and in the course of employment; (2) employee provided timely notice pursuant to § 287.420 RSMo; (3) employee met his burden of proof with respect to the issue of medical causation; (4) employer is obligated to pay employee \$4,997.97 in past medical expenses; (5) employer is obligated to provide future medical treatment as may be reasonable, necessary, and causally related to his injury; (6) employee sustained a 15% permanent partial disability of the body as a whole as a result of his injury; and (7) employee failed to meet his burden of proving entitlement to costs under § 287.560 RSMo.

Employer filed a timely Application for Review challenging the administrative law judge's findings and conclusions with respect to the issues of: (1) whether employee sustained an occupational disease; (2) medical causation; and (3) notice.

Employee: Ivan Fall

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On November 13, 2013, employee filed a Motion For Costs arguing the employer's Application For Review does not raise an argument premised on any evidence in the record or supported by any legal authority. In the Motion, employee argues that employer ignores controlling case law authority as to the issue of notice and relies upon substantive amendments to Chapter 287 that did not take effect until January 2014. Employee suggests employer's arguments are not tendered to this Commission in good faith. Employee alleges that his costs in responding to employer's Application for Review amount to \$1,200.00, representing 6 hours of work on the part of his attorney at an hourly rate of \$200.00.

The Commission has not received any response from the employer to employee's Motion For Costs.

Section 287.560 RSMo provides, in relevant part, as follows:

[I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

The Commission is authorized under the foregoing section to award the attorney's fees incurred by a party in responding to proceedings that are brought, prosecuted, or defended without reasonable grounds: "[t]he 'whole cost of the proceedings' includes all amounts the innocent party expended throughout the proceeding brought, prosecuted, or defended without reasonable grounds, including attorney's fees." *DeLong v. Hampton Envelope Co.*, 149 S.W.3d 549, 555 (Mo. App. 2004)(citation omitted).

The courts have cautioned the Commission to limit an award of costs under § 287.560 to those cases where "the issue is clear and the offense egregious." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003). Here, we are convinced that the issue is clear, because employer's position quite simply finds no evidentiary support whatsoever in the record. Rather, the uncontested lay testimony and expert medical opinion evidence overwhelmingly supports the administrative law judge's conclusion that employee suffered an occupational disease and is entitled to benefits. Employee is also correct in pointing out that employer, having appealed the issue of notice, wholly ignores the relevant and controlling precedent of *Allcorn v. Tap Enters.*, 277 S.W.3d 823 (Mo. App. 2009), the holding of which is inarguably dispositive.

We are further convinced that the offense is egregious. In its brief and at oral argument in this matter, employer failed to advance a single colorable argument that would support our disturbing the administrative law judge's award in any way. Employer's counsel conceded that employer did not provide any expert medical testimony to rebut that advanced by employee, but argued that the issue in this case is whether the Commission can rely on "pure opinion" evidence in resolving issues of medical causation. We are perplexed by this statement, as it seems to ignore fifty years of Missouri case law cautioning that "the question of causation [is] one for medical testimony, without which a finding for claimant would be based on mere conjecture and speculation and not on

Employee: Ivan Fall

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substantial evidence.” *Welker v. MFA Cent. Co-operative*, 380 S.W.2d 481, 487 (Mo. App. 1964). Employer’s citation to recent and substantive amendments to Chapter 287 that are in no way applicable to this claim, and its failure to direct us to relevant and controlling legal authority with respect to the issue of notice are further suggestive of the lack of good faith with which employer approaches this Commission. Accordingly, we find that employer’s conduct before the Commission is egregious.

In light of the foregoing considerations, we conclude that employer’s appeal to the Commission is without reasonable grounds. We conclude that the whole cost of these proceedings should be assessed against employer. We find that \$1,200.00 represents a fair and reasonable charge for services rendered by employee’s attorney in responding to employer’s Application for Review. We conclude that employer is liable to employee for \$1,200.00 in attorney’s fees as the whole cost expended by employee in responding to employer’s appeal herein.

**Conclusion**

We affirm and adopt the award of the administrative law judge with this supplemental opinion.

Employee is entitled to, and employer is hereby ordered to pay, \$1,200.00 in attorney’s fees representing employee’s costs in responding to employer’s appeal herein.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued July 19, 2013, is attached and incorporated by this reference.

The Commission approves and affirms as fair and reasonable the administrative law judge’s allowance of a 25% lien in favor of employee’s attorney on compensation awarded herein.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Ivan Fall

Injury No. 08-118155

Dependents: N/A

Employer: Matt Miller Co., Inc. d/b/a Red Door Construction

Insurer: Carolina Casualty Insurance Co.

Additional Party: N/A

Hearing Date: May 6, 2013

Checked by: LTW

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: April 11, 2008
5. State location where accident occurred or occupational disease was contracted: Greene County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While engaged in employment with the Employer, Employee experienced occupational exposure to anhydrous ammonia, which caused him to sustain an injury to his upper lobe and resulted in him suffering an injury in the nature of asthma, in the form of reactive airways disease.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: BAW (Asthma / Reactive Airways Disease)
14. Nature and extent of any permanent disability: 15% ppd
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? \$4,997.97

- 18. Employee's average weekly wages: \$480.00
- 19. Weekly compensation rate: \$320.00 (TTD / PPD)
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses: .....	\$4,997.97
Future medical care is awarded.	(See Award)
60 weeks of permanent partial disability from Employer & Insurer:.....	\$19,200.00
Weeks of disfigurement from Employer:.....	N/A
Permanent total disability benefits from Employer & Insurer:.....	N/A

- 22. Second Injury Fund liability: N/A

**TOTAL: \$24,197.97, plus future medical care**

- 23. Future requirements awarded: Yes (See Award)

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: **Randy Alberhasky, Esq.**

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Ivan Fall

Injury No. 08-118155

Dependents: N/A

Employer: Matt Miller Co., Inc. d/b/a Red Door Construction

Insurer: Carolina Casualty Insurance Co.

Additional Party: N/A

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on May 6, 2013. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about May 28, 2013.

The employee appeared personally and through his attorney, Randy Alberhasky, Esq. The employer and insurer appeared through their attorney, John Wendler, Esq.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about April 11, 2008, Matt Miller Co., Inc. d/b/a Red Door Construction was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Carolina Casualty Insurance Co.
- (2) On the alleged injury date of April 11, 2008, Ivan Fall was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged incident of occupational disease of April 11, 2008, occurred in Greene County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (4) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (5) At the time of the alleged incident of occupational disease of April 11, 2008, the employee's average weekly wage was \$480.00, which is sufficient to allow a compensation rate of \$320.00 for temporary total disability compensation / permanent total disability compensation, and a compensation rate of \$320.00 for permanent partial disability compensation.
- (6) Temporary disability compensation has not been provided to the employee.

- (7) The employer and insurer have not provided medical treatment to the employee.

The issues to be resolved by hearing include:

- (1) Whether the employee sustained an accident or incident of occupational disease on or about April 11, 2008; and, if so, whether the accident or occupational disease arose out of and in the course of his employment with the employer?
- (2) Whether the employee notified the alleged employer of his injury as required by Section, 287.420, RSMo?
- (3) Whether the alleged accident or incident of occupational disease caused the injuries and disabilities for which benefits are now being claimed?
- (4) Whether the employer and insurer are obligated to pay for certain past medical care and expenses?
- (5) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?
- (6) Whether the employee sustained any permanent disability as a consequence of the alleged incident of occupational disease; and, if so, what is the nature and extent of the disability?
- (7) Whether the employee is entitled to assessment of costs, including allowance of attorney's fees, against the employer and insurer pursuant to Section 287.560, RSMo?

### **EVIDENCE PRESENTED**

The employee testified at the hearing in support of his claim. Also, the employee offered for admission the following exhibits:

- Exhibit A..... Medical Records from Branson Family Medicine
- Exhibit B.....Medical Records from Branson Pulmonology and Sleep  
(Records Certified October 5, 2010)
- Exhibit C..... . Medical Records from Branson Pulmonology and Sleep  
(Records Certified April 16, 2013)
- Exhibit D.....Medical Records from Cox Medical Center - Branson
- Exhibit E..... Medical Records from Skaggs Regional Medical Clinic
- Exhibit F..... Medical Records from Wal-Mart Pharmacy  
(Records Certified December 3, 2012)
- Exhibit G..... Medical Records from Wal-Mart Pharmacy  
(Records Certified April 23, 2013)
- Exhibit H..... Claim for Compensation (Inclusive of Attached Correspondence)

Exhibit I ..... Answer of Employer & Insurer to Claim for Compensation  
(Inclusive of Attached Correspondence)  
Exhibit J .... Amended Answer of Employer & Insurer to Claim for Compensation  
(Inclusive of Attached Correspondence)  
Exhibit K.....Scheduling Order  
Exhibit L1-L7..... Attorneys Correspondence In Re: Norbert Belz, M.D.  
Exhibit M ..... Section 287.210, RSMo Letter  
Exhibit N..... Disclosure of Medical Records from Wal-Mart  
Exhibit O..... Disclosure of Medical Records from Branson Pulmonology  
Exhibit P..... Disclosure of Medical Records from Branson Pulmonology  
Exhibit Q..... Disclosure of Medical Records from Wal-Mart Pharmacy & Cox  
Medical Center-Branson  
Exhibit R1-R4 ..... Photographs  
Exhibit S..... Attorney Retainer Agreement  
Exhibit T ..... Legal Expenses Summary & Billing Statement  
Exhibit U..... Deposition of Ivan Fall (Inclusive of Attachments)  
Exhibit V..... Deposition of Habib Munshi, M.D. (Inclusive of Attachments)  
Exhibit W ..... Deposition of P. Brent Koprivica, M.D.  
Exhibit X..... Deposition of Robert Fisher (Inclusive of Attachments)

The exhibits were received and admitted into evidence.

The employer and insurer presented two witnesses at the hearing of this case – Douglas Ludlow, Ph.D. and Robert Fisher In addition, the employer and insurer offered for admission the following exhibits:

Exhibit 1..... Deposition of Habib Munshi, M.D. (Inclusive of Attachments)  
Exhibit 2..... Errata Sheet of Deponent Ivan Fall  
Exhibit 3..... Buildings Location & Description Sheet  
Exhibit 4..... Timesheets  
Exhibit 5..... CV of Douglas Kent Ludlow, Ph.D.

The exhibits were received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Amended Answer of Employer/Insurer to Claim for Compensation
- Amended Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

## **DISCUSSION**

### *Background & Employment*

The employee, Ivan Fall, is 37 years of age, having been born on August 10, 1975. Mr. Fall resides in Ozark, Missouri.

Mr. Fall obtained his GED in 1994. He attends college, majoring in Occupational Therapy Assistant, has been going through Ozarks Technical Community College since 2007 for this degree. Subsequent to high school, Mr. Fall obtained employment with L&M Benavidez and engaged primarily in hanging road signs and cantilevers and overhead structures.

Mr. Fall has held temporary jobs from doing retail with the \$1 Shop in Branson, Missouri, to a cleaning company called MasterCorp, each for about three years. He also worked as a cashier/stocker at a convenience store, and then a dishwasher at the Welk Resort.

In or around August of 2006 Mr. Fall obtained employment with the employer, Matt Miller Co., Inc. d/b/a Red Door Construction ("Red Door Construction"). He continued in this employment through April 2008, when Red Door Construction terminated him from their employment.

Mr. Fall is currently working a part time job at Wal-Mart in Springfield, Missouri. He works about 26 hours a week and performs a variety of duties. The employment with Wal-Mart includes cashier work, customer service, cart pusher, inventory control specialist, and unloading trucks. He has been with Wal-Mart since April 2009 to the present time. He found himself unemployed from the time employment was terminated at Red Door Construction to the time he obtained employment with Wal-Mart.

### *Claim of Occupational Disease*

#### General Facts

The underlying claim arises out of a construction project located in Springfield, Missouri. The employer, Red Door Construction, employed Mr. Fall to perform general labor work involving the demolition and rehabilitation of seven buildings of varying size. This construction project was commonly known as the "Ice House Project". The buildings in the project were 100 years old or more. A number of the Ice House Project buildings were used previously as refrigerated storage or refrigerated warehouses.

Historically the refrigeration system utilized in these older refrigerated warehouses utilized refrigeration loops involving pipes filled with ammonia. (The liquid ammonia would run through two or three pipe loops that traveled through the buildings.) Ammonia is a chemical compound and is used commonly as a refrigerant. The natural form for ammonia is as a vapor, and it occurs at ambient temperature, approximately 68 degrees. In order for ammonia to take a

liquid form the pipes must be pressurized and the temperature must be reduced to 28 degrees below zero. At the time of the alleged occurrence, only 3-4 of the seven buildings had been used for refrigeration in the recent past.

The construction project in question involved rehabilitation of multiple buildings. This rehabilitation process included removal or remediation of asbestos and ammonia from the buildings. The contractor for remediation of the ammonia was Springfield Mechanical, a company owned by Bob Fischer of Springfield, Missouri. (This company previously owned the buildings.) The remediation of the ammonia was accomplished in February and March of 2007 under a lump sum contract entered into between Red Door Construction and Springfield Mechanical. (In context of this lump sum contract Springfield Mechanical agreed to perform the remediation work for a single sum regardless of the amount of time and man hours needed to perform the work. A vacuum system was used to remove the ammonia, and access points in the pipe loops were cut off, preventing the lines from being pressurized.) Subsequent to the remediation work, the piping system remained in the buildings, but the pipes were cut and left open to allow for ambient air during the demolition and completion of the rehabilitation process.

Mr. Fall worked on this construction project prior to, during and subsequent to the remediation work performed by Springfield Mechanical. The records presented at the hearing indicate that Mr. Fall began working on the "Ice House Project" in January 2007, and continued in this employment until being terminated by Red Door Construction on April 18, 2008. During this period he worked 4 to 5 days a week, in each of the 7 buildings that were being renovated.

#### Testimony of Ivan Fall

The employee, Ivan Fall, testified that he worked on all 7 of the buildings, first carting out freestanding trash and debris, followed by the tedious removal of refrigerated piping that ran throughout almost every floor of every building and in tunnels underneath the buildings that connected them together. Mr. Fall testified that for about 8 months he worked at cutting and removing piping from each of the buildings. The piping would wind up and down and around the walls over several floors. He would use a saw to cut the piping and virtually everyday he would smell ammonia while he was working. Frequently he would see a gaseous vapor come out of the pipes and it would make him cough and lose his breath. Sometimes there would be a liquid sludge with ammonia smell. He testified that they would either keep working when they smelled ammonia, or if the coughing was too much they would leave until the gas dissipated from the room. Sometimes the remediation workers would be called in to remove the ammonia, but not always. Mr. Fall produced a picture of the tank and hose that was used by the remediators.

Mr. Fall testified that in April of 2007, while engaged in employment and performing his work duties at the Ice House Project, he was working inside of Building 3 when he was up on his ladder and cut into a pipe that was attached to the ceilings. He remembers cutting into the pipe and getting a blast of ammonia to the face, which in turn knocked him off his ladder and briefly unconscious. According to Mr. Fall, upon gaining consciousness after suffering this fall, he experienced ringing in his ears, blurred vision, and he couldn't breathe. He felt like he had suffered sunburn to his face. He reported it to his supervisor, Todd.

A day later another supervisor, Ryan Hazkill, asked him if he needed to make a report of it, and Mr. Fall told him yes, as well as making reference that he possibly needed medical

attention. The employer, however, did not refer Mr. Fall to any physician. Eventually, according to Mr. Fall, the skin burning, the blurred vision and the ringing in the ears all subsided, but he continued to have breathing problems. Mr. Fall further alleges that after working on this project for a few months and being exposed to ammonia virtually every day, he started noticing problems with his breathing and lung capacity. After having no prior problems, he began having difficulty riding his bike to work without having to stop and catch his breath. He further notes being tired and fatigued, as well as feeling run-down with generalized malaise.

### Testimony of Robert Fisher

Robert Fisher testified both by deposition and in person at the hearing on behalf of the employer and insurer. Mr. Fisher noted that he formerly owned the buildings in 1999, and operates a remediation business. In context of this case, as the owner of Springfield Mechanical, Red Door Construction secured him to remove ammonia from the piping, containers and cooling system that had been used to refrigerate the buildings, which involved the Ice House Project. Mr. Fisher noted that the pipes contained ammonia, which ran throughout buildings 1, 2, 3 and 4. It is unclear from his testimony whether buildings 5, 6 and 7 included piping that contained ammonia. (At the hearing Mr. Fisher testified that the pipes containing ammonia did not run through buildings 5, 6 and 7. However, in his deposition Mr. Fisher testified that he didn't know if the pipes containing ammonia were in buildings 5, 6 and 7. And on cross-examination when asked about his prior deposition testimony, he admitted that he didn't know.)

In explaining the remediation process, Mr. Fisher testified that ammonia is a gas, and in order to remediate the ammonia out of the piping system he utilized a Venturi device. This device enables a technician with a background in ammonia to tie into the ammonia piping system. The technician dilutes the ammonia by blending the ammonia with water. In this regard, the Venturi device does not pump water into the ammonia-filled pipes; rather, the ammonia is extracted by using a vacuum system, which directs the ammonia into a system or container that allows the ammonia to blend with water. Upon reaching proper dilution rates, the mixture is sprayed into plastic containers, which are then removed from the premises.

Notably, simply purging the pipes of ammonia by use of the Venturi device does not purge or remove ammonia smell from the pipes. Water is not pumped into the pipes at any time. Mr. Fisher further acknowledged that he had no personal knowledge of what was done on the Brick City project since he wasn't personally involved, but that his workers would use a Venturi device to tap into the pipes and remove the ammonia using a vacuum system. In the use of this system the pipes would not be rinsed out or flushed with water at any time. Additionally, it was noted that the piping system situated in the Ice House Project buildings may have been up to 100 years of age.

On cross-examination Mr. Fisher acknowledged that he was not present at the buildings when the ammonia was removed. Notably, Mr. Fisher did not know if they just tied into one spot or several spots. He didn't know whether they cut the pipes when they used the Venturi device to drain them. He wasn't aware of any testing that was done on the air for ammonia exposure. Also, he acknowledged that the construction workers would have been able to smell the aroma of ammonia in the remediated pipes. Yet, according to Mr. Fisher, the smell would not be toxic or cause any physical harm to an individual working on or with the remediated pipes.

Mr. Fisher testified that he never spoke to Matt Miller or anyone at his company regarding the remediation process in anticipation of testifying at his deposition or the hearing. He didn't confirm or discuss any ammonia leaks at the property. He didn't review any materials or contracts other than the limited time sheets he was asked to bring to the hearing, which being in January of 2007 and end after April 1, 2007. He admitted that he would have time sheets after that date, which would indicate whether his company worked on the Brick City project after April 1, 2007, but he didn't request them from his bookkeeper or bring them. He testified that the time sheets he did bring only go through April 1, 2007.

#### Testimony of Douglas Ludlow, Ph.D.

Douglas Ludlow, Ph.D., is a Professor of chemical engineering from Missouri University of Science and Technology. He testified as an expert in chemical engineering in behalf of the employer and insurer. He had been retained by the employer and insurer, and issued a report dated December 31, 2012. He did not review any materials or depositions from Robert Fisher or from the Matt Miller Company. He did not review Ivan Fall's deposition. He did not review the doctors' depositions. Yet, he did review MSDS statements and OSHA standards for ammonia exposure.

In his report, he made several assumptions regarding the remediation process that he later discovered at the hearing were inaccurate. He had rendered an opinion that theoretically Ivan Fall could not have been exposed to significant amounts of ammonia based upon a belief that water had been flushed through the pipes several times "as is typically done" and the pipes left open thereafter. In fact, this process was not used, but instead a vacuum device was used that didn't involve flushing water through the pipes or leaving them open afterwards. Dr. Ludlow testified that he was not familiar with the process used by Mr. Fisher, and freely admitted that he did not hold himself out as an expert on ammonia remediation. He admitted that he was aware of no ammonia monitoring done at the work site. Therefore, according to Dr. Ludlow, it would be impossible to know the actual levels of concentration that Mr. Fall was exposed to from ammonia vapors.

#### *Medical Treatment*

Mr. Fall was seen by Dr. Zeller for evaluation in September 2009. Lab work was undertaken, and chest x-ray was ordered, which came back as negative. His lab work was mild elevation of the liver enzymes. He had shortness of breath and dyspnea on exertion. On September 29, 2009 an echocardiogram was performed, with no findings of cardiovascular disease.

He did not return to Dr. Zeller until May 2010, and at that point, he was referred to Dr. Habib Munshi, a pulmonologist with Branson Pulmonology and Sleep Clinic.

Mr. Fall presented to Dr. Munshi on June 23, 2010, with complaints of shortness of breath, with a popping sensation in his chest, with stinging and painful breathing. Mr. Fall described his cough as frequent throughout the day, or during or after activity, with wheezing present. Upon examination Dr. Munshi found mucus in his chest, with complaints of difficulty walking, climbing stairs or any moderate/heavy exercise. Further, Mr. Fall was shown to have mild air

flow obstruction, air trapping, significant post bronchodilators, which were suggestive of reactive airways disease. His breath sounds are faint on auscultation.

The clinical examination of June 23, 2010, was normal. During the course of his treatment with Dr. Munshi (a pulmonologist) Mr. Fall underwent a pulmonary function test (PFT), which measured the total lung capacity (amount of air left in the lung after you have exhaled). Mr. Fall's total lung value was in the normal range. He was found to have some air trapping as his residual value was high. The expiratory reserve volume was low but not too low. The test of air trapping has a normal span of 80-120 and Mr. Fall's was 121. The results of this diagnostic study provided a finding of moderate obstructive deficit. Dr. Munshi diagnosed Mr. Fall with asthma and shortness of breath, suggestive of a reactive airways dysfunction syndrome. And in light of this diagnosis Dr. Munshi prescribed Symbicort and Xopenex.

Dr. Munshi testified that the purpose of this medication is to decrease inflammation and to prevent Mr. Fall from having triggers. "That would keep him on a level keel instead of having – instead of reacting to different triggers." Dr. Munshi further indicates that the nature of this medical condition necessitates future medical care, which Mr. Fall will require throughout his life. Such medical care includes office visits, diagnostic studies and prescription medication.

Although Dr. Munshi did not specifically render an opinion as to medical causation, he notes that ammonia is a toxic chemical that can cause the type of illness and medical condition presented by Mr. Fall, and for which he was providing Mr. Fall with treatment. In describing the nature of this medical condition and its impact upon Mr. Fall, Dr. Munshi propounded the following testimony:

Q. Reactive airway disease, is that something you consider sort of a subset of asthma?

A. I think reactive airways disease is just a description of the airway reactivity in asthma. But you can also see airway reacting in bronchitis.

Q. Okay. So is reactive airways disease also an obstructive disease?

A. Reactive airways are obstructive.

Q. And do you consider that, if someone has reactive airway disease, to be permanent condition?

A. Well, the reactive airways is a description of what's going on with the airways. So I'm not quite sure I understand.

Q. Well, if someone develops that as a result of exposure to chemicals, and in this situation we're talking about anhydrous ammonia, is that something that you expect them to, once they've developed it, once they have it –

A. See, the reactive airway dysfunction syndrome they talk about is a specific entity where you get exposed to ammonia or some other product and you immediately have, you know, airway symptoms, and that's what it's referred to. But whether those symptoms will continue into asthma or not, that's not always the case. But that immediate exposure is the reactive airway dysfunction syndrome, and then it's the subsequent irritant-induced asthma that you are left with

\* \* \*

Q. When someone develops reactive airway disease and then asthma as a result of exposure to a chemical, and again, just for example, anhydrous ammonia, once they're done that, do they become more susceptible to other types of irritants like perfumes or smoke or other airborne contaminants?

A. Yes.

\* \* \*

Q. When someone develops reactive airway disease and then asthma as a result of exposure to a chemical, and again, just for example, anhydrous ammonia, once they're done that, do they become more susceptible to other types of irritants like perfumes or smoke or other airborne contaminants?

A. Yes.

Q. But he's going to have to adjust over time to any environment he's in, whether it's at home or at work, to anything that irritates his lungs?

A. Yeah. I mean, he'd have to learn his triggers, because everybody has different triggers and different – different things that limits their activity and triggers the asthma.

Q. When he's having some sort of reaction, asthmatic reaction, what effect does have that on his lung capacity, his ability to breathe?

A. Well, when you have a asthma attack, your airways constrict so then you cannot exhale the air in and out as well as you should be able to do. And you get more air left in your lungs, so then your breath becomes smaller in capacity and makes you short of breath, people usually reach for an inhaler to open the – help open their lungs up.

In noting that Mr. Fall underwent subsequent exams and diagnostic studies that showed improvement, including findings in a normal range, Dr. Munshi does not indicate that Mr. Fall no longer suffers such a medical condition. In this regard, Dr. Munshi indicates that the nature of this medical condition allows an individual to be normal on one day, and another day has more bronchospasm. Also, in addressing Mr. Fall's status as a smoker, Dr. Munshi testified that even if someone started smoking as a teenager, it would be in their mid to late forties before you start seeing obstructive airways disease from smoking. And in regards to Mr. Fall's smoking history, he occasionally smoked, as in once in a while, even still it hurts and is difficult for him to finish.

Dr. Munshi also refers to literature where they describe what is referred to as RADS, reactive airways dysfunction syndrome. It states that RADS has been described as a "big band" affair. After an acute exposure to gas, smoke, fume or vapors with irritant properties, such as ammonia, and the subject has no prior history of respiratory complaints, and is usually how it gets diagnosed. Repeated peak exposure to irritant gases increase the risk for both adult-onset asthma and wheezing. The diagnosis of irritant-induced asthma is not often as straightforward as

RADS. That being said, jobs associated with exposure to high concentration of irritants are associated with an increasing risk for occurrence of asthma. Patient with RADS are usually treated with inhalers or oral glucocorticoids.

Dr. Munshi stated that Mr. Fall's ratio of FEV1 over FVC ratio is 68%, and generally, they want to see it over 80% to be normal. Mr. Fall did not give any indication of anything in his medical past to indicate he'd had asthma or a reaction to anything when he was younger or before he worked for this former employer. When questioned about pulmonary function tests showing ammonia as a reactive airway, he states that he's been trying to read up on it since he doesn't deal with that every day. However, according to Dr. Munshi, from what he was reading it sounded like it is unpredictable. And in one study, it talked about 13 years later, almost all participants continued to have symptoms consistent with asthma. Dr. Munshi mentioned that the history that Mr. Fall had provided to him sounded like a case of reactive airways dysfunction syndrome, which has left Mr. Fall with persistent reactive airways.

### *Independent Medical Examination*

#### P. Brent Koprivica, M.D.

P. Brent Koprivica, M.D., an occupational physician, testified by deposition in behalf of the employee. Dr. Koprivica performed an independent medical examination of Mr. Fall on December 28, 2010. At the time of this examination Dr. Koprivica took a history from Mr. Fall, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Fall, Dr. Koprivica diagnosed Mr. Fall with a reactive airways disease. Additionally, Dr. Koprivica opined that Mr. Fall's occupational exposure to anhydrous ammonia during the period he worked on the Ice House Project caused him to suffer upper lobe damage. Dr. Koprivica further opined that this occupational exposure to the ammonia presented him with a greater risk of developing the injury than that faced by the general public.

Dr. Koprivica's medical causation opinion includes consideration of whether the exposure is sufficient to have potential to cause harm; whether the timing of that exposure is appropriate, basically if it predates the development of the symptoms and the pathology; and whether the exposure was competent to produce the pathology that he's looking at and whether or not there's any underlying scientific evidence; whether it's biologically plausible that there's a relationship between the two. Considering these factors, Dr. Koprivica opined that the exposure reported by Mr. Fall was sufficient and biologically plausible. Further, this biologic plausibility, combined with the timing of symptoms, make a causal relationship likely.

In rendering his opinion, Dr. Koprivica noted that the literature indicates that "lower concentration exposure to anhydrous ammonia vapor for a long period of time can result in extensive burns of the entire tracheobronchial tree" and that the development of obstructive and restrictive airway disease was associated with ammonia exposure. He outlines that in a treatise entitled *Toxicology by Thomas J. Healy and William O. Brundt*, that on pages 473-475, development of obstructive and restrictive disease associated with ammonia exposure is noted in case reports. Dr. Koprivica's opinion was that exposure over time, including the significant exposure event on April 11, 2008, was the prevailing factor in his ongoing pulmonary impairment represented by moderate obstructive disease. Dr. Koprivica thus concludes that Mr. Fall presents with reactive airways disease (RAD) as evidenced by objective pulmonary testing.

According to Dr. Koprivica, the limited medical care and treatment provided to Mr. Fall for treatment of the reactive airway disease was medically reasonable and a direct necessity in an attempt to cure and relieve Mr. Fall from the effects of the occupational disease. Dr. Koprivica similarly opines that the nature of this medical condition will require Mr. Fall to undergo receipt of future medical care, including the need for pulmonary monitoring and provision of appropriate medication for the reversible component of his airway disease.

In determining the nature and extent of Mr. Fall's medical condition referable to this occupational exposure, Dr. Koprivica opines that Mr. Fall is at maximal medical improvement in reference to the work place exposure claim of April 11, 2008. The reactive airway disease was partially reversible with medication. In considering the reversibility of his reactive airways disease with ongoing treatment, but recognizing that Mr. Fall is governed by limitations or restrictions that require him to avoid certain triggers, such as avoiding exposure to smoking, dust and fumes, Dr. Koprivica opined that this incident of occupational disease caused Mr. Fall to sustain a permanent partial disability of 25 percent to the body as a whole. Mr. Fall should avoid exposure to smoking, dust and fumes.

Norbert Belz, M.D.

The employer and insurer caused Mr. Fall to present to Norbert Belz, M.D., an occupational physician, for an independent medical examination on October 5, 2011. Notably, the employee's original request for hearing was denied, pursuant to the employer and insurer's objections, on the grounds that the employer and insurer needed time obtain this examination from Dr. Belz and to take his deposition. A scheduling order was entered providing the employer until September 28, 2012, to provide the employee with a copy of Dr. Belz's report. The order further provided the employer and insurer until November 16, 2012, to take Dr. Belz's deposition.

The employee notes that the employer and insurer never provided to the employee a copy of Dr. Belz's report, and the employer and insurer never took the deposition of Dr. Belz. Similarly, the employer and insurer never offered into evidence the medical report of Dr. Belz, or cause Dr. Belz to testify at the hearing of this case.

## **FINDINGS AND CONCLUSIONS**

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

### **I. Incident of Occupational Disease & Injury**

The underlying issue presented in this case is whether the employee sustained an incident of occupational disease in the nature of asthma, in the form of reactive airways disease, in his employment with the employer, Red Door Construction.

The employee alleges that as a consequence of suffering occupational exposure to anhydrous ammonia during the period he worked on the Ice House Project, in his employment with Red Door Construction, he sustained a work-related injury. The employee further alleges that this occupational exposure and the nature of his injury involved him suffering upper lobe damage, which has resulted in him suffering an injury in the nature of asthma, in the form of reactive airways disease. Additionally, the employee contends that this occupational exposure to the ammonia presented him with a greater risk of developing the injury than that faced by the general public. The employee relies principally upon the medical opinion of Dr. Koprivica, and to a lesser extent the medical opinion of Dr. Munshi.

The employer and insurer dispute the employee's contentions, and contest liability on grounds that while Mr. Fall may have a medical condition involving asthma, in the nature of restrictive airways disease, the medical condition is not causally related to his employment. The employer and insurer suggest the medical condition is merely an idiopathic condition, for which there is no employer liability. The employer and insurer do not necessarily rely upon or point to medical opinion, but contend the burden of proof is on the employee; and the employee has failed to present sufficient evidence to meet this burden. The employer and insurer principally assert that there is no evidence of the employee suffering any toxic exposure to ammonia, for which a medical causation can be found.

The term "occupational disease" is defined in Section 287.067, RSMo. In pertinent part, this statute states:

1. In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.
2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.
3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in

causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

In the case of *Vickers v. Missouri Department of Public Safety*, 283 S.W.3d 287 (Mo. App. W.D. 2009), the court discussed the burden of proof and evidence necessary for an employee to establish that an occupational disease is compensable under Section 287.067, as the law existed prior to the 2005 amendments. The court stated as follows, 283 S.W.3d at 292 *et seq.*:

In proving a causal connection between the conditions of employment and the occupational disease, the claimant bears the burden of proof; to prove causation it is sufficient to show a recognizable link between the disease and some distinctive feature of the job . . . and there must be evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease. However, the cause and development of an occupational disease is not a matter of common knowledge. There must be medical evidence of a direct causal connection. . . . 'A claimant must submit medical evidence establishing a *probability* that working conditions caused the disease, although they need not be the sole cause.' . . . 'Even where the causes of the diseases are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee.'

Notably, however, the court's discussion of proving causation in *Vickers* must be viewed in context of Section 287.067, RSMo as amended in 2005. The Amendments to this statute changed the causation factor to require that the occupational exposure be the "prevailing factor" in relation to causation. See, *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo. App. E.D., 2007). In discussing this new requirement, the court in *Lawson* stated,

The legislature amended several sections of the Workers' Compensation Act in 2005. In particular, portions of section 287.067 and 287.020 were rewritten. Specifically, section 287.067.2 discusses when an injury by occupational disease is considered compensable. Prior to 2005, the section stated that such an injury will be compensable if it "is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020." Subsections 2 and 3 of section 287.020 previously contained definitions for "accident" and "injury." Prior to 2005, those definitions included language which concluded that an injury was compensable if it is work related, which occurs if work was a "substantial factor" in the cause of the disability.

After the 2005 amendments to the statutes, the definition of a compensable injury by occupational disease was changed to use the language "prevailing factor" in relation to causation. Specifically, section 287.067.2 states:

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the

resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.020.3 defines "injury" using similar terms.

217 S.W.3d at 349-350 *et seq.*

In this case, there is strong "biological plausibility" that on multiple occasions during his employment with Red Door Construction, and while working on the Ice House Project, the employee experienced occupational exposure to anhydrous ammonia, which caused him to sustain an injury to his upper lobe and resulted in him suffering an injury in the nature of asthma, in the form of reactive airways disease. The prevailing factor in relation to causation is the demands of the job that Mr. Fall performed in his employment with the employer, Red Door Construction, and the exposure to ammonia while working on the Ice House Project. Further, this occupational exposure to the ammonia presented him with a greater risk of developing the injury than that faced by the general public.

The evidence presented in this case established among other things the following facts:

1. The employer, Red Door Construction, employed the employee, Ivan Fall, to perform general labor work involving the demolition and rehabilitation of seven buildings of varying size. This construction project was commonly known as the "Ice House Project". The buildings in the project were 100 years old or more. A number of the Ice House Project buildings were used previously as refrigerated storage or refrigerated warehouses.
2. Historically the refrigeration system utilized in these older refrigerated warehouses utilized refrigeration loops involving pipes filled with ammonia. (The liquid ammonia would run through two or three pipe loops that traveled through the buildings.) Ammonia is a chemical compound and is used commonly as a refrigerant. The natural form for ammonia is as a vapor, and it occurs at ambient temperature, approximately 68 degrees. In order for ammonia to take a liquid form the pipes must be pressurized and/or the temperature must be reduced to 28 degrees below zero. There was ammonia in the pipes, the buildings had been used for giant refrigeration and had pipes running throughout them that used ammonia as a refrigerant.
3. The construction project relating to the Ice House Project involved rehabilitation of multiple buildings. This rehabilitation process included removal or remediation of asbestos and ammonia from the buildings.
4. The contractor for remediation of the ammonia was Springfield Mechanical, a company owned by Bob Fischer of Springfield, Missouri. (This company previously owned the buildings.)

5. Ammonia is a gas, and in order to remediate the ammonia out of the piping system Springfield Mechanical utilized a Venturi device. This device enables a technician with a background in ammonia to tie into the ammonia piping system. The technician dilutes the ammonia by blending the ammonia with water. In this regard, the Venturi device does not pump water into the ammonia filled pipes. Rather, the ammonia is extracted by using a vacuum system, which directs the ammonia into a system or container that allows the ammonia to blend with water. Upon reaching proper dilution rates, the mixture is sprayed into plastic containers, which are then removed from the premises.
6. Simply purging the pipes of ammonia by use of the Venturi device does not purge or remove ammonia smell from the pipes. Water is not pumped into the pipes at any time. Mr. Fisher had no personal knowledge of what was done on the Ice House Project since he wasn't personally involved, but his workers utilized a Venturi device to tap into the pipes and remove the ammonia using a vacuum system. In the use of this system the pipes would not be rinsed out or flushed with water at any time.
7. The remediation of the ammonia occurred in February and March of 2007 under a lump sum contract entered into between Red Door Construction and Springfield Mechanical. (In context of this lump sum contract Springfield Mechanical agreed to perform the remediation work for a single sum regardless of the amount of time and man hours needed to perform the work. A vacuum system was used to remove the ammonia, and access points in the pipe loops were cut off, preventing the lines from being pressurized.)
8. The pipes that ran throughout buildings 1, 2, 3 and 4 contained ammonia, and the remediation process did not completely remove all ammonia from the piping system. It is unclear whether the pipes situated in buildings 5, 6 and 7 contained ammonia.
9. Subsequent to the remediation work, the piping system remained in the buildings, but the pipes were cut and left open to allow for ambient air during the demolition and completion of the rehabilitation process.
10. The employee worked on the construction involving the Ice House Project prior to, during and subsequent to the remediation work performed by Springfield Mechanical. He began working on the "Ice House Project" in January 2007, and continued in this employment until being terminated by Red Door Construction on April 18, 2008. During this period he worked 4 to 5 days a week, in each of the 7 buildings that were being renovated.
11. The employee was exposed to ammonia in liquid "sludge" and vapor forms almost daily for several months during the remediation of ammonia pipes in the buildings at the Ice House Project. He would frequently cut into pipes and see the vapor leak from the pipes and it would cause him to hack, choke and lose his breath. It would burn his skin like a sunburn. Sometimes it was so bad he would have to leave the building. He was not provided any safety equipment.

12. On one occasion, during this period of employment, the exposure to ammonia was so bad that he was knocked off his ladder and briefly lost consciousness. The side of his face was burned.
13. Dr. Koprivica, Mr. Fall's occupational doctor, and Dr. Munshi the treating physician and a pulmonologist, agree that Mr. Fall suffers from asthma, or reactive airway disease. Dr. Koprivica is the only doctor that rendered an opinion as to the cause of the reactive airway disease, opining that the occupational exposure to ammonia was the prevailing factor in causing his disease.
14. Mr. Fall was not exposed to ammonia outside of work with the employer.
15. Dr. Munshi declined to provide an opinion on causation, but did confirm that Mr. Fall suffered from asthma that may have been caused by work exposure to ammonia vapor. No doctor rendered an opinion that Mr. Fall's reactive airway disease was not caused by exposure to ammonia.

Moreover, the employer and insurer retained Dr. Norbert Belz (he was specifically named as their expert in the scheduling order) to perform an independent medical examination, which he did. Similarly, through this exam Dr. Belz was asked to render an opinion on causation. However, the medical opinion of Dr. Belz was never offered or entered into evidence, and Dr. Belz was not called to testify at the hearing. Nor did the employer and insurer secure a written medical report from Dr. Belz and tender it to the employee for review, although the employee requested a copy of the report. Failure of a party to call a witness who has knowledge of facts and circumstances vital to the case generally raises a presumption that the testimony would be unfavorable to the party failing to offer it. *Kelly by Kelly v. Jackson*, 798 S.W.2d 699, 701 (Mo. banc 1990). Dr. Belz's report was not made available to the employee, and the employee did not have equal access to Dr. Belz since he was an examining physician retained by the employer and insurer.

In addition, in considering the medical opinions of Dr. Koprivica and Dr. Munshi, I find both doctors credible, reliable and worthy of belief. Although I do not find Mr. Fall to be a compelling witness, and found him to be combative and not straight forward, I accept as true his testimony regarding work activity and exposure to ammonia. Accordingly, as to this issue I find in favor of the employee. On or about April 11, 2008, the employee sustained an incident of occupational disease in the nature of asthma, in the form of reactive airways disease, which arose out of and in the course of his employment with the employer, Red Door Construction.

## II. Notice

An employee who sustains a workers' compensation injury in Missouri is required to provide his or her employer with timely written notice of the injury, and the failure to provide such notice may result in the employee not being able to maintain a proceeding for compensation. The notice provision is set forth in Section 287.420, RSMo (2006), which, in relevant part, states,

No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless

written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition, unless the employee can prove the employer was not prejudiced by failure to receive the notice.

In *Allcorn v. Tap Enterprises*, 277, S.W.3d 823, (Mo. App. S.D. 2009) the Court of Appeals noted that this notice statute incorporates six elements -- (1) written notice, (2) of the time, (3) place, and (4) nature of the injury, and (5) the name and address of the person injured, (6) given to the employer no later than thirty days after the diagnosis of the condition. *Id.* at 828-30. Further, the court interpreted the sixth element as being triggered once a “diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure.” *Id.*

Notably, the recent change in the law from the former statute requires notice to be given in cases involving an incident of occupational disease or repetitive trauma, which the notice statute did not previously require. Otherwise, the change appears minimal. The former statute stated the following:

No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury ... has been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless ... the employer was not prejudiced by failure to receive notice.

Section 287.420, RSMo

In light of the similarity between the two statutes, I am persuaded that the new statute does not change the purpose of the underlying notice requirement. Namely, the notice requirement is twofold – to enable the employer to conduct an accurate and thorough investigation of the facts surrounding the injury; and to ensure that the employer has the opportunity to minimize the employee’s injury by providing prompt medical treatment. *Messersmith v. Missouri – Columbia / Mt. Vernon*, 43 S.W.3d 829 (Mo.banc 2001). *See also*, *Seyler v. Spirtas Industrial*, 974 S.W.2d 536 (Mo.App. E.D. 1998). Accordingly, as in the past, giving notice is not an unconditional prerequisite to recovery. The failure to give timely written notice may be excused if it is determined that the failure to provide timely notice did not prejudice the employer. The evidence in the record need not be overwhelming or uncontroverted. *Id.*

Further, in the context of determining whether the employer has been prejudiced by the lack of timely written notice, several familiar principles applicable to the former statute bear reprise. The burden is upon the claimant to demonstrate that the employer did not suffer any prejudice. Actual notice of the accident within 30 days is a *prima facie* showing that the employer was not prejudiced by the lack of the requisite notice. *Seyler* at 538. Upon a *prima facie* showing, the burden shifts to the employer to demonstrate that it was prejudiced by the failure of the notice to be in writing. *Id.* In the absence of the employer having actual notice of the accident within 30 days, the burden is upon the claimant to produce evidence demonstrating that the employer was not prejudiced in its ability to conduct an accurate and thorough investigation of the facts surrounding the injury; and the employer was not prejudiced in its

ability to minimize the employee's injury. *Id.* In the context of this issue, I am persuaded that these principles may similarly guide construction and application of Section 287.420, RSMo (2006) to the facts of this case.

The evidence presented in this case reveals that no diagnostician made a causal connection between the work exposure to ammonia and Mr. Fall's reactive airway disease until Dr. Koprivica did in his report dated December 28, 2010, well after the claim had been filed and notice provided. I therefore find that notice was timely provided. This issue is resolved in favor of the employee.

### III. Medical Care

#### Past Medical Expenses

The employee seeks payment of past medical care and expenses in the amount of \$4,997.97. In support of this claim, the employee presented evidence of medical records and bills relating to treatment of his asthma, in the nature of reactive airways disease, and which relate to his occupational exposure to ammonia. These expenses are in the amount of \$4,997.97. Notably, in causing the employee to incur these expenses, the employer and insurer contested liability and elected to forego exercising the employer's right to select the health care provider.

Section 287.140, RSMo requires the employer to provide such medical treatment as is reasonably necessary to cure and relieve from the effects of the employee's injury. See *Landers v. Chrysler Corp.*, 963 S.W. 2d 275 (Mo. App. 1997). Once the employee has admitted evidence of the medical bills and records, and presents his testimony that the treatment was for the work-related injury, then the burden shifts to the employer and insurer to prove that the medical bills were unreasonable and unfair. *Esquivel v. Day's Inn of Branson and Cox Medical Center*, 959 S.W.2d 486, 489 (Mo. App. 1998). If an employer refuses to provide medical treatment, then the employer loses control over selection of the health care provider and the employee may seek reimbursement for related expenses at the hearing. *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. 2007).

Accordingly, in light of the foregoing, I find and conclude that as a consequence of the incident of occupational disease of April 11, 2008, and resulting injury in the nature of reactive airways disease, the employee incurred medical care and expenses in the amount of \$4,997.97. The aforementioned medical care was reasonable, necessary, and causally related to the April 11, 2008, occupational disease. Further, the medical expenses were fair and reasonable. Therefore, the employer and insurer are ordered to pay to the employee, Ivan Fall, the sum of \$4,997.97 in reimbursement of medical expenses for treatment resulting from the occupational disease.

#### Future Medical Care

The employee seeks an award for future medical care. In order to receive an award of future medical benefits under Chapter 287, RSMo, an employee does not need to show "conclusive evidence" of a need for future medical treatment. Instead, the employee need only show a "reasonable probability" that because of her work related injury, future medical treatment will be necessary. *Stevens v. City of Citizens Memorial Healthcare Foundation*, 244 S.W. 3d 43

(Mo. App. 2008). In this context it must be shown that the need for future medical care “flows(s) from the accident.” *Landers v. Chrysler Corp.*, 963 S.W. 2d 275 (Mo. App. 1997) at 283. Further, the phrase “to cure and relieve” has been construed to mean treatment that “give comfort even though restoration to soundness is beyond avail.” *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. 1996) (parenthesis omitted).

In considering the question of future medical care both Dr. Koprivica and Dr. Munshi testified that Mr. Fall will require future medical care, including inhalers, medication and regular doctor visits, in order to treat and relieve the effects of the reactive airway disease. There is no medical opinion to the contrary. This issue is thus resolved in favor of the employee. The employer and insurer are ordered to provide the employee, Ivan Fall, with such medical care as may be reasonable, necessary and causally related to the restrictive airways disease.

#### IV. Permanent Disability Compensation

The evidence is supportive of a finding that the April 11, 2008, incident of occupational disease caused the employee to suffer certain permanent disability to his body as a whole. In this regard, Mr. Fall suffers reactive airways disease, which has reduced his lung function, and requires him to take prescription medication in order to control the effects of the disease. In considering the nature and extent of the disability caused by this disease, Dr. Koprivica opined that this incident of occupational disease caused Mr. Fall to sustain a permanent partial disability of 25 percent to the body as a whole.

Although the nature of this disease has allowed Mr. Fall to experience improvement, including normal pulmonary function studies, the improvement does not reflect a permanent state of improvement or a complete healing. The nature of this medical condition is a partially reversible condition with medication. And in considering the reversibility of his reactive airways disease with ongoing treatment, Mr. Fall is governed by limitations or restrictions that require him to avoid certain triggers, such as avoiding exposure to smoking, dust and fumes. Notably, from time to time he can experience a reaction to fumes that requires use of his emergency inhaler. According to Dr. Koprivica and Dr. Munshi, there is no way of knowing when this will occur, but that he should not be involved in jobs that expose him to gas or dust. Thus, the nature of this disease, as a permanent medical condition, requires the use of medication to have a normal life; and Mr. Fall must avoid certain jobs and certain environments.

Accordingly, after consideration and review of the evidence, I find and conclude that as a consequence of the April 11, 2008, incident of occupational disease, the employee, Ivan Fall, sustained a permanent partial disability of 15 percent to the body as a whole. Therefore, the employer is ordered to pay to the employee, Ivan Fall, the sum of \$19,200.00, which represents 60 weeks of permanent partial disability compensation, payable at the compensation rate of \$320.00 per week.

#### V. Costs

The employee seeks an award for costs, including attorney’s fees, pursuant to Section 287.560, RSMo. This statute allows the Division to issue an award for costs, including attorney’s

fees, whenever “any proceedings have been brought, prosecuted or defended without reasonable ground...” As to this issue I find and conclude that the employee has failed to sustain his burden of proof. This issue is thus resolved in favor of the employer and insurer. The request for costs is denied.

Made by: \_\_\_\_\_

L. Timothy Wilson  
*Administrative Law Judge*  
*Division of Workers' Compensation*