

FINAL AWARD DENYING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge  
With Supplemental Opinion)

Injury No.: 06-104584

Employee: David Taylor  
Employer: Contract Freighters, Inc.  
Insurer: Con-way Truckload, Inc.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, heard the parties' arguments and considered the whole record, we find 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, we affirm the award and decision of the administrative law judge as supplemented herein, and award no compensation in the above-captioned case. The award and decision of Chief Administrative Law Judge L. Timothy Wilson, issued October 1, 2008, is attached and incorporated by this reference.

The controlling statutes in the case at bar are § 287.120.1 RSMo and § 287.020.3(3) RSMo.

In pertinent part, and as of the date of the accident, these sections provided as follows:

Section 287.120.1 Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, . . . . .

Section 287.020.3(3) An injury resulting directly or indirectly from idiopathic causes is not compensable. . . .

Section 287.020.3(3) was enacted in 2005. For purposes of this appeal there was no substantive change in the 2005 enactment concerning § 287.120.1 RSMo.

Fact Findings/Credibility Findings of Administrative Law Judge

The administrative law judge thoroughly detailed his findings of fact and credibility determinations, and there is no reason to alter those findings of fact and credibility determinations, and in fact, we give deference to both.

A relevant finding of fact, made by the administrative law judge, after carefully reviewing all of the evidence, was that employee, while operating his motor vehicle, suffered a coughing episode, which caused employee to lose control of his motor vehicle, and sustain the resulting injuries for which workers' compensation benefits are being claimed. As determined by the administrative law judge "the evidence is supportive of a finding that he lost control of his vehicle as a result of his coughing."

Additionally, the administrative law judge found the evidence to be supportive of a finding that the coughing episode suffered by the employee immediately preceding the accident, was due to an idiopathic occurrence. Employee had an admitted history of coughing episodes spontaneously occurring prior to the accident of November 4, 2006; and this condition continued subsequent to the accident occurring November 4, 2006. These “coughing spells” were noted in the medical records and were also admitted by employee. There is no evidence in the record to support a finding that the coughing spell occurring November 4, 2006, immediately preceding the motor vehicle accident, was due to employee’s working environment. In fact, the Commission can not make an inferential finding that the coughing episode was causally related to employee’s working environment due to the lack of any supportive evidence. The origin of the coughing spell, which caused the motor vehicle accident, was personal to the employee, or peculiar to the employee, due to the employee’s admitted history of coughing spells, which consequently renders it idiopathic in nature. Idiopathic is defined as “peculiar to the individual: innate”. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993).

In summary, we agree with the finding by the administrative law judge that the coughing spell which immediately preceded the motor vehicle accident, was of an origin personal in nature, peculiar to the employee, thus rendering it an idiopathic occurrence; and, consequently, we further agree with the finding of the administrative law judge that the coughing episode caused employee to lose control of the motor vehicle which resulted in the motor vehicle accident/crash and resulting injuries for which workers' compensation benefits are being claimed.

#### Legal Discussion

Subsequent to the administrative law judge determining that employee’s coughing episode, which caused the motor vehicle accident, began with an origin personal in nature, independent of employee’s work environment, peculiar to employee, rendering it an idiopathic occurrence, the administrative law judge then addressed the issue of whether or not the employee was entitled to workers' compensation benefits for injuries sustained in a motor vehicle accident precipitated by an idiopathic occurrence. In other words, due to the fact that the precipitating event was an idiopathic occurrence, is a resultant injury deemed to have arisen out of and in the course of employment as prescribed by § 287.120 RSMo? It is axiomatic that the burden of proof rests on employee.

Pursuant to the legislative changes enacted in 2005, specifically, § 287.020.3.(3) RSMo, we agree with the legal conclusion of the administrative law judge that this injury was not due to an accident that arose out of and in the course of employment.

Consistent with § 287.120.1 RSMo, an employee must show that his or her injury arises out of and in the course of his or her employment as a condition precedent to recovery. *Abel v. Mike Russell’s Standard Service*, 924 S.W.2d 502 (Mo. banc 1996).

The precipitating cause of the motor vehicle accident was an idiopathic occurrence, i.e., attributable to employee’s history of coughing episodes the origin of which was personal to the employee, the cause of which was unrelated to employee’s working environment. Idiopathic is defined as “peculiar to the individual: innate”. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993).

Based on the foregoing, the remaining principal issue facing the Commission can be stated as follows: when an employee, solely because of an idiopathic occurrence, sustains an injury distinguished from the effects of the idiopathic attack or occurrence which in and of itself is noncompensable, be found to have sustained an injury arising out of his employment?

The general rule prior to the statutory changes enacted by the Missouri Legislature in 2005, was that such an

injury, distinguished from the effects of the idiopathic attack or occurrence, was compensable, if the employment placed the employee in a position increasing the dangerous effects precipitated by the idiopathic attack or occurrence. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993).

By definition, idiopathic occurrences are peculiar or innate to an individual and begin with an origin which is personal. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993). Prior to 2005, an employee, for injuries solely caused by an idiopathic attack or occurrence but distinguishable from the effects of the idiopathic occurrence, was able to recover workers' compensation benefits for distinguishable injuries if the employee satisfied the "arising out of" component of § 287.120 RSMo, by proving there was some affirmative employment contribution resulting in the distinguishable injury to offset the prima facie showing of a personal origin. Prime examples are injuries sustained due to idiopathic occurrences resulting in falls from heights; or injuries sustained due to idiopathic occurrences while driving a motor vehicle; etc. The conditions of the workplace either contributed to, increased the risk to, caused or bore a relationship resulting in these distinguishable injuries.

Prior to the legislative changes enacted in 2005, the proper test of "causal connection," involving an idiopathic occurrence, was whether the conditions of employment caused or contributed to cause the accident. If the conditions of the workplace contributed to cause the accident, even if the precipitating cause were idiopathic, the causal connection was established. In other words, the accident would not have occurred but for the condition of the workplace. *Alexander*, supra

The sine qua non of recovery under § 287.120.1 and *Alexander*, supra, prior to 2005, is a condition of the workplace that bears a causal connection to the employee's injury. The condition of the workplace bears a causal connection to the injury only when the condition is unique to the workplace or is a common condition that is exacerbated by the requirements of employment. *Abel*, supra. However, the legislative enactment of 2005, § 287.020.3(3), i.e., "an injury resulting directly or indirectly from idiopathic causes is not compensable," and the recent Appellate Court interpretation in the case of *Ahern v. P & H, LLC*, 254 S.W.3d 129 (Mo.App. E.D. 2008), have mandated a change from the former general rule. In the *Ahern* case, supra, the employee fell from a roof while working as a carpenter and injured his shoulder. The fall was due to employee's pre-existent "seizure condition," the origin of which was personal to the employee, unrelated to his work environment. Employee's claim for workers' compensation benefits for the injured shoulder (a distinguishable injury from the idiopathic occurrence) was denied as the injured shoulder resulted directly or indirectly from an idiopathic cause, i.e., the employee's seizure which was personal in nature or idiopathic.

In affirming the denial of benefits to the employee's injured shoulder, the Appellate Court stated:

In his third point, Claimant contends the Commission erred in applying Section 287.020.3(3) because under the "increased risk analysis" Claimant's claim would be compensable. We disagree.

Claimant likens the circumstances of this case to those in *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993). In *Alexander*, a claimant became dizzy and fell from a raised platform on which he was required to work. *Alexander*, 851 S.W.2d at 526-27. In finding compensation proper, the Supreme Court indicated that a causal connection existed between claimant's injury and his work because his workplace contributed to, or increased the risk, of his accident. *Id.* At 528-529. While the facts of *Alexander* are similar to those of claimant's case, in light of the Legislature's 2005 amendment of Section 287.020, we cannot apply *Alexander's* holding here.

*Ahern*, 254 S.W.3d. at 135.

The Court in *Ahern*, supra, clearly rejects the former holding of *Alexander*, supra, and its progeny, that injuries, distinguishable from the effects of an idiopathic attack or occurrence, were compensable if the

employment placed the employee in a position increasing the dangerous effects precipitated by the idiopathic attack or occurrence. A showing of some affirmative employment contribution to offset the prima facie showing of personal origin, i.e., the idiopathic cause, is no longer to be followed in the State of Missouri since the statutory enactment of 2005.

As simply stated by the Appellate Court in *Ahern*, supra, injuries resulting directly or indirectly from idiopathic conditions are not work-related and not compensable.

#### Conclusion

In the instant case, the "coughing episode," experienced by employee immediately preceding the motor vehicle accident of November 4, 2006, was of personal origin to the employee, peculiar to the employee, as indicated by his medical history of spontaneous coughing episodes and personal admissions of same, unrelated to his working environment, and thus, idiopathic in nature. Furthermore, the "coughing episode" solely caused the employee to lose control of the motor vehicle causing the motor vehicle wreck and resulting injuries for which workers' compensation benefits are being claimed. The fact that the conditions of his employment, i.e., driving a motor vehicle, may have caused, contributed to, or increased the risk of injury, no longer results in the injury arising out of and in the course of employment due to the statutory enactment of 2005.

If an injury results directly or indirectly from an idiopathic condition the injuries do not arise out of and in the course of employment and workers' compensation benefits are to be denied, regardless if there is evidence of some affirmative employment contribution. The prima facie showing of personal origin, idiopathic occurrence causing directly or indirectly the injury, is not offset by the workplace contributing to or increasing the risk of the accident.

Given at Jefferson City, State of Missouri, this 16th day of June 2009.

#### LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

#### DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

#### DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on 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.

## Preliminaries

Since the inception of workers' compensation laws, courts have grappled with the compensability of injuries sustained on the job, where the mishap resulting in the injury was triggered by some cause personal to the employee. The cases are generically referred to as "idiopathic fall" cases although injuries sustained by mechanisms other than falls are analyzed in the same manner. Over time, a general rule was adopted across jurisdictions, including Missouri.

The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle.

### *Larson's Workers' Compensation Law* § 9.01

In 2005, the Missouri legislature removed Missouri from the mainstream by enacting legislation to deny workers' compensation benefits to an injured employee if a cause peculiar to the employee contributed to the occurrence of an injury, even where work conditions increased the dangerous effects of the work accident. Section 287.020.3(3) provides that, "[a]n injury resulting directly or indirectly from idiopathic causes is not compensable."

In the case of *Ahern v. P & H, LLC*, 254 S.W.3d 129, 134 (Mo.App. 2008), the Court of Appeals for the Eastern District of Missouri applied §287.020.3(3) to deny compensation to an injured employee in a case where the severity of the injury was clearly caused by conditions of the employment (idiopathic seizure caused roofer to fall from roof). Missouri employers may now put employees in jobs exposing them to the risks of serious injury yet the employer may avoid financial responsibility for an injury caused by those very risks if a cause peculiar to the employee contributed in any way, however small, to the occurrence of the injury.

I cannot overstate my disagreement with the policy enacted by this insidious legislation. Fortunately for employee, this mean-spirited policy codifying industry exploitation of hard-working Missourians does not bar compensation in this case because: 1) a cough did not cause the accident, and, 2) employer failed to prove employee's cough was idiopathic.

### *Majority Opinion*

With all due respect to the majority, its analysis is significantly flawed. First, the majority erroneously found that a cough caused employee's accident. Second, the majority found the cough was idiopathic. Finally, the majority included the supposed idiopathic cause in its analysis of whether employee's injury arose out of his employment. With the 2005 legislative changes, the legislature statutorily excised the consideration of idiopathic causes from the arising out of determination and made the causal contribution of an idiopathic cause an affirmative defense.

The majority incorrectly states the administrative law judge found that employee's injuries did not arise out of and in the course of his employment. The administrative law judge never got around to making a finding about whether employee's injuries arose out of and in the course of employment. The administrative law judge ruled the injuries not compensable solely because the truck accident was precipitated by what he found to be an idiopathic cause – a cough.

The majority ascribes a holding to *Ahern*, supra, for which *Ahern* does not stand. The majority concludes, "[a]s simply stated by the Appellate Court in *Ahern*, supra, injuries resulting directly or indirectly from

idiopathic conditions are not work-related and not compensable." The majority errs. The *Ahern* court merely observed that "[i]njuries resulting directly or indirectly from idiopathic conditions are not *wholly* work related." *Ahern*, 254 S.W.3d at 135. (Emphasis mine.) A close reading of *Ahern* will reveal that the *Ahern* court never ruled that Mr. Ahern's injury did not arise out of his employment.

I believe the chronologically correct analysis of claims for which an employer defends on the ground that there was an idiopathic cause is as follows:

- Did employee sustain an accident arising out of and in the course of employment?
- If so, did the accident result in personal injuries?
- If so, did employer prove the injuries resulted directly or indirectly from idiopathic causes?
- If so, the injuries are not compensable under Chapter 287.

As will be seen, employee established that a dip in the road caused him to veer off the highway. Whether or not employee was coughing at the time he ran off the road is immaterial.

### Facts

On November 4, 2006, the truck employee was driving veered off Highway 87 in Texas. The truck ran through brush, a sign and some trees. Immediately after the incident, employee experienced low back pain.

Employee testified a dip in the ground caused him to pull the wheel and veer off the road. EMT and medical records reflect that employee told responders that he was coughing at or near the time he veered off the road.

Dr. Swaim diagnosed employee with, among other things, a compression fracture of the L2-L4 vertebra, a strained right thumb, right ulnar neuropathy, chronic lumbar strain, and muscle spasms. Dr. Swaim believes the November 4, 2006, truck accident was the prevailing factor in causing the injuries. He believes employee has sustained permanent partial disability as a result of the work injuries. Dr. Swaim opines employee will need further medical evaluation and treatment for his injuries. He believes employee needs further evaluation of his ulnar neuropathy to determine if employee sustained a permanent partial disability related thereto.

### Discussion

The facts found by the majority are not supported by the evidence. First, there is no evidence to support a conclusion that employee suffered a "coughing spell" preceding the truck accident. At most, the evidence supports a finding that employee was coughing contemporaneously with veering off the road. None of the records in evidence report that employee said he was having a "coughing spell" immediately preceding veering off the road or while he was veering off the road. None of the records in evidence report that employee said he veered off the road *because* he was coughing. Employee does not recall that he was coughing when the accident occurred. At most, the records establish that employee was coughing at the same time he was veering off the road. Correlation does not imply causation. I strongly encourage reviewing courts to focus on content of the reports in evidence, and not the fallacious inferences advanced by employer.

### *Compensability*

Section 287.120.1 provides:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability

therefor whatsoever, whether to the employee or any other person.

Employer is liable to employee for workers' compensation benefits if employee sustained personal injury by accident arising out of and in the course of his employment. Further, § 287.020.3 provides that, "[a]n injury by accident is compensable only if the accident 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."

### Injury

Section 287.020.3(5) defines "personal injury" as "violence to the physical structure of the body." Dr. Swaim described the violence employee's body sustained in the truck accident.

### Accident

Section 287.020.2 defines "accident:"

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

On November 4, 2006, the truck employee was driving veered off Highway 87 in Texas. The truck ran through brush, a sign and some trees. Immediately after the incident, employee experienced low back pain. Employee sustained an accident.

### Arising Out of and In the Course of Employment

The next question is whether employee's personal injury arose out of and in the course of employee's employment. The legislature enacted a two-part test for determining if an injury arises out of and in the course of employment. Section 287.020.3 provides that:

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The testimony of Dr. Swaim establishes that the truck accident was the prevailing factor in causing the injuries to employee's body (compression fractures, thumb strain, lumbar strain, ulnar neuropathy.)

Employee has established the first prong of the arising out of and in the course of employment test.

I now consider the second prong of the test. Whether or not one believes that the truck accident was caused by a cough, it is clear that the physical injuries employee suffered were caused by the truck accident. One hazard posed by employee's job is driving a big rig at highway speeds. Employee's injuries in this case come from a hazard or risk that is peculiar to employment. The violence to the physical structure of employee's body clearly did not come from a hazard or risk unrelated to employee's employment as a truck driver to which workers are equally exposed in their normal nonemployment life. The hazards of driving a large, heavy vehicle are not normally encountered by workers in nonemployment life.

The employee's accident arose out of and in the course of employment as defined by §287.020.3(2). So, absent statutory provisions to the contrary, the employer is liable to "to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever,

whether to the employee or any other person.” See §287.120.1.

I believe a dip in the road caused employee to veer off the road. Nonetheless, I will explain why the idiopathic cause exclusion does not apply even if a cough caused employee to veer off the road.

### Idiopathic Cause Exclusion

There is no question that under the law before August 28, 2005, employee's injuries would have been compensable even if the cough were considered an idiopathic condition. See *Alexander*, 851 S.W.2d at 527. See also, *Dubose v. City of St. Louis*, 210 S.W.3d 391, 396 (Mo.App. 2006), wherein the court held, "the fact that an idiopathic condition caused claimant to lose control of his patrol car does not prevent recovery because the evidence showed that claimant's injuries resulted from the collisions his car was involved in after it went out of control."

Section 287.020.3(3) provides that, "[a]n injury resulting directly or indirectly from idiopathic causes is not compensable." This exclusion is in the nature of an affirmative defense to employer. Section 287.808 provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. 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.

It is not employee's job to prove his cough is not an idiopathic condition. It is employer's burden to prove that it is.

Thus, the question to be answered if the cough caused employee to veer off the road is, *notwithstanding that employee's accident arose out of and in the course of employment, has employer established that it is more likely than not the employee's injuries result directly or indirectly from idiopathic causes such that the injuries are not compensable under the Missouri Workers' Compensation Law?*

In *Alexander, supra*, the Missouri Supreme Court adopted the following definition of idiopathic "1: peculiar to the individual: INNATE." 851 S.W.2d at 827. The definition survived the 2005 changes to the Workers' Compensation Law. See *Ahern*, 254 S.W.3d at 133.

"Evidentiary support is required to successfully claim an event is entirely idiopathic, i.e., the event results from some cause personal to the individual, such as a physical defect or disease." *Huffmaster v. Am. Rec. Prods.*, 180 S.W.3d 525, 529 (Mo.App. 2006). In this case, there is no evidentiary support that employee's cough was caused by a physical defect or disease.

All people cough. People cough for a variety of reasons. People with respiratory conditions that manifest through coughing also cough for reasons unrelated to the condition. Coughing is certainly not peculiar to employee. In workers' compensation matters, expert medical evidence is necessary to prove medical matters not within lay understanding. The medical origin of a cough is not a matter for lay understanding. In the instant case, employer offered no medical evidence that employee's cough is an idiopathic condition.

No doctor testified that "smoker's cough" is a medical condition and no doctor testified that employee has it. Employer points to employee's concession that he may have a "smoker's cough" as competent evidence to support a finding that employee has a medical condition of "smoker's cough." This argument must clearly fail. An employee's testimony about what medical condition he thinks he has, standing alone, will not support a claim for compensation for the condition. It would be manifestly unjust if that same lay evidence were deemed sufficient to defeat a claim. (What's good for the goose is good for the gander.) Employer has not

shown by competent medical evidence that the alleged accident-causing cough was idiopathic.

Even if employer had proven that employee suffers from some medical condition known as "smoker's cough," that alone would not establish the defense. Employer would have to prove that the *specific* cough(s) causing the accident had its origin in the condition known as "smoker's cough," as opposed to being another type of cough such as a sudden involuntary cough resulting from the accidental inhalation of a respiratory irritant.

Employer has failed to meet its burden of establishing the injuries employee suffered during the truck accident resulted from an idiopathic cause. Accordingly, the §287.020.3(3) bar to compensation does not apply in this case.

### *Beyond Mr. Taylor*

The majority's decision today opens the door to results I am sure were not intended by the legislature. Imagine a bomb squad technician coughing while attempting to disarm a bomb thereby detonating the bomb and causing an explosion. What about a nurse treating a communicable disease patient suffering a sneeze and thereby accidentally sticking himself with a contaminated needle? I do not believe the legislature intended to deny compensation in the situations described.

Consider further the strict application of § 287.020.3(3). The provision does not state that the idiopathic condition must be the injured employee's condition. What if the bomb squad technician was working with a co-worker at the time of the explosion? We would be compelled to deny compensation for the co-worker because his injuries resulted "directly or *indirectly* from idiopathic causes".

What of those cases in which a work-related injury is primarily caused by an employer's negligence? Employees gave up their right to sue in tort for injuries caused by employer negligence. Under a strict application of § 287.020.3(3), it seems a minimally contributing idiopathic event such as a cough will relieve employer from all liability for its negligent infliction of injury.

### *Workers' Compensation Bargain*

The result in this case maims the Workers' Compensation bargain. In exchange for a speedy and sure remedy for work-related injuries, employees gave up the right (in most instances) to sue their employers in civil suits. Employers, on the other hand, gave up their traditional defenses against such injury claims in exchange for certain liability under the Law and a release from all other liability.

The Workers' Compensation bargain sprung, in part, from a collective societal belief that the costs of industrial injuries should be borne by industry. The legislature has declared that for this class of on-the-job injuries (those to which an idiopathic condition causally contributes, even minutely), industry does not bear the burden, even where conditions peculiar to the employment cause the employee to sustain significantly greater injury than employee would have suffered in non-employment life. Instead, society bears that burden.

### *Justiciable Controversy*

This case presents the type of facts deemed necessary for a justiciable constitutional challenge by a plurality of the Missouri Supreme Court in *Mo. Alliance for Retired Ams. v. DOL & Indus. Rels., Div. of Worker's Comp.*, 277 S.W.3d 670 (Mo. banc 2009). This case makes a showing that specific provisions of the act, as amended, are so narrow and restrictive that they provide no adequate remedy for this injured worker. See *Mo. Alliance*, 277 S.W.3d at 677.

The majority's ruling in this case (with which I disagree) presents the very circumstance described by Judge Richard B. Teitelman in the following excerpt from his dissent in *Mo. Alliance*.

The 2005 amendments further restrict the availability of a remedy by providing that "[a]n injury resulting directly or indirectly from idiopathic causes is not compensable." Section 287.020.3(3), RSMo Supp. 2005. An "idiopathic" cause is one that is unique to an individual. Previously, compensation was available for such injuries provided that workplace conditions were a contributing factor. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525, 527 (Mo. banc 1993). Moreover, in a common law tort action, there is no defense for idiopathic conditions. The complete exclusion of any compensation for an injury that even is caused "indirectly" caused by an idiopathic condition will preclude recovery for large numbers of individuals who, under the former workers' compensation statute or in a common law tort action, would be entitled to recovery.

*Mo. Alliance*, 277 S.W.3d at 685.

### Conclusion

Employee, the only witness to the truck accident, testified that he hit a dip in the road that pulled the wheel to the right causing him to veer off the road. Employee has established that he suffered an accident arising out of and in the course of employment resulting in personal injuries. Employee has shown that the accident was the prevailing factor in causing his injuries and his resulting disability. Employer has not succeeded in establishing that an idiopathic cause contributed in any way to causing employee's injuries. Employee is entitled to compensation under the Missouri Workers' Compensation Law. I would issue a temporary award of medical treatment and temporary total disability benefits.

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John J. Hickey, Member

## AWARD

Employee: David Taylor

Injury No. 06-104584

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: Contract Freighters, Inc.

Additional Party: Second Injury Fund

Insurer: Con-way Truckload, Inc.

Hearing Date: July 25, 2008

Checked by:

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? NO
2. Was the injury or occupational disease compensable under Chapter 287? N/A

3. Was there an accident or incident of occupational disease under the Law? N/A
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? N/A
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
9. Was claim for compensation filed within time required by Law? N/A
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: N/A

- Nature and extent of any permanent disability: N/A

15. Compensation paid to-date for temporary disability: \$577.47
16. Value necessary medical aid paid to date by employer/insurer? \$1495.27
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$666.41
19. Weekly compensation rate: \$576.55

- Method wages computation: STIPULATED

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable: -0-

Unpaid medical expenses: N/A

N/A weeks of temporary total disability (or temporary partial disability)

N/A weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

22. Second Injury Fund liability: NO

Total: -0-

23. Future requirements awarded: NO

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

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

Employee: David Taylor

Injury No. 06-104584

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: Contract Freighters, Inc.

Additional Party: Second Injury Fund

Insurer: Con-way Truckload, Inc.

Hearing Date: July 25, 2008

Checked by:

### **AWARD ON HEARING**

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on July 25, 2008. 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 August 25, 2008.

The employee appeared personally and through his attorney John Christiansen, Esq. The employer appeared through its attorney, Greg Carter, Esq. The Second Injury Fund appeared through its attorney, Christina Hammers, Assistant Attorney General.

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

- (1) On or about November 4, 2006, Contract Freighters, Inc. ("CFI") was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully self-insured.
- (2) On the alleged injury date of November 4, 2006, David Taylor was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The contract of employment for the above-referenced employment by and between David Taylor and CFI was made in Joplin (Jasper County), Missouri. The parties agree to venue lying in Newton County, Missouri. Venue is

proper.

(4) The employee notified the employer of his injury as required by Section, 287.420, RSMo.

(5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

(6) At the time of the claimed accident, the claimant's average weekly wage was sufficient to allow a compensation rate of \$666.41 for temporary total disability compensation, and the compensation rate of \$376.55 for permanent partial disability compensation.

(7) Temporary total disability compensation has been provided by the employer in the amount of \$577.47, representing 6/7 weeks in temporary total disability compensation.

(8) The employer has provided medical treatment to the employee, having paid \$1,495.27 in medical expenses.

The sole issues to be resolved by hearing include:

(1) Whether the employee sustained an accident on or about November 4, 2006; and, if so, whether the accident arose out of and in the course of the employee's employment with CFI?

- Whether the alleged accident of November 4, 2006, caused the injuries and disability for which benefits are now being claimed?
  
- Whether the employee has sustained injuries that will require medical care in order to cure and relieve the employee of the effects of the injuries?
  
- Whether the employee is entitled to temporary disability benefits? (The employee seeks payment of temporary total disability compensation for the period of November 4, 2006 to the present, and continuing indefinitely into the future, less credit of \$577.47.)
  
- Whether the employer and insurer are obligated to pay for certain past medical care and expenses?
  
- Whether the claimant sustained any permanent disability as a consequence of the claimed accident; and, if so, what is the nature and extent of the disability?

(7) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

### **EVIDENCE PRESENTED**

The employee, David Taylor, testified at the hearing in support of his claim. In addition, Mr. Taylor offered

for admission the following exhibits:

Exhibit A ..... Medical Report from Truett L. Swaim, M.D.  
Exhibit B ..... Medical Records from Dimmit County Memorial Hospital  
Exhibit C ..... Medical Records from Freeman Health System  
Exhibit D ..... Medical Records from Allegheny General Hospital  
Exhibit E ..... Medical Records from Alle-Kiski Medical Center  
Exhibit F ..... Letter Dated July 16, 2007  
Exhibit G ..... Medical Records from UPMCHS Community Care Physicians  
Exhibit H ..... Medical Records from Quest Diagnostics  
Exhibit I ..... Correction Page, Deposition of David A. Taylor

Exhibits B, C, G, and H were received and admitted into evidence as to the claim involving both CFI and the Second Injury Fund. Exhibits A, D, E, and I were received and admitted into evidence as to the claim involving CFI, but denied as to the Second Injury Fund. Exhibit F was received but denied admission into evidence.

The employer and insurer presented two witnesses at the hearing of this case – Todd Rose and Troy Robertson. In addition, the employer and insurer offered for admission the following exhibits:

Exhibit 1 ..... Medical Report from Ted A. Lennard, M.D.  
Exhibit 2 ..... Deposition of David A. Taylor  
Exhibit 3 ..... Notes of Conversation

Exhibit 3 was received and admitted into evidence as to the claim involving David Taylor and the Second Injury Fund. Exhibits 1 and 2 were received and admitted into evidence as the claim involving David Taylor, but denied admission as to the Second Injury Fund.

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

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 official notice of the documents contained in the Legal File, which include:

- Minute Entries
- Request for Hearing-Hardship Hearing
- Notice of Hearing
- Answer of Employer/Insurer to Claim for Compensation
- Answer of Second Injury Fund 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**

The employee David A. Taylor is 66 years of age, having been born on July 5, 1942. Mr. Taylor is married and resides with his wife in the State of Pennsylvania. In addition, Mr. Taylor is approximately 6 feet, 0 inches, and

weighs approximately 183 pounds. Additionally, Mr. Taylor is not presently employed or otherwise engaged in working.

Mr. Taylor's employment history includes working as an over-the-road truck driver. Notably, Mr. Taylor engaged in employment with CFI as an over-the-road truck driver on two different occasions, totally 13 ½ years of employment with CFI.

On or about November 4, 2006, while engaged in his employment with CFI and driving an 18-wheeler on U.S. Highway 83, approximately 18 miles from Carrizo Springs, Texas, Mr. Taylor sustained a motor vehicle accident. Notably, at the time of this motor vehicle accident, the road and weather conditions were clear and Mr. Taylor was familiar with the road. Further, the motor vehicle accident did not involve any other vehicles. Rather, the truck ran off the road toward the right side of the road, and while Mr. Taylor attempted to correct and veer back to the left, he did not get the truck turned and onto the highway. Instead, the truck went three-quarters of a mile back through brush, a fence, and Mesquite trees. Although the truck did not roll, the accident caused significant damage to the cab, including breaking out the windshield.

### *Injury / Medical Care*

Upon coming to a stop, Mr. Taylor climbed out of the truck, and received assistance from two young men who approached him and assisted him in getting to the back of the truck. Additionally, an ambulance was called to the scene, which resulted in Mr. Taylor receiving immediate medical attention. The emergency medical technician personnel placed Mr. Taylor on a backboard and maintained his cervical spine with placement of a c-collar and headblocks, and then carried Mr. Taylor out of the brush area to the ambulance, then transporting him by ambulance to Dimmit County Memorial Hospital.

Mr. Taylor received diagnostic care and evaluative care in the emergency room of Dimmit County Memorial Hospital. Upon concluding that Mr. Taylor had not suffered any fractures and did not present with a medical condition necessitating admission into the hospital on an in-patient basis, the attending emergency room physician discharged Mr. Taylor from the hospital. Thereafter, Mr. Taylor went to a local motel, and then had a friend or co-worker pick him up and take him to Laredo, Texas, where Mr. Taylor stayed overnight. Thereafter, the co-worker transported Mr. Taylor by tractor-trailer to Joplin, Missouri.

While in Joplin, Mr. Taylor received a referral by CFI for evaluation with a physician (Dr. Estep) in Joplin. At the time of this visit, Mr. Taylor complained of pain of the right thumb, left lumbar spine, and left sacral area. Dr. Estep diagnosed Mr. Taylor with a lumbar strain, sacroiliac strain and right thumb strain, and prescribed conservative care that included prescription for Medrol Dosepak, muscle relaxants, and physical therapy. Mr. Taylor received this care, which included therapy for two weeks. Later, CFI terminated Mr. Taylor, resulting in Mr. Taylor returning home to Pennsylvania by bus.

During the course of Mr. Taylor's presence in Joplin, CFI performed certain investigation into the nature and cause of the motor vehicle accident. Following its investigation, CFI concluded that the incident involved an idiopathic condition and a medical concern not covered by The Workers' Compensation Law for the State of Missouri. CFI thus informed Mr. Taylor of its intention to deny liability, and its decision to not provide him with any additional medical care.

Thereafter, Mr. Taylor followed-up with his family physician (Dr. Ashok Shetty), who ordered diagnostic studies that included an MRI of the lumbar spine, and additional repeat x-rays of the lumbar spine. The diagnostic care provided through Mr. Taylor's family physician revealed compression fractures of the lumbar spine. Additionally, Mr. Taylor continued to present with lumbar pain and discomfort, as well as numbness in his right ring finger and little finger.

Mr. Taylor received a referral to a different physician for treatment of his various concerns. However, lacking insurance or sufficient money to pay for the treatment being recommended, Mr. Taylor received limited medical care. Additionally, Mr. Taylor received several referrals, which included referrals to a neurologist for his lumbar spine and

the numbness in his upper extremity, a psychiatrist for depression, and a gastroenterologist for a colonoscopy.

Mr. Taylor continues to present with constant back pain, and on a scale of 1 to 10, he describes his pain at a pain level 5 all the time. Mr. Taylor notes that it does not take much activity to cause pain. Additionally, Mr. Taylor notes that he experiences numbness in his right hand. According to Mr. Taylor, his injuries cause him to have trouble in performing daily activities. Additionally, Mr. Taylor notes that, since the accident, he has not been able to drive a truck; and he has engaged in limited work, primarily working for his son, who provides favorable accommodations for him.

Truett L. Swaim, M.D., who is a physician that is board certified by American Board of Orthopedic Surgery and American Board of Independent Medical Examiners, testified by submission of his complete medical report. Dr. Swaim performed an independent medical examination of Mr. Taylor on September 10, 2007. At the time of this examination, Dr. Swaim took a history from Mr. Taylor, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Taylor, Dr. Swaim opined that the November 4, 2006 accident caused Mr. Taylor to suffer an injury in the nature of a compression fracture of the lumbar spine at the level of L3 and L4, a contusion / strain of the right thumb, and right ulnar neuropathy.

In addition, Dr. Swaim opines that Mr. Taylor is at maximum medical improvement relative to the injuries he sustained on November 4, 2006. Dr. Swaim, however, opines that Mr. Taylor is in need of additional medical care relative to treatment of his lumbar spine and right hand. Dr. Swaim is of the opinion that the November 4, 2006 accident caused Mr. Taylor to suffer a permanent partial disability of 40 percent to the body as a whole, referable to the lumbar spine. Yet, Dr. Swaim declines to issue a disability rating for the right upper extremity, in light of Mr. Taylor needing additional medical treatment and evaluation.

#### *Cause of Accident*

At the hearing, Mr. Taylor did not offer an explanation for losing control of the vehicle, and did not recall coughing or suffering a coughing attack. However, the medical records of the emergency medical personnel indicate that Mr. Taylor lost control of the 18-wheeler because he suffered a coughing episode. In this regard, the records of the emergency response team note the cause of Mr. Taylor's presenting medical concern as follows:

[Mr. Taylor] was driving 18 wheeler, began to cough and reared off side of road.  
*See Exhibit B.*

And, in an additional section of the above-referenced medical record, wherein Mr. Taylor is noted to have provided the emergency medical personnel a history, the attending physician notes:

Patient [Mr. Taylor] stated that he was driving on 83 north towards Asherton, he began to cough and reared off side of road into brush area.

Similarly, in reporting the history of the present illness or injury, the attending nurse providing assistance and assessment of the injury in the emergency department of Dimmit County Memorial Hospital provides a history as follows:

Chief Complaint: MVC, Driver c/o pain to mid-back

Onset: today

Data Source: EMS

History of Present Illness or Injury: went off road onto ditch lost control of truck while coughing; wearing seatbelt; ambulatory @ scene

In addition, while Mr. Taylor did not recall suffering any coughing at the time of the motor vehicle accident, Mr. Taylor acknowledges that he told, or could have told, the emergency medical personnel, as well as the other treating physicians / nurses, that he lost control of the truck while coughing. In being questioned about the number of people who report him as having stated that the motor vehicle accident occurred while he was coughing, Mr. Taylor

stated that he had “no idea why he would tell them that the accident happened while coughing if it didn’t happen. Additionally, Mr. Taylor acknowledges that he had to have either coughed or thought he coughed, or he wouldn’t have been telling everybody he coughed.

Relative to the issue of coughing, Mr. Taylor acknowledges that he is a smoker and has smoked for many years. Similarly, Mr. Taylor acknowledges that he has a smoker’s cough, and coughs at different times. In addressing this issue during the taking of his deposition, Mr. Taylor propounded the following testimony:

Q. Before you went off the road, did you have a problem with coughing?

A. I supposedly told somebody that I coughed. When I coughed and who I told, I really don’t know.

Q. Okay.

A. I don’t know that I would have said that I had a problem with coughing. I could have said I coughed. I really do not know.

Q. Do you have a smoker’s cough?

A. Well, I do cough at different times. I guess you could call it a smokers’ cough. I think most people that smoked 45 years probably has some sort of cough.

Q. How often do you cough when you have your smokers’ cough?

A. I’ve talked to your for an hour and a half and I haven’t coughed once, so that’s my answer. I’m more apt to cough when I get nervous or overly excited or upset.

In addition, the medical records of Dr. Estep indicate that Mr. Taylor suffers from coughing, and that he lost control of the truck while coughing. In his medical note of November 10, 2006, Dr. Estep notes that Mr. Taylor “continues to have some coughing spells. [And, he] will have increased discomfort when he does cough.”

Additionally, while treating with Dr. Flannagan, Mr. Taylor provided a history of “driving through Texas when something occurred in his truck which forced him from the road.” And, in completing his medical history for Dr. Flannagan, Mr. Taylor notes that he is a smoker, who has smoked two packs per day for over thirty years. Additionally, Mr. Taylor notes that he previously suffered a heart attack and suffered from asthma; and he presents with a cough, shortness of breath, and frequent urinary condition.

## **FINDINGS AND CONCLUSIONS**

The Workers’ Compensation Law for the State of Missouri underwent substantial amendment on or about August 28, 2005. This change governs the underlying workers’ compensation case, which involves an accident date of November 4, 2006.

### **I.**

#### **Applicability of Section 287.020.3(3), RSMo**

The underlying issue presented in this case involves consideration of whether the motor vehicle accident sustained by Mr. Taylor on November 4, 2006 resulted in a compensable work-related injury, as recognized in Section

287.020, RSMo. In this regard, CFI does not readily dispute that Mr. Taylor sustained a motor vehicle accident on November 4, 2006, while engaged in his employment with CFI as an over-the-road truck driver. Notably, while driving an 18-wheeler on U.S. Highway 83, approximately 18 miles from Carrizo Springs, Texas, Mr. Taylor ran off the road toward the right side of the road. He attempted to correct and veer back to the left, but did not get the truck turned and onto the highway. Instead, in losing control of his vehicle, he traveled approximately three-quarters of a mile off the highway and into a ditch, through brush, a fence, and Mesquite trees.

Yet, CFI denies liability, contending Mr. Taylor did not sustain a compensable work-related injury. In asserting its defense, CFI argues, Mr. Taylor suffered an idiopathic condition in the nature of a cough, which caused him to lose control of the 18-wheeler and to suffer the motor vehicle accident that propelled him off the highway and into a ditch, through brush, a fence, and Mesquite trees.

In asserting the compensability of his claim, Mr. Taylor contends that the burden is on CFI to prove the affirmative defense of the injury resulting from an idiopathic condition, and CFI failed to sustain its burden of proof. At best, Mr. Taylor argues, the idiopathic nature of the cough causing an accident is speculative without definitive proof. Simply stated, according to Mr. Taylor, the cause of the accident cannot be sufficiently determined, and need not be determined to be compensable under the Act.

In 2005, the Missouri Legislature amended Section 287.020.3, in part, with the inclusion of subsection (3), which states:

An injury resulting directly or indirectly from idiopathic causes is not compensable.

In addition, in defining the term "idiopathic" the Missouri Court of Appeals recently reaffirmed earlier case law defining idiopathic to mean "peculiar to the individual, innate," and need not be "inborn." *Ahern v. P&H, L.L.C.*, 254 S.W.3d 129 (Mo. App., E.D. 2008). And, in offering this definition, the Court in *Ahren* declined to limit the definition of "idiopathic" to a condition "arising spontaneously or from an obscure or unknown cause." See Merriam-Webster.

In light of the foregoing, the adjudication of this case may be resolved in light of *Ahern*. Notably, in *Ahern*, the employee fell from a roof while working as a carpenter and suffered injuries associated with the fall. Yet, the court found the injury not compensable, determining that the fall was due to a seizure unrelated to work, and the seizure constituted an idiopathic condition. In rendering its decision the court noted that, at least indirectly, the fall and resulting orthopedic injuries suffered by the employee resulted from the seizure – an idiopathic condition triggering the applicability of Section 287.020.3(3), RSMo 2005.

Notably, in *Ahern*, the employee suffered an injury associated with the risk of his employment, while performing roofing work on a roof. Further, the injuries sustained by the employee related directly to falling off the roof, and not to the seizure. In this context, there appears to be little question that the employee in *Ahern* sustained an injury arising out of and in the course of his employment as a carpenter, while engaged in construction of a roofing project. Yet, the court determined the seizure to be responsible for causing the fall, and the seizure to be an idiopathic condition that rendered the injury not compensable under the law. Thus, implicitly, in finding the injury not compensable, the court acknowledged an indirect causal relationship existing between the orthopedic injuries and the seizure, and the applicability of Section 287.020.3(3), RSMo.

The facts of the present case are similar to *Ahern*. In the present case, Mr. Taylor suffered an injury associated with the risk of his employment, while performing over-the-road truck driving. Further, the injuries sustained by Mr. Taylor relate directly to the motor vehicle accident. Yet, the motor vehicle accident resulted from Mr. Taylor engaging in a coughing episode, which caused Mr. Taylor to lose control of his 18-wheeler, and to veer off the highway and into a ditch, through brush, a fence, and Mesquite trees.

In this regard, after consideration and review of the evidence, I find and conclude that, on November 4, 2006, while engaged in his employment with CFI, and while operating an 18-wheeler, Mr. Taylor suffered a coughing

episode. Further, this coughing episode caused Mr. Taylor to lose control of his 18-wheeler, and to veer off the highway and into a ditch, through brush, a fence, and Mesquite trees. Although Mr. Taylor stated at trial that he did not know the cause of the accident, the evidence is supportive of a finding that he lost control of his vehicle as a result of coughing. In this context, Mr. Taylor told the EMTs at the scene that he started coughing and lost control of the vehicle. Similarly, Mr. Taylor told emergency room personnel at Dimmit County Memorial Hospital, Dr. Estep at Occumed, Todd Rose of CFI, and Troy Robertson of CFI, that he started coughing and lost control of the vehicle.

In addition, the evidence is supportive of a finding that the cough suffered by Mr. Taylor prior to the accident is an idiopathic condition, as defined and enunciated in *Ahern*. Mr. Taylor is a 40-plus year smoker, who suffers from a smoker's cough. He smoked in his truck and conceded that the cigarette smoking could cause him to cough. Additionally, as noted by Mr. Taylor, he suffers coughing without warning. And, the medical records of Dimmit County Memorial Hospital, dated November 4, 2006, note associated symptoms to include coughing; while Dr. Estep, in a follow-up examination, notes that, on November 10, 2006, Mr. Taylor was continuing "to have some coughing spells." Also, the medical records of Allegheny General Hospital, Patient Registration form, dated January 9, 2007, indicates that Mr. Taylor suffers from among other things, a cough and shortness of breath; although, in an office note of Dr. Shetty dated March 7, 2007, Mr. Taylor denied any shortness of breath.

Accordingly, in light of the foregoing, I find and conclude that the coughing episode is an idiopathic condition, as defined by the court in *Ahern*. Similarly, I find and conclude that the injuries sustained by Mr. Taylor resulted indirectly from the idiopathic cough. Notably, similar to the seizure in *Ahern* causing the employee to fall off the roof, Mr. Taylor's coughing episode caused him to veer off the highway. The indirect causal relationship between the idiopathic cough (seizure in *Ahern*) and the resulting injuries is sufficient to render the injury not compensable under Section 287.020.3(3), RSMo 2005.

Section 287.020.3(3), RSMo 2005 includes not only injuries that result *directly* from an idiopathic cause, but also injuries that result *indirectly* from an idiopathic cause. Although the Court in *Ahern* does not address specifically the implications of this statutory exclusion, the principle enunciated in *Ahern* highlights the distinction existing between a compensable injury covered under Chapter 287, RSMO, which requires the accident to be the prevailing factor in causing the employee's injury, and an indirect idiopathic injury arising under Section 287.020.3(3), RSMo. Notably, an idiopathic condition need only be a triggering or precipitating event, and not the prevailing factor, in causing indirectly an injury, rendering Section 287.020.3(3), RSMo applicable and a basis for exclusion from coverage under the Act the worker's injury.

Therefore, for the forgoing reasons, and constrained by the principle set forth in *Ahern*, I find and conclude that the November 4, 2006 accident and resulting injuries were the indirect result of an idiopathic cough, and Section 287.020.3(3), RSMo 2005 is applicable to the present case. Accordingly, the Claim for Compensation is denied. All other issues are rendered moot.

Date: 10/1/08

Made by: /s/ L. Timothy Wilson

L. Timothy Wilson

*Chief Administrative Law Judge*

*Division of Workers' Compensation*

*Signed September 17, 2008*

A true copy: Attest:

/s/ Jeffrey W. Buker

Jeffrey W. Buker

*Director*

*Division of Workers' Compensation*

*Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993).

The administrative law judge clearly implied that the injuries arose out of and in the course of employment.

I recognize this Commission has no authority to rule on constitutional issues, but I suspect the legislature's complete destruction of a remedy for this class of personal injury may well run afoul of the certain remedy guarantee of the Missouri Constitution (Art I, §14), as well as, the state and federal due process clauses (Missouri Constitution, Art. I, §10; Constitution of the United States, 14th Amendment).

The parties agree that issues 5, 6, 7, and 8 would be deferred pending a final hearing, in the event the undersigned issued a temporary or partial award.