

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

Injury No.: 09-013530

Employee: Michael Tracy  
Employer: Glazders Wholesale Drug Company  
Insurer: Travelers Indemnity Company of America

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, and considered the whole record, we find that the award of the administrative law judge denying 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**

Statute of limitations

We wish to briefly note that the administrative law judge's analysis regarding the issue whether employee's claim is barred by the statute of limitations is fully supported by the court's decision in the case of *Dungan v. Fuqua Homes, Inc.*, WD77068 (May 27, 2014). On August 19, 2014, the Supreme Court of Missouri denied an application for transfer filed in the case, so we believe the decision has precedential and binding effect. Because the decision in *Dungan* is dispositive, no further analysis or discussion is necessary.

**Conclusion**

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Linda J. Wenman, issued April 17, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26<sup>th</sup> day of August 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee:	Michael Tracy	Injury No.:	09-013530
Dependents:	N/A		Before the
Employer:	Glazders Wholesale Drug Company		<b>Division of Workers'</b>
Additional Party:	N/A		<b>Compensation</b>
Insurer:	Travelers Indemnity Company of America		Department of Labor and Industrial
Hearing Date:	March 20, 2014		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	LJW

### 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? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 20, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis 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? No
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While stocking shelves, Employee felt sudden low back pain that radiated into his left leg.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$2,247.34

Employee: Michael Tracy

Injury No.: 09-013530

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Sufficient to produce the rates listed below.
- 19. Weekly compensation rate: \$444.93 / \$404.66
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None

TOTAL: - 0 -

22. Future requirements awarded:

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

Employee:	Michael Tracy	Injury No.:	09-013530
Dependents:	N/A	Before the	
Employer:	Glazders Wholesale Drug Company	<b>Division of Workers'</b>	
Additional Party:	N/A	<b>Compensation</b>	
		Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Travelers Indemnity Company of America	Checked by:	LJW

### **PRELIMINARIES**

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on March 20, 2014. Post-trial briefs were received from the parties on April 3, 2014. Attorney Daniel Keefe represented Michael Tracy (Claimant). Glazders Wholesale Drug Company (Employer) is insured by Travelers Indemnity Company of America and represented by Attorney Jaudon Godsey. The Second Injury Fund (SIF) was dismissed prior to the start of hearing.

The parties identified the following issue for disposition in this case as a statute of limitations defense. Claimant offered Exhibits A and E-G. Exhibits B-D were marked, but withdrawn. Employer offered Exhibit 1. The parties offered Joint Exhibit H-2. All offered exhibits were admitted into the record. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

### **STIPULATIONS**

The parties stipulate to the following Agreed Statement of Facts:

1. On February 20, 2009, Claimant while in the employment of Employer sustained an alleged low back injury by accident that arose out of his employment in St. Louis County, MO.
2. Claimant and Employer were operating under the provisions of the Missouri Workers' Compensation Act. (Act)
3. Employer was fully insured by Travelers Indemnity Company of America.
4. Claimant's weekly temporary total disability (TTD) rate was \$444.93, and his weekly permanent partial disability (PPD) rate was \$404.66.
5. Employer paid \$2,247.34 in medical benefits under the Act, with the last payment made on June 13, 2009.

6. Between June 13, 2009 and November 24, 2010, Claimant obtained and paid for unauthorized medical treatment.
7. Employer received proper notice of the alleged February 20, 2009 injury, and a timely First Report of Injury was filed by Employer.
8. Claimant filed a Claim for Compensation on January 30, 2012. Employer filed its Answer to Claim on February 21, 2012.
9. Claimant filed an amended Claim on May 18, 2012. Employer filed its amended Answer on June 14, 2012.
10. Due to the February 20, 2009 injury, Claimant sustained 16% BAW PPD referable to his low back.
11. Disputes remain between Claimant and Employer as to the compensability of the claim based on the applicable statute of limitations.

### **FINDINGS OF FACT**

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be summarized. In addition to the Agreed Statement of Facts, I find the following additional findings of fact:

1. On February 20, 2009, Claimant was stocking shelves for Employer when he felt sudden pain in his low back that radiated into his left leg. When his pain did not subside, Claimant sought emergency room care on February 22, 2009, and he was diagnosed with a lumbar sprain/strain. Claimant notified Employer of the injury and was directed to Barnes Care for further medical treatment.
2. Claimant was initially seen at Barnes Care on February 27, 2009, was diagnosed with a lumbosacral sprain and placed on work restrictions. At a March 6, 2009 follow-up visit, Claimant was prescribed a Medrol Dosepak and physical therapy was ordered. When Claimant did not improve, a MRI of the lumbar spine was ordered. On March 20, 2009, the MRI demonstrated spondylolisthesis at L5-S1, a board-based disc bulge and annular tear at L4-5, narrowing of the L5-S1 disc space, and facet changes at L4-5 causing minimal foraminal stenosis. Claimant was referred by Barnes Care to Dr. Kitchens, a spinal neurosurgeon.
3. Dr. Kitchens examined Claimant on March 31, 2009, noted the MRI findings, and diagnosed worsening spondylolisthesis, worsening low back and radicular pain, and severe neural foraminal narrowing at L5-S1. Dr. Kitchens and Claimant elected to continue conservative medical treatment along with lifting restrictions. On April 9, 2009, Dr. Kitchens opined Claimant's February 20, 2009 work injury was the primary factor in aggravating Claimant's spondylolisthesis. On May 14, 2009, Dr. Kitchens noted improvement in Claimant's symptoms, and recommended a series of cortisone injections.

4. On June 3, 2009, Employer notified Dr. Kitchen that medical care was no longer authorized as the claim was being denied.<sup>1</sup>

5. Claimant continued medical treatment with Dr. Kitchens on his own, and proceeded to receive the pain management suggested by Dr. Kitchens by utilizing his private insurance. Between June 13, 2009 and November 24, 2010, Claimant received unauthorized medical treatment from Dr. Kitchens, pain management, and chiropractic care. He also obtained a second neurosurgeon opinion from Dr. Boland. Dr. Boland agreed with Dr. Kitchens treatment plan and opined Claimant should avoid surgery and continue conservative medical treatment for his lumbar spine.

6. Claimant was examined at his request by Dr. Volarich on December 17, 2012. Upon physical examination, Dr. Volarich noted the following abnormal findings: diminished pinprick sensation in the left calf along the S1 distribution; increased low back pain with heel and toe walking; decreased lumbar spine range of motion; positive trigger point left sacroiliac joint; and positive left straight leg raise. Dr. Volarich diagnosed a disc protrusion with annular tear at L4-5 creating a left-sided foraminal stenosis as well as aggravation of Claimant's preexisting spondylolisthesis at L5-S1 causing left leg radicular symptoms. Dr. Volarich opined Claimant's work injury on February 20, 2009 was the prevailing factor in causing his current symptoms. Dr. Volarich rated Claimant's injury at 25% BAW PPD referable to the L4-5 disc protrusion and annular tear, and the aggravation of his L5-S1 spondylolisthesis. During deposition testimony, Dr. Volarich opined Claimant reached maximum medical improvement (MMI) on August 20, 2010, the date Claimant last saw Dr. Kitchens. (Exhibit A, pg.12) Dr. Volarich also opined that all care received by Claimant was reasonable and necessary to cure and relieve Claimant from the effects of his injury. (Exhibit A, pgs. 9, 24)

7. Claimant was examined at the request of Employer by Dr. Tate on May 16, 2013. Upon physical examination, Dr. Tate noted the following abnormal findings: decreased lumbar lordosis with mild paravertebral tenderness; and decreased lumbar spine range of motion with extension. Dr. Tate diagnosed spondylolisthesis at L5-S1 and degenerative disc changes at L4-5. Dr. Tate opined the spondylolisthesis was not caused by Claimant's February 20, 2009 work injury, but the work injury precipitated his radicular symptoms. Dr. Tate rated Claimant's injury at 7% BAW PPD referable to the lumbar spine. During deposition testimony, Dr. Tate opined Claimant reached MMI during August 2009, because "essentially, that was shortly after all of the patient's treatment that had been requested had been performed, and there was no additional treatment rendered after that." (Exhibit 1, pg.12) Dr. Tate later acknowledged Claimant received pain management treatment during August 2010. (Exhibit 1, pg. 18)

### **RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

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<sup>1</sup> Employer abruptly stopped medical care without seeking an opposing medical opinion. The next date of medical exam authorized by Employer was May 16, 2013, when Claimant was sent to Dr. Tate for a rating examination.

### Issues related to statute of limitations defense

Employer asserts a statute of limitations defense. Section 287.430 RSMo., (2005) limits the length of time an injured worker has to file a claim for workers' compensation benefits. Section 287.430 provides, in pertinent part:

No proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. . . . The statute of limitations contained in this section is one of extinction and not of repose.<sup>2</sup>

The parties stipulate Claimant's date of injury was February 20, 2009, and Employer timely filed a First Report of Injury on March 3, 2009. These dates provide Claimant a two year statute of limitations. The question presented in the instant case is one of pure law, namely, when did the two year statute of limitations begin to run? Employer asserts it began to run on June 13, 2009, the date it last paid for Claimant's medical care. Claimant asserts the statute of limitations would not have begun to run until August 2010, the date Dr. Volarich opines Claimant reached MMI. Claimant asserts that under the application of "strict construction" as §287.430 is silent regarding *who* needs to make the *last payment* to treat the injury, payments by Claimant and his private insurance made after Employer stopped treatment must be considered as long as the §287.140.1 RSMo., requirements that the treatment was reasonably necessary to cure and relieve him of the injury are met.<sup>3</sup> Essentially, Claimant argues the statute of limitations is *tolled* until the last payment was made on his behalf by his private insurer.

I disagree. The true question here involves what payments should be considered as being "*made under this chapter*" when determining when the statute of limitations began to run. Even applying "strict construction," analyzing the words *made under this chapter* requires applying the rules of statutory construction. The instant case is less one of strict construction versus one of proper statutory interpretation. "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). In assisting us in determining the legislative intent in this regard is case law directly on point.

This exact question was previously considered by the Missouri Court of Appeals Western District in *Bryan v. Summit Travel, Inc.*, 984 S.W.2d 185 (Mo. App. W.D. 1998) (overruled on other grounds in part by *Hampton*). In *Bryan*, the appellant contended that payments made on her account by Medicaid and private insurance tolled the running of

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<sup>2</sup> Section 287.430 RSMo., was not amended during the 2005 legislative session.

<sup>3</sup> Section 287.800.1 RSMo., was legislatively amended in 2005 changing from liberal construction to strict construction.

the statute of limitations until Medicaid and private insurance made the last payment on her behalf. The *Bryan* Court stated as follows:

Thus, the question is whether the payments made to cover Appellant’s medical costs were made “under this chapter.” Section 287.430 was amended in 1980 to supplant a previous version of the statute which had provided that the statutory period for filing a claim was “subject to being tolled by *any* payment made on account of the injury.” *Blair v. Associated Wholesale Grocers*, 593 S.W.2d 650, 652 (Mo. App. 1980); *Skinner v. Dawson Metal Products*, 575 S.W2d 935, 941 (Mo. App. 1978) (emphasis added). The 1980 amendment’s deletion of the words “any payment made on account of the injury” and addition of the words “under this chapter” evidences the legislature’s desire to toll the statutory period, not merely when payments of any kind are made on an injured employee’s behalf generally, but rather only when such payments are specifically made pursuant to Chapter 287, the Workers’ Compensation Law.

In the instant case, neither Appellant’s employer nor anyone else on it’s [Employer’s] behalf ever instituted payment of Appellant’s medical expenses under the mandate of Chapter 287 or any other reason. Instead, the payments that were made on account of Appellant’s injury were by Medicaid and Appellant’s spouse’s insurer, neither of which were furnished under Chapter 287. . . *Id.*@ 187, 188.

In the instant case, as in *Bryan*, the payments made by Claimant and his private insurance were not payments *made under* Chapter 287, but were payments made on behalf of Claimant only and did not toll the statute of limitations. Accordingly, I find the last payment made under Chapter 287 was made by Employer on June 13, 2009. Claimant had until June 13, 2011 in which to timely file a Claim for Compensation. Claimant filed his claim on January 30, 2012, and his Claim is barred by the Statute of Limitations.

**CONCLUSION**

Claimant’s claim is barred by the statute of limitations. As Claimant’s claim is barred, Employer owes no benefits.

Date: \_\_\_\_\_

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

LINDA J. WENMAN  
*Administrative Law Judge*  
*Division of Workers' Compensation*

