

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-083796

Employee: John Shelton  
Employer: Delmar Gardens  
Insurer: Travelers Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 25, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 25, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 24<sup>th</sup> day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED  
John J. Hickey, Member

Attest:

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Secretary

Employee: John Shelton

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

#### **Law**

Employer/insurer bears the burden of proving that employee forfeited his benefits. "The burden of establishing any affirmative defense is on the employer...In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true." § 287.808 RSMo.

Section 287.120.6(3) RSMo provides, in relevant part:

An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section 195.010, RSMo, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

We must construe the above provision strictly. See § 287.800.1 RSMo.

Employer argues that forfeiture is appropriate under § 287.120.6(3) because employer's policy clearly authorized post-injury testing and employee refused to take a test for alcohol.

#### **Discussion**

##### ***Did employer's policy clearly authorize post-injury testing?***

The language of employer's drug and alcohol policy relating to post-injury testing appears in the pre-printed attestation above employee's signature on an undated document entitled *Notice to Employees of Delmar Gardens Enterprises, Inc.* The attestation reads, in relevant part, "I understand that if in the event I am injured while on the job, I will be subject to a drug and/or alcohol test *upon receiving treatment.*" (Emphasis added.)

Jessica Hayes, employer's assistant administrator and human resources director, explained the policy: "When an employee is hurt or injured on the job they are required to submit to a breath alcohol, and drug screen *upon treatment at our medical center.* And if they do refuse or do not submit to that they are subject to termination." (Emphasis added.)

Jeanna Woods, employer's administrator, described employer's post-injury alcohol and drug test policy, too. "Whatever day they go for *medical treatment* they have to submit to that test." (Emphasis added.)

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A careful reader will note that the plain language of the policy makes employee's obligation to submit to a drug and/or alcohol test contingent upon employee receiving medical treatment. The testimony of employer's human resources director goes further and makes employee's obligation to submit to a drug and/or alcohol test contingent upon employee receiving treatment from employer's authorized medical provider.

The fly in the ointment of employer's forfeiture argument is that the Missouri Workers' Compensation Law imposes no duty upon employee to accept treatment from employer's medical provider. Employee has an absolute right to choose his own physicians. Section 287.140 RSMo, plainly states that, "[i]f the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense."

In summary, employer's policy only required employee to submit to alcohol or drug testing if employee accepted treatment from the medical providers chosen by employer. Employee chose his own physician and accepted that he would have to pay for the medical expenses associated with that treatment. Employer's policy did not unequivocally and clearly mandate that employee submit to post-injury alcohol and drug testing under the circumstances of this case.

***Did employer request that employee take a test for alcohol or nonprescribed controlled substance?***

There is no evidence that employer ever requested that employee take a test for alcohol or nonprescribed controlled substances. No witness testified to asking employee to take an alcohol or drug test. No medical records reflect any such request. The only evidence regarding a test is the following statement appearing in an August 21, 2006, letter from Dayetra Sloan of Concentra to employer: "When [employee] finally came inside we took him in the back for his Breath Alcohol Test and he refused all *treatment*." (Emphasis added). Ms. Sloan did not record that she asked employee to submit to any test.

The absence of any evidence of a request by employer that employee take a drug or alcohol test is fatal to employer's argument that forfeiture is appropriate in this matter.

***Did employee refuse to take a test for alcohol or nonprescribed controlled substance?***

There is no evidence in the record that employee refused to take a test for alcohol or drugs. The only evidence regarding a test is the following statement appearing in an August 21, 2006, letter from Dayetra Sloan of Concentra to employer: "When [employee] finally came inside we took him in the back for his Breath Alcohol Test and he refused all *treatment*." (Emphasis added).

All that Ms. Sloan asserts is that employee refused treatment. Employee concedes as much. Unless it is conducted for the purpose of determining the appropriate course of medical service to provide, a test for the presence of alcohol is not "treatment." "Treat" means, "to care for (as a patient or part of the body) medically or surgically: deal with by

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medical or surgical means: give a medical treatment to...: to seek cure or relief of (as a disease)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2435 (2002).

Examinations conducted merely to allow the employer to determine questions of causality or liability generally do not constitute "medical treatment." *Faries v. ACF Industries, Inc.*, 531 S.W.2d 93, 97 (Mo. App. 1975). See also, *Meekins v. St. John's Reg'l Health Ctr., Inc.*, 149 S.W.3d 525 (Mo. App. 2004) (drug screen is not medical treatment).

Employer has proven employee refused treatment. Employer has failed to establish employee refused to participate in an alcohol test. The forfeiture provision of § 287.120.6(3) is not triggered in this case.

***Records of the Division of Employment Security***

Employer/insurer offered as evidence *some* records of a Division of Employment Security unemployment compensation case involving employee and employer. The records stop short of the evidentiary hearing and all subsequent proceedings. Employer/insurer's incomplete offer is explained by § 288.215 RSMo, which prohibits using decisions of the Appeals Tribunal and the Labor and Industrial Relations Commission as evidence in actions not brought under the Missouri Employment Security Law.

1. Any finding of fact, conclusion of law, judgment or order made by an appeals tribunal, the labor and industrial relations commission or any person with the authority to make findings of fact or law in any proceeding under this chapter shall not be conclusive or binding in any separate or subsequent action not brought under this chapter, and shall not be used as evidence in any subsequent or separate action not brought under this chapter, before an arbitrator, commissioner, commission, administrative law judge, judge or court of this state or of the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.
2. Any finding of fact, conclusion of law, judgment or order made by an arbitrator, commissioner, commission, administrative law judge, judge or any other person or body with authority to make findings of fact or law in any proceeding not brought under this chapter shall not be binding or conclusive on an appeals tribunal or the labor and industrial relations commission in any subsequent or separate proceeding brought under this chapter, regardless of whether the prior action was between the same or related parties or involved the same facts.
3. Nothing in subsection 1 of this section shall be construed to prevent the use of evidence presented in any proceeding under this chapter in any other proceeding not brought under this chapter.

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There were further proceedings in the unemployment case that are not documented in the exhibits offered by the employer/insurer. Relying on the incomplete record of the proceedings in the unemployment case, the administrative law judge found that, "a certified copy of the Employment Security records were introduced into evidence and those contain a finding that the claimant refused to undergo alcohol testing and was terminated by the employer in connection with his misconduct in that regard." While the administrative law judge's description of one of the unemployment exhibits is accurate, the exhibit is not persuasive on the issue of whether claimant refused to undergo alcohol testing. The "finding" referenced by the administrative law judge was merely the determination of a Division of Employment Security deputy. Deputy determinations are the result of a preliminary investigation and are not based upon evidence presented in an evidentiary hearing. See § 288.070 RSMo.

***Did employer violate § 287.128.3 RSMo?***

Although not helpful to determining the refusal issue, the Division of Employment Security records raise one important issue. The records suggest that employer repeatedly misled employee about his rights under the Workers' Compensation Law. Section 287.140 RSMo, plainly states that, "[i]f the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense." Employer is not required to pay the medical bills associated with treatment an employee secures on his own. But an employee making such an election to treat with doctors of his own choosing does not forgo other benefits under the Law. Notwithstanding employee's clear right to choose his own physician, employer's representatives repeatedly told him he was required to seek treatment through employer's medical providers. Here's a sampling of some of the misstatements appearing in the records submitted by employer to the Division of Employment Security.

Jeanna Woods – "I told him he must go to concentra!"

Angela Harpole – "I counseled Mr. Shelton that he must attend Concentra Medical Center in order to receive paid workman's compensation by Delmar Gardens."

"Mr. Shelton stated to me that he did not want to be seen at Concentra, and that he had already been seen by his own doctor. Again, I reminded Mr. Shelton that he had to be seen by a Concentra doctor in order to obtain paid workman's compensation. At this time he stated he would like to take sick days for the 12<sup>th</sup> thru 15<sup>th</sup>, and would return to work. In accordance with his own doctors' statement, I told him that he was on restricted duty and could not return to work on full duty and that Delmar Gardens would not honor paid light duty unless specified by a Concentra doctor. At this time again Mr. Shelton refused to see a Concentra doctor and agreed to take a week off of work for the time of restricted duty without pay."

Jessica Kiene – "Mr. Shelton had hurt himself while working here at Delmar Gardens of Creve Couer. When an employee hurts himself while working they must go to our medical center to receive treatment. Mr. Shelton did not want to

Employee: John Shelton

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go to our medical center and went to his own doctor. We told Mr. Shelton that he needs to be seen by our medical center to receive Workers Compensation.”

As discussed earlier, employee’s right to workers’ compensation benefits, with the exception of medical expenses, is not contingent on employee treating with a medical provider authorized by employer. But, according to employer’s own records, Jeanna Woods and Angela Harpole both told employee he had to be treated at Concentra or employee could not receive workers’ compensation benefits. And it appears employee may have not pursued temporary total disability benefits as a direct result of Angela Harpole’s statements.

The 2005 amendments to the Missouri Workers’ Compensation Law stripped away some of the protections previously afforded to injured workers. Before the changes, an employer had to conspicuously post its workplace drug and alcohol policies on its premises. Further, an employer had to prove that an injured worker had actual knowledge of the policy and that employer made a diligent effort to inform the worker of the need to obey the policy before the worker’s violation could adversely affect his workers’ compensation benefits. Gone are the requirements that the employer diligently post the rules and train workers about the rules. Gone, too, are the exceptions to forfeiture where an employer acquiesced in the drug or alcohol use.

It is one thing to relieve employer of the obligation to warn workers about forfeiture provisions in the law. It is quite another to condone affirmative misrepresentation of a worker’s rights under the workers’ compensation law. I will not do so.

Short of immediately hiring counsel, an injured worker is at the mercy of employer to provide him with accurate information about his rights because the legislature eliminated the legal advisors who were previously employed by the Division of Workers’ Compensation to explain workers’ compensation rights to injured workers.

Section 287.128.3 RSMo provides, in part:

It shall be unlawful for any person to:

...

(6) Knowingly make or cause to be made any false or fraudulent material statement or material representation for the purpose of obtaining or denying any benefit;

(7) Knowingly make or cause to be made any false or fraudulent statements with regard to entitlement to benefits with the intent to discourage an injured worker from making a legitimate claim;

I do not know if employer’s administrator and her staff knew that the statements they made to employee were false at the time they made the statements. I do not know if employer’s administrator and her staff made the statements for the purpose of denying any benefit to employee or with the intent to discourage employee from claiming

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benefits to which he is entitled. I will give them the benefit of the doubt and assume they were unaware that their statements were contrary to the Workers' Compensation Law. I encourage administrative law judges to question employer witnesses to determine their level of knowledge where it appears an injured worker has been misled about his or her rights by the witness. In that way, instances of deliberate misinformation may be more easily identified for referral to the Division of Workers' Compensation's Fraud and Noncompliance Unit for investigation.

*Compensation*

Employer admits that employee sustained an injury by accident on August 9, 2006. Employer does not dispute that the injury arose out of and in the course of employment. Employee's injury is compensable and employee's benefits are not forfeited. I find credible the opinion of Dr. Berkin that employee sustained a permanent disability as a result of the August 9, 2006, accident. I would award to employee permanent partial disability benefits of 12.5% of the body as a whole referable to the low back.

I would reverse the administrative law judge's award. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-083797

Employee: John Shelton  
Employer: Delmar Gardens  
Insurer: Travelers Insurance Company

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Given at Jefferson City, State of Missouri, this 24<sup>th</sup> day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED  
John J. Hickey, Member

Attest:

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Employee: John Shelton

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

#### **Law**

Employer/insurer bears the burden of proving that employee forfeited his benefits. "The burden of establishing any affirmative defense is on the employer...In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true." § 287.808 RSMo.

Section 287.120.6(3) RSMo provides, in relevant part:

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We must construe the above provision strictly. See § 287.800.1 RSMo.

Employer argues that forfeiture is appropriate under § 287.120.6(3) because employer's policy clearly authorized post-injury testing and employee refused to take a test for alcohol.

#### **Discussion**

##### ***Did employer's policy clearly authorize post-injury testing?***

The language of employer's drug and alcohol policy relating to post-injury testing appears in the pre-printed attestation above employee's signature on an undated document entitled *Notice to Employees of Delmar Gardens Enterprises, Inc.* The attestation reads, in relevant part, "I understand that if in the event I am injured while on the job, I will be subject to a drug and/or alcohol test *upon receiving treatment.*" (Emphasis added.)

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The fly in the ointment of employer's forfeiture argument is that the Missouri Workers' Compensation Law imposes no duty upon employee to accept treatment from employer's medical provider. Employee has an absolute right to choose his own physicians. Section 287.140 RSMo, plainly states that, "[i]f the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense."

In summary, employer's policy only required employee to submit to alcohol or drug testing if employee accepted treatment from the medical providers chosen by employer. Employee chose his own physician and accepted that he would have to pay for the medical expenses associated with that treatment. Employer's policy did not unequivocally and clearly mandate that employee submit to post-injury alcohol and drug testing under the circumstances of this case.

***Did employer request that employee take a test for alcohol or nonprescribed controlled substance?***

There is no evidence that employer ever requested that employee take a test for alcohol or nonprescribed controlled substances. No witness testified to asking employee to take an alcohol or drug test. No medical records reflect any such request. The only evidence regarding a test is the following statement appearing in an August 21, 2006, letter from Dayetra Sloan of Concentra to employer: "When [employee] finally came inside we took him in the back for his Breath Alcohol Test and he refused all *treatment*." (Emphasis added). Ms. Sloan did not record that she asked employee to submit to any test.

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medical or surgical means: give a medical treatment to...: to seek cure or relief of (as a disease)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2435 (2002).

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Employee: John Shelton

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There were further proceedings in the unemployment case that are not documented in the exhibits offered by the employer/insurer. Relying on the incomplete record of the proceedings in the unemployment case, the administrative law judge found that, "a certified copy of the Employment Security records were introduced into evidence and those contain a finding that the claimant refused to undergo alcohol testing and was terminated by the employer in connection with his misconduct in that regard." While the administrative law judge's description of one of the unemployment exhibits is accurate, the exhibit is not persuasive on the issue of whether claimant refused to undergo alcohol testing. The "finding" referenced by the administrative law judge was merely the determination of a Division of Employment Security deputy. Deputy determinations are the result of a preliminary investigation and are not based upon evidence presented in an evidentiary hearing. See § 288.070 RSMo.

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It is one thing to relieve employer of the obligation to warn workers about forfeiture provisions in the law. It is quite another to condone affirmative misrepresentation of a worker’s rights under the workers’ compensation law. I will not do so.

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benefits to which he is entitled. I will give them the benefit of the doubt and assume they were unaware that their statements were contrary to the Workers' Compensation Law. I encourage administrative law judges to question employer witnesses to determine their level of knowledge where it appears an injured worker has been misled about his or her rights by the witness. In that way, instances of deliberate misinformation may be more easily identified for referral to the Division of Workers' Compensation's Fraud and Noncompliance Unit for investigation.

*Compensation*

Employee has established that he sustained an injury by accident on August 14, 2006, while transferring a resident. Employee's injury is compensable and employee's benefits are not forfeited. I find credible the opinion of Dr. Berkin that employee sustained a permanent disability as a result of the August 14, 2006, accident. I would award to employee permanent partial disability benefits of 12.5% of the body as a whole referable to the low back.

I would reverse the administrative law judge's award. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member