

**ORDER**

Injury No.: 08-090367

Employee: Richard Wors  
Employer: Allied Waste  
Insurer: American Home Assurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

**Introduction**

On May 27, 2014, an administrative law judge issued an award allowing compensation to employee. Among other things, the award provided that employer/insurer was obligated to provide future medical care to cure and relieve the physical and psychiatric effects of employee's work injury. No appeal was taken.

On October 13, 2015, the Labor and Industrial Relations Commission (Commission) received from employee a "Request for Hearing" alleging that employer/insurer had not provided employee with ongoing medical care and that employee's health was being harmed as a result. By order dated December 22, 2015, the Commission denied employee's Request for Hearing because employee had failed to state a prima facie claim for relief.

On December 30, 2015, the Commission received from employee a second "Request for Hearing" alleging employee contacted employer/insurer on June 27, 2014, July 1, 2014, July 9, 2014, January 22, 2015, February 25, 2015, March 23, 2015, April 17, 2015, April 24, 2015, and May 6, 2015, requesting that employer/insurer furnish the treatment ordered by the administrative law judge; that employer/insurer had not furnished any treatment other than to send employee to a doctor who attempted to relitigate the causation of employee's lumbar complaints, and then released employee from care; and that employee's health was being harmed as a result of employer/insurer's failure to comply with the award. Employee requested a hearing concerning the provision of medical treatment, and an award ordering payment of his past medical bills, terminating employer/insurer's right to direct medical care, and awarding employee's fees and costs.

On January 25, 2016, the Commission received employer/insurer's "Response to the Request for Hearing." Therein, employer/insurer alleged that it was following the recommendations of the authorized treating physician in discontinuing certain medications, and that it had been unable to find a psychiatrist willing to take employee as a patient. Employer/insurer requested the Commission deny employee's request for hearing.

On February 16, 2016, the Commission remanded this matter to the Division of Workers' Compensation to take evidence regarding the parties' dispute over future medical treatment, in light of recent guidance from the Supreme Court of Missouri making clear that this Commission retains jurisdiction over disputes arising from awards

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or settlements including the provision of open future medical treatment. See *State ex rel. ISP Minerals, Inc. v. Labor & Indus. Rels. Comm'n*, 465 S.W.3d 471 (Mo. 2015).

On April 19 and 22, 2016, an administrative law judge held a hearing to give effect to our February 16, 2016, order of remand. The transcript from the remand hearing has returned to us for an order resolving the parties' dispute over awarded medical treatment. After a careful review of that transcript, the transcript from the original hearing, and the entire record, we enter this order resolving the parties' dispute over awarded medical treatment.

### **Findings of Fact**

#### *Original hearing and award*<sup>1</sup>

On August 15, 2008, this mechanic employee suffered a low back work injury while working for employer. Employer/insurer paid for two surgeries with Dr. David Robson (an L5-S1 fusion and revision to address pseudoarthrosis) and post-surgical physical therapy, but then denied any additional medical treatment, after which employee began to abuse alcohol.<sup>2</sup> On February 20, 2014, the parties proceeded to hearing before an administrative law judge. Employee sought an award of temporary total disability benefits, past and future medical expenses, and permanent disability benefits.

On May 27, 2014, the administrative law judge issued her award of temporary total disability benefits, past and future medical expenses, and permanent total disability benefits against the employer/insurer, crediting Dr. Robson and Dr. David Volarich's opinion that the accident caused a herniated disc at L5-S1 with aggravation of previously asymptomatic spondylolisthesis, as well as post laminectomy syndrome due to persistent pseudoarthrosis at L5-S1. *Award*, pages 13-14. The administrative law judge also credited Dr. Wayne Stillings's opinion that employee suffered depression and anxiety as a result of the work injury. *Id.* The administrative law judge awarded future medical treatment from employer/insurer as follows:

The record establishes that Claimant is in need of further care. Employer is liable to provide future medical treatment to cure and relieve from the effects of Claimant's orthopedic injuries. This includes medication and other modalities designed to control his pain. He is currently benefiting from Norco and ibuprofen for his back pain. In addition, if stress to the adjacent levels of his lumbar spine causes them to break down, as Dr. Volarich predicted, more aggressive treatment may become necessary, including medications, physical therapy, injections, a TENS unit and continued CT scans.

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<sup>1</sup> The facts and history set forth in this section are derived from the administrative law judge's award, and thus essentially constitute "the law of the case," owing to the finality of that award. See *Smith v. Capital Region Med. Ctr.*, 458 S.W.3d 406, 414 (Mo. App. 2014).

<sup>2</sup> Employee was charged with a DWI in 1999, but the administrative law judge credited his testimony that he was merely "a casual weekend drinker for many years prior to the accident." See *Award*, page 6. The administrative law judge also credited employee's testimony that he began drinking 12-18 beers per day to self-medicate his pain referable to the work injury after employer/insurer cut off treatment. *Id.*

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Employer shall also provide treatment for the psychological injuries of depression and anxiety. Dr. Volarich recommended medications for the depression (he is currently benefiting from Cymbalta), and Dr. Stillings stated that Claimant would benefit from further psychiatric care due to the injury of August 15, 2008, including evaluations with a psychiatrist and medication.

To clarify, Employer is not responsible for providing Claimant with treatment for his alcohol addiction, per se. However, if treatment for Claimant's depression would also treat his alcoholism, Employer will nonetheless be liable. ...

I find Claimant has provided sufficient proof that it is reasonably probable he is or will be in need of medical care to cure and relieve the physical and psychiatric effects of his work injury. Employer shall retain the right to direct care consistent with the findings herein.

*Award*, pages 16-17.

As noted above, there was no appeal taken of the administrative law judge's award of May 27, 2014. Accordingly, we must conclude that the award is final, conclusive, and binding. See *King v. Chrysler Corp.*, 91 S.W.3d 696 (Mo. App. 2002).

*Post-award medical treatment*

On June 27, 2014, employee's attorney sent employer/insurer a letter requesting treatment and suggesting Dr. Russell Cantrell might be a good choice of treating physician. On July 15, 2014, employer/insurer's senior claims representative, Evelyn Crawford, sent a letter to employee's attorney responding that an appointment had been set up with Dr. Cantrell. On August 27, 2014, employee saw Dr. Cantrell.

Prior to employee's August 27, 2014, appointment with Dr. Cantrell, employer/insurer failed to provide Dr. Cantrell a copy of the award, and did not advise him that the appointment was for purposes of furnishing the treatment ordered by the administrative law judge. Nor did employer/insurer provide a complete set of medical records.<sup>3</sup> Moreover, the letter Ms. Crawford sent to Dr. Cantrell represented to him that the question whether employee needed treatment was *unresolved* and even characterized employee's depression as merely "alleged" by employee's attorney to have resulted from the work injury:

The clmt [sic] is abusing alcohol and suffering from depression and anxiety which claimant's attorney alleges those conditions are worsened by the effects of the work injury. Please review the previously forwarded

<sup>3</sup> Employer/insurer provided Dr. Chabot's but not Dr. Volarich's reports, despite the administrative law judge's express finding crediting Dr. Volarich over Dr. Chabot because "[t]he factual inaccuracies and other flaws in Dr. Chabot's opinion render it unpersuasive." *Award*, page 14. Employer/insurer also failed to provide Dr. Cantrell with the reports from either of the evaluating psychiatrists.

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medical records and after evaluation of the claimant please advise if the any [sic] additional medical treatment is needed and if so, please provide your recommendations.

*Transcript of Remand Hearing, pages 367-67A.*

As a result of these failures to fully or accurately inform him, Dr. Cantrell lacked the necessary context for his evaluation, and made treatment decisions based on an incomplete picture of employee's medical history and status. For example, Dr. Cantrell terminated employee's prescription antidepressant medication on the mistaken impression employee was taking it for neurological complaints; at his deposition, Dr. Cantrell conceded he never would have done so had he known that employee was taking this medication in connection with a psychiatric diagnosis:

Q. Do you know whether [Cymbalta] was being prescribed in his case as an antidepressant or not?

A. I don't know that I could say for sure since I did not have the psychiatric records that may have been generated by Dr. Stillings.

Q. Were you aware that he had a psychiatric problem at the time you initially saw him?

A. Let's see. ... I did not undertake a series of questions to delineate whether he had a psychiatric problem or not.

Q. Okay. Just let me ask you this then. Before terminating the Cymbalta did you seek out the opinions of any psychiatrist, psychologist, or his family doctor as to whether or not that was being used for psychological reasons?

A. No. Nor would it be my intention, if he were taking a medication for a condition other than the pain associated with his work injury, to discontinue that. In other words, I'm not making comments on whether he needs his blood pressure medication and what dose. And likewise, if he was on Cymbalta for psychiatric reason, I would not be weighing in on that issue.

*Transcript, pages 340-41.*

Dr. Cantrell also terminated employee's narcotic pain medications owing to a concern that employee would abuse this medication given employee's history of alcohol abuse.

The issue whether narcotic medications are appropriate given employee's past alcohol abuse was litigated at the original hearing with considerable cross-examination from employer/insurer, see *Transcript of Original Hearing, pages 33-36, 56-57*, and was

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finally resolved by the administrative law judge when she credited employee and his experts and found that he benefits from Norco (a prescription narcotic) and that the *absence* of prescription medications was what prompted employee to begin abusing alcohol when employer/insurer originally cut off treatment.<sup>4</sup> *Award*, pages 6, 16. However, Dr. Cantrell was obviously unaware of this, owing to employer/insurer's failure to provide him the necessary information.

On January 22, 2015, employee's attorney sent employer/insurer a letter noting that no psychiatric treatment had yet been provided, that Dr. Cantrell had terminated employee's prescription medications, and requesting employer/insurer select another doctor in light of this. On February 25, 2015, employee's attorney sent another letter to employer/insurer noting that there had been no response to his letter of January 22, 2015.

Also on February 25, 2015, employee saw Dr. Cantrell for follow-up. Despite employee's report to Dr. Cantrell that he was suffering a worsening of his condition in the absence of his medications, Dr. Cantrell refused any further treatment to employee, and recommended employee take over-the-counter ibuprofen.

On February 26, 2015, Ms. Crawford sent a fax to employee's attorney indicating employer/insurer would authorize psychiatric treatment with Drs. Greg Bassett or Melissa Harbit. Via phone call on March 4, 2015, employee selected Dr. Bassett. That same day, Ms. Crawford called Dr. Bassett's office to inquire about an appointment for employee. Dr. Bassett's office, however, advised Ms. Crawford that Dr. Bassett was not accepting any new patients. So, Ms. Crawford called Dr. Harbit's office, whereupon she learned that Dr. Harbit was only willing to provide an independent medical examination, and would not provide treatment to employee.<sup>5</sup>

On March 23, 2015, employee's attorney sent a letter requesting an update from employer/insurer regarding psychiatric treatment and also requesting employer/insurer authorize employee's pain medications as prescribed by employee's primary care physician, or alternatively authorize pain management. On March 24, 2015, Ms. Crawford requested a psychiatric appointment with Dr. Pribor's office; on March 31, 2015, she learned Dr. Pribor was also unwilling to treat employee.

Ms. Crawford testified, at the remand hearing, that she spoke with employee's attorney on March 31, 2015; that the two discussed the difficulty in finding a psychiatrist willing to

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<sup>4</sup> There is no evidence whatsoever that anything has changed with regard to employee's ability to manage his use of prescription pain medications; instead, in a new medical report obtained for purposes of this post-award proceeding, Dr. Volarich continues to recommend these medications as appropriate for employee, as he has not abused them in the past.

<sup>5</sup> We note that Dr. Harbit was employer/insurer's evaluating psychiatrist at the original hearing in this matter, at which time she opined that employee did not suffer any psychiatric disability, as a result of the work injury or otherwise. See *Transcript of Original Hearing*, page 1121. Consequently, it is not especially surprising that she was unwilling to accept employee as a psychiatric patient, nor would such referral seem appropriate.

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provide treatment; and that the conversation concluded with employee's attorney telling Ms. Crawford he would find out the name of the doctor that prescribed employee's medications before, and then let Ms. Crawford know, but thereafter, Ms. Crawford "never received anything." *Transcript of Remand Hearing*, page 22. Notably, this circumstance (employee's attorney agreeing to find information for Ms. Crawford but then never providing it) is not mentioned anywhere in Ms. Crawford's own written account of this telephone call. *Id.* at 394. In any event, it is wholly unclear to us why employer/insurer needed additional information on this point, as it was a matter of record that employee's primary care physician, Dr. Christopher Abercrombie, had been prescribing employee's psychiatric medications leading up to the original hearing. See *Award*, pages 6, 16.

Also on March 31, 2015, Ms. Crawford faxed a letter to Dr. Cantrell asking whether he would refer employee for pain management. In that letter, Ms. Crawford failed yet again to apprise the doctor that there was a final award in this matter, or of the administrative law judge's findings, or of the obvious and rather serious errors (such as Dr. Cantrell's discontinuing employee's psychiatric medication) that had already resulted from employer/insurer's initial failure to provide this information. On April 1, 2015, Dr. Cantrell sent Ms. Crawford a letter advising that he would not refer employee for pain management and reiterating his opinion that prescription pain medications would not benefit employee.

On April 17, 2015, employee's attorney again sent a letter requesting an update from employer/insurer regarding ordered treatment. Ms. Crawford spoke with employee's attorney via telephone on April 24, 2015, and suggested employee's psychiatric medications could be processed through employer/insurer's pharmacy benefit manager. However, there is no indication on this record that Ms. Crawford (or anyone else with employer/insurer) took any steps to actually accomplish this. Ms. Crawford, for her part, admits that she took no action because, according to her testimony, she was still waiting for employee's attorney to provide her with the name of a prescribing psychiatrist. Again, it is unclear to us what (if any) additional information was needed from employee at this point, as it was a matter of record that Dr. Abercrombie had been prescribing employee's medications until Dr. Cantrell terminated them.

In late April 2015, employee ran out of antidepressant medications, owing to Dr. Cantrell's choice to terminate them, and employer/insurer's failure to have them reinstated. As a result, employee began to experience symptoms of withdrawal, including dizziness and nausea. After three days, employee's withdrawal symptoms grew serious enough to prompt employee's wife to call Dr. Abercrombie's office for help. Dr. Abercrombie's records reveal that employee's wife was "hysterically crying," owing to employee's "severe withdrawal from the Cymbalta." *Transcript*, page 233.

On April 24, 2015, Dr. Abercrombie ordered a refill of employee's antidepressant medication, which employee paid for on his own. That same day, employee's attorney sent a letter to employer/insurer advising that employee had been forced to seek treatment from his own providers, and that further litigation would follow.

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Thereafter, employee saw Dr. Abercrombie on May 19, 2015, September 30, 2015, November 12, 2015, December 21, 2015, January 10, 2016, and January 12, 2016, for treatment and refills of his antidepressant and prescription pain medications. Employee paid for all of this treatment out-of-pocket. We find that the post-award treatment employee sought and the expenses employee incurred are precisely those which the administrative law judge ordered employer/insurer to provide; we find, consequently, that this treatment was reasonably required to cure and relieve the effects of the work injury.

At the remand hearing, employee offered records corresponding to his treatment with Dr. Abercrombie, along with certain bills from this provider. Specifically, employee provided bills demonstrating he was charged \$167.00 for his visit with Dr. Abercrombie on May 19, 2015, and \$167.00 for his visit on January 12, 2016.<sup>6</sup> Employee also provided Walgreen's pharmacy records revealing he was charged a total of \$385.94 for prescription pain and antidepressant medications ordered by Dr. Abercrombie. Thus, the record before us reveals employee incurred a total of \$719.94 in post-award expenses. We find these charges reasonable.

On May 1, 2015, Ms. Crawford faxed a letter to employee's attorney indicating she'd contacted four psychiatric doctors who were unwilling to see employee,<sup>7</sup> and that employer/insurer was going to rely on Dr. Cantrell's opinion with regard to employee's low back, and therefore would not be offering any additional pain management, and that employee could take ibuprofen.

On May 6, 2015, employee's attorney sent Ms. Crawford a letter noting that it remained employer/insurer's duty to find a treating psychiatrist, and requesting that employer/insurer continue searching, but stating "we would be glad to find a psychiatrist for you, if you so desire." *Transcript of Remand Hearing*, page 288. At the remand hearing, Ms. Crawford indicated she understood from this May 6, 2015, letter that employee had decided to find a psychiatrist on his own, so she took no action in connection with the letter. In fact, by Ms. Crawford's own admission, employer/insurer took no action whatsoever between May 2015 and March 2016 to provide psychiatric treatment for employee.

In other words, employer/insurer rested, yet again, on the premise that something more was needed from employee before it could comply with the administrative law judge's award with regard to psychiatric treatment. Remarkably, despite employer/insurer's taking this position, Ms. Crawford maintained throughout the remand hearing that employer/insurer did not relinquish its right to select the treating physician at any time.

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<sup>6</sup> Employee did not, however, provide Dr. Abercrombie's bills in connection with the September 30, 2015, November 12, 2015, December 21, 2015, or January 10, 2016, dates of service.

<sup>7</sup> Actually, the record before us demonstrates that Ms. Crawford had approached only three psychiatrists as of May 1, 2015, one of whom had already provided sworn testimony in this matter that employee does not have any psychiatric problems.

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On September 8, 2015, employee saw Dr. Volarich for an independent medical evaluation; as we have noted, Dr. Volarich's opinions remain wholly unchanged, and he continues to recommend that employee needs ongoing pain management including prescription pain medications.

On March 2, 2016, Ms. Crawford again asked if Dr. Harbit, or Dr. Jarvis in the same office, would see employee for psychiatric visits; both responded they were only interested in providing independent medical evaluations.<sup>8</sup> On March 3, 2016, Ms. Crawford asked Dr. Jennifer Brockman if she would see employee for psychiatric care; on March 10, 2016, she learned Dr. Brockman was unwilling to see employee.

At the remand hearing of April 19 and 22, 2016, employee testified that following issuance of the award, he continued to benefit from the receipt of prescription pain medications and psychiatric treatment as outlined by the administrative law judge above. Employer/insurer has presented no evidence to suggest (let alone prove) that employee's medical condition has changed in any way. We credit employee's testimony, and find that he continues to benefit from the receipt of prescription pain medications and psychiatric treatment as outlined by the administrative law judge in her award.

Employee provided an itemized accounting of his attorney fees and expenses incurred in seeking post-award treatment in this matter. Specifically, employee provided evidence demonstrating that, between November 25, 2014, and April 19, 2016, his attorney spent 31.10 hours pursuing post-award medical treatment, at a rate of \$275.00 per hour, with an additional hour of paralegal time billed at \$85.00 per hour. Employee also provided an accounting of the expenses incurred by his attorney in pursuing post-award medical treatment, reflecting a total of \$1,823.37. Employer/insurer has not advanced any evidence to suggest that these attorney fees are unreasonable, or that these expenses were unjustified.

Accordingly, we credit employee's essentially un rebutted evidence on this topic, and find his attorney's hourly rate to be fair and reasonable, and the charges reflected in the itemized statement to be well-supported by the record before us. We also find the expenses to be justified. We find that employee expended \$10,460.87 in seeking post-award treatment from the employer/insurer.

### **Conclusions of Law**

#### **Post-award medical expenses**

Employee asks the Commission to enter an order that employer/insurer must reimburse his post-award medical expenses. Employee relies on the new report from Dr. Volarich stating that his opinions regarding future medical treatment are unchanged. Meanwhile, employer/insurer's position is that it is entitled to rely on the opinion from Dr. Cantrell, and that it was up to employee to find a treating psychiatrist where its initial efforts to

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<sup>8</sup> We note that this additional action on Ms. Crawford's part came only after we issued our order of remand on February 16, 2016.

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find one failed. We conclude that the parties are precluded from now contesting this issue before the Commission, for the following reasons.

As we noted at the outset, our Supreme Court has recently clarified that the Commission retains jurisdiction where the parties dispute an award or settlement providing for open future medical care. See *State ex rel. ISP Minerals, Inc. v. Labor & Indus. Rels. Comm'n*, 465 S.W.3d 471 (Mo. 2015). The settlement at issue in the *ISP Minerals* case expressly left future medical treatments "open"; the treatment modalities that might reasonably be required to cure and relieve the effects of the work injury were not identified or even discussed. *Id.* at 475-77 (Mo. 2015). In concluding that the Commission retained jurisdiction to determine the future medical benefits to which employee was entitled, the court reasoned as follows:

Employee's claim is essentially a claim for a determination of the workers' compensation benefits for future medical care to which Employee is entitled pursuant to section 287.140.1. The determination of a claimant's benefits for future medical care pursuant to section 287.140.1 is generally considered to be an issue that is within the exclusive province of the Division of Workers' Compensation. Adopting Employer's argument and holding that the commission has no jurisdiction to determine the nature and extent of Employee's future workers' compensation medical benefits would amount to requiring the circuit court to determine the amount of Employee's workers' compensation benefit. This result is not compelled by the plain language of section 287.390.1, is inconsistent with the commission's exclusive role in determining the amount of workers' compensation benefits, and is contrary to the goal of providing a simple and non-technical method of compensation for workplace injuries.

*ISP Minerals*, 465 S.W.3d at 475 (internal citations omitted).

Here, the administrative law judge did not merely award unspecified "open" medical treatment. Instead, the administrative law judge discussed, considered, and *unambiguously* awarded the very treatment modalities employee now seeks, and that employer/insurer has, to date, failed to provide.

We have found that employee will continue to benefit from the receipt of prescription pain medications and psychiatric treatment as outlined by the administrative law judge in her award; that nothing has changed in this regard since the date upon which the administrative law judge issued her award; and that the treatment employee sought and received on his own was the very same treatment the administrative law judge unambiguously awarded. We have found that the medical treatment employee has received on his own was reasonable and necessary to cure and relieve the effects of employee's work injury on August 15, 2008. We have found that the charges therefore in the amount of \$719.94 are reasonable. Because employer/insurer failed and refused

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to provide authorized care, we conclude that employer/insurer is therefore liable for payment of same.

A Workers' Compensation award adjudicates the rights of the parties as effectively as a judgment of a court of law ... Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement, the attack is a "collateral attack."

*Barry, Inc. v. Falk*, 217 S.W.3d 317, 320 (Mo. App. 2007).

In our view, employer/insurer's conduct amounts to nothing more than an attempt to collaterally attack a clear, unambiguous, and finally adjudicated award from an administrative law judge. This is not a case wherein the parties dispute whether some new treatment modality, perhaps unforeseen at the time of the award's entry, is reasonably required to cure and relieve the effects of the work injury. Instead, this case is akin to the situation in *Schneider v. Feeder's Grain & Supply*, 24 S.W.3d 739 (Mo. App. 2000), where the court found that because a settlement between the parties specifically addressed the very future treatment at issue (installation of a new prosthetic device), the appropriate remedy was summary judgment on the employee's garnishment action after registering the settlement as a judgment pursuant to § 287.500 RSMo. We conclude that employee's remedy for seeking enforcement of the award and/or reimbursement of his post-award medical expenses now lies in circuit court, pursuant to § 287.500 RSMo, as in the *Schneider* case.

Change of physician or other requirement

Section 287.140 RSMo provides, in relevant part, as follows:

1. In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. ...

2. If it be shown to the division or the commission that the requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, the division or the commission may order a change in the physician, surgeon, hospital or other requirement.

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10. The employer shall have the right to select the licensed treating physician, surgeon, chiropractic physician, or other health care provider;

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provided, however, that such physicians, surgeons or other health care providers shall offer only those services authorized within the scope of their licenses. For the purpose of this subsection, subsection 2 of section 287.030 shall not apply.

Employee seeks an order divesting employer/insurer of its right to direct treatment, invoking our discretion under § 287.140.2 above, and advancing a theory that relying upon Dr. Cantrell's opinions endangered employee's life, health, or recovery by prompting him to drink heavily to self-medicate his chronic pain. Employee's increased drinking in the absence of pain management treatment is well-documented in the record before us, but we need not reach the question whether employer/insurer's actions necessarily caused this choice of unhealthy behavior on employee's part.

This is because we are convinced that employer/insurer endangered employee's health or recovery for purposes of § 287.140.2 when it chose to provide Dr. Cantrell with incomplete information and frame employee's visit as an independent medical examination in a contested case, rather than a visit to establish treatment pursuant to an unambiguous final award from the Division of Workers' Compensation; when it chose thereafter to rely upon findings from Dr. Cantrell that ran directly contrary to the facts of this case as set forth in the administrative law judge's award; and when it denied employee the very medical treatment the administrative law judge found was benefitting him. In effect, employer/insurer sought to collaterally attack the administrative law judge's award via the procurement of uninformed opinions from Dr. Cantrell, and thereby placed employee's health and recovery at risk.

Perhaps most egregiously, employer/insurer's withholding of relevant information regarding both employee's medical history and the history of this claim directly resulted in Dr. Cantrell's discontinuing a psychiatric medication on the mistaken belief that employee had no psychiatric diagnosis. After this occurred, employer/insurer took no action whatsoever to rectify this error or to apprise Dr. Cantrell of his mistake. Instead, employer/insurer contacted three psychiatrists, and because each of them were unwilling to see employee, employer/insurer took the position that it had become employee's burden to restore his access to psychiatric treatment. Employer/insurer maintained that position for nearly a year, despite employee's continual requests to provide awarded treatment. We conclude that employer/insurer's actions have endangered employee's health and recovery.

Therefore, it appears to us that a change in "physician, surgeon, hospital or other requirement" is warranted in this case pursuant to § 287.140.2. We will tailor our exercise of this rather broad discretion to the facts of the case before us, and the extent to which the employee's health or recovery has been endangered. Given that employer/insurer's post-award actions have continually served to frustrate, delay, or otherwise hinder employee's ability to receive the treatment that was awarded to him, it appears to us that employer/insurer cannot be entrusted to select the authorized treating physician going forward.

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Accordingly, effective immediately, employer/insurer shall not select the authorized treating physician. Instead, employer/insurer shall pay for medical treatment furnished by doctors of employee's choosing (such as Dr. Abercrombie) who will accept the facts of this case as found by the administrative law judge, and who will provide the treatment that has been determined to be reasonably required to cure and relieve the physical and psychiatric effects of employee's work injury. Further, employer/insurer shall fully compensate all such providers in such a manner as to ensure that employee will not be required to pay any such medical expenses up-front or out-of-pocket.

Section 287.560 RSMo fees

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

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. The division or the commission may permit a claimant to prosecute a claim as a poor person as provided by law in civil cases.

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

The proceedings before the Commission in this matter were initiated by employee in an effort to secure the medical treatment the administrative law judge awarded to him. The question before us is whether employer/insurer defended employee's attempts to secure post-award treatment "without reasonable ground." If so, employee is entitled to an award of costs. The courts have cautioned the Commission to limit an award of costs under § 287.560 to those cases where "the issue is clear and the offense egregious." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003).

With regard to employee's chronic pain, employer/insurer's defense is that it was entitled to rely on Dr. Cantrell's opinion that employee doesn't need ongoing pain management from a physician. But, as we have noted, Dr. Cantrell's opinions run directly contrary to the facts of this case as found by the administrative law judge. Dr. Cantrell was of course entitled to his own opinions, but absent any showing of a change of condition or circumstance, there is no justiciable issue as to whether employee needs the pain management treatment the administrative law judge awarded to him, and thus the issue is, undeniably, "clear."

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With regard to the psychiatric effects of the work injury, employer/insurer's defense is that it tried to get employee in to see several different psychiatrists, after which its adjuster, Evelyn Crawford, effectively abandoned employer/insurer's responsibility in favor of assuming employee's attorney should undertake the obligation of finding an appropriate provider. But nothing in § 287.140 RSMo relieves employer/insurer of the obligation to provide the treatment employee needs merely because employer/insurer encounters difficulty finding an appropriate provider. Given the longstanding case law principle that "[a]n employer's duty to provide statutorily-required medical aid to an employee is absolute and unqualified," *Downing v. McDonald's Sirloin Stockade*, 418 S.W.3d 526, 529 (Mo. App. 2014), we conclude that the issue with regard to psychiatric treatment was also "clear," in that employer/insurer unquestionably had a continuing statutory obligation to find a provider notwithstanding any difficulties.

We turn now to the question whether employer/insurer's offense in this case was "egregious." In this regard, we reiterate that not only did employer/insurer rely upon findings from Dr. Cantrell that ran directly contrary to those by the administrative law judge; it actively procured those opinions by withholding pertinent information regarding employee's medical history and the history of this claim. In effect, employer/insurer misled Dr. Cantrell into making critical errors such as discontinuing employee's antidepressant medication—and then wholly failed to rectify the situation when such errors became evident.

With regard to employer/insurer's failure to provide psychiatric care, we reiterate that employer/insurer took no action in this regard for nearly a year after May 2015; resting upon the assumption that employee would find a provider on his own—although employer/insurer hoped to retain the right to approve, authorize, and direct that provider. As a result of employer/insurer's actions, employee was forced to pay for his necessary medical expenses out-of-pocket, despite having earlier proceeded to a final hearing and securing an award of future medical treatment from an administrative law judge. Employer/insurer's actions, in our view, manifest a callous disregard for the health and recovery of this permanently and totally disabled worker, as well as a disregard for the authority of the Division of Workers' Compensation and the binding and final nature of the administrative law judge's award. We conclude, therefore, that employer/insurer has acted egregiously.

We conclude that, for purposes of § 287.560, employer/insurer defended these post-award proceedings without reasonable grounds. Employer/insurer is hereby ordered to pay to employee his fees and costs in the amount of \$10,460.87.

**Order**

Employer/insurer is liable for employee's post-award medical expenses in the amount of \$719.94.

Effective as of the date of this order, employer/insurer shall not select the authorized treating physician or other provider. Instead, employer/insurer is hereby ordered to pay

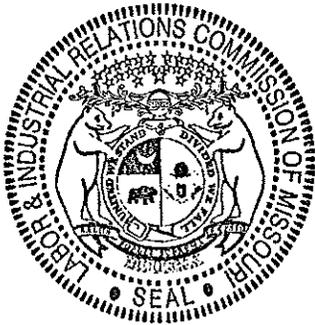
Employee: Richard Wors

medical providers of employee's own choosing, and shall pay to such providers the expenses of any and all medical treatment that may reasonably be required to cure and relieve the physical and psychiatric effects of employee's work injury, consistent with the administrative law judge's award of May 27, 2014.

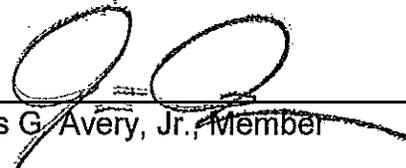
Employer/insurer is hereby ordered to pay employee's fees and costs in the amount of \$10,460.87, because employer/insurer lacked any reasonable ground for its defense in these proceedings.

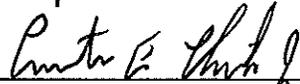
Given at Jefferson City, State of Missouri, this 13th day of September 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

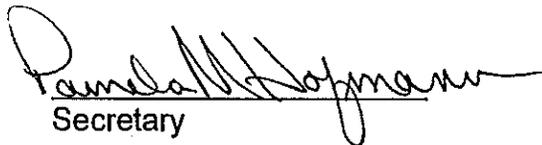


  
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John J. Larsen, Jr., Chairman

  
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James G. Avery, Jr., Member

  
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Curtis E. Chick, Jr., Member

Attest:

  
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Secretary