FINAL AWARD DENYING COMPENSATION
(Affirming Award of Administrative Law Judge by Separate Opinion)

Injury No.: 13-085074

Employee: Timothy Mealer

Employer: Russ Jackson Transportation

Insurer: N/A

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This 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, read the petitioner's brief, 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 of the administrative law judge by separate opinion.

Introduction
Employee filed a claim for compensation in this case alleging he sustained a compensable injury on October 25, 2013, in Cahokia, Illinois, while working for employer. Employer did not file an answer to employee's claim for compensation.

Employee appeared for a hearing before an administrative law judge on December 14, 2015. Employer did not appear at that hearing. At the hearing, employee's attorney asserted[1] that: (1) employee was in the employment of employer on October 25, 2013; (2) employee sustained an accident arising out of and in the course of the employment; (3) employee's claim is subject to the jurisdiction of the State of Missouri and Division of Workers' Compensation (Division); (4) employee is entitled to the maximum compensation rate of $446.85; (5) employer and employee were operating under the provisions of the Missouri Workers' Compensation Law; (6) employer's liability was not insured; (7) employer had notice of the injury; and (8) the claim for compensation was filed within the time prescribed by law. Employee's attorney asked the administrative law judge for a favorable ruling finding employer liable to employee for permanent partial disability benefits, as well as past and future medical expenses.

The administrative law judge determined as follows: (1) employee was an employee of employer; (2) employee suffered an injury which arose out of and in the course of his employment on October 25, 2013; (3) employer and employee operated under the Missouri Workers' Compensation Law; (4) employer's liability was not insured; (5) it is not clear from the evidence how many employees worked for employer on October 25, 2013; (6) jurisdiction is proper in St. Louis County; (7) the claim for compensation was

[1] We note that the administrative law judge asked the employee's attorney, at the outset of the hearing, to "please testify" as to various elements of employee's claim. *Transcript*, page 7. Employee's attorney was not sworn, however, and did not offer her own testimony at the hearing as to any of the elements of employee's claim; instead, she provided assertions announcing the employee's position with respect to each element or issue identified by the administrative law judge.

timely filed; (8) employer is not liable for past medical expenses because employee failed to meet his burden of proving the bills in evidence related to his work injury; (9) an award of permanent partial disability benefits cannot be made because employee failed to meet his burden of proving he had reached maximum medical improvement; and (10) future medical benefits cannot be determined because employee did not prove he had reached maximum medical improvement.

Employee filed a timely application for review alleging the administrative law judge erred: (1) in finding there was no compensable injury; (2) in denying payment of past medical expenses; (3) in denying Second Injury Fund Liability; (4) in not awarding permanent partial disability and disfigurement benefits; and (5) in not awarding future medical treatment. Employee alternatively argued that the administrative law judge should have entered a temporary or partial award, given her finding that employee had not reached maximum medical improvement.

On October 12, 2016, the Commission issued an order remanding this matter to the Division to conduct an evidentiary hearing for the taking of evidence regarding: (1) the issue whether the Division and Commission have jurisdiction to decide employee's claim for compensation; and (2) the medical expenses employee has incurred since the prior hearing, to the extent employee alleges any such medical care and related expenses were reasonable and necessary to cure and relieve him of the effects of the work injury.

The Division conducted the remand hearing on February 2, 2018, and returned the file to the Commission. For the reasons set forth herein, we affirm the award denying compensation, because we conclude employee was not working for an "employer" subject to the Missouri Workers' Compensation Law on October 25, 2013.

Findings of Fact

Employee worked for employer as a truck driver hauling grain from St. Clair, Missouri, to Madison, Illinois. He suffered the injuries for which he claims compensation herein on October 25, 2013. Employee testified that his supervisor, Russ Jackson, told him employer didn't have workers' compensation insurance, because employer did not have five employees. Apart from this testimony from employee, there is no other evidence on this record as to the number of employees working for employer on October 25, 2013, or at any other time.

Consequently, there is no evidence on this record that would support a factual finding by this Commission that employer had five or more employees on October 25, 2013. Nor is there any evidence on the record that would support a finding that employer made an election to become subject to the provisions of the Missouri Workers' Compensation Law. Finally, there is no evidence on this record that would support a finding that employer was engaged in the construction industry as of October 25, 2013.

We find that employer did not have five or more employees on October 25, 2013; that employer did not make an election to become subject to the provisions of the Missouri

Workers' Compensation Law; and that employer was not engaged in the construction industry as of October 25, 2013.

Conclusions of Law

The Missouri courts have made clear that the existence of an employment relationship subject to the Missouri Workers' Compensation Law is one of subject-matter jurisdiction, and that, as such, the issue cannot be determined by consent, stipulation, or (as in this case) any default in the employer's answer or appearance:

> Jurisdiction has many meanings depending on the context used. Subject-matter jurisdiction is defined as the authority to determine the general question involved; if a petition states a claim belonging to a general class over which the authority of the court extends, that court has subject-matter jurisdiction. ... However, subject-matter jurisdiction cannot be conferred by consent or agreement of the parties, by appearance or answer, or by estoppel.

Sodipo v. Univ. Copiers, 23 S.W.3d 807, 809 (Mo. App. 2000).

In *Sodipo*, the court held that the Commission was required to determine whether it had subject-matter jurisdiction over the claim, where the Second Injury Fund raised, for the first time on appeal before the Commission, the argument that the Missouri Workers' Compensation Law did not apply to the underlying employment relationship. *Id.* at 810. As the court explained: "the Commission exercises limited jurisdiction, and if the legislature exempts any cases from the Commission's purview, then Claimant's workers' compensation claim falls outside such class of cases over which the Commission maintains jurisdiction." *Id.* The court concluded that, on the record before it, the employee's claim was excluded from coverage by operation of § 287.090 RSMo, and that the Commission was therefore required to dismiss the claim. *Id.*

Here, despite our interlocutory order remanding this matter to the Division for the express purpose of giving employee an opportunity to establish that we have jurisdiction over this claim, the record does not contain evidence sufficient to allow us to so conclude. This is because, as further discussed below, employee has failed to advance evidence sufficient to permit us to conclude that employee sustained his injuries in the context of an employment relationship subject to the Missouri Workers' Compensation Law.

Section 287.120.1 RSMo provides, in relevant part, as follows:

> 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 or occupational disease arising out of and in the course of the employee's employment.

Pursuant to the foregoing, we are authorized to issue an award of compensation only in cases where the employer is "subject to the provisions" of the Missouri Workers' Compensation Law. Consequently, it is incumbent upon the employee, in any proceeding for compensation, to demonstrate that he was working, at the time he was injured, for an employer subject to the provisions of the Missouri Workers' Compensation Law.

Section 287.030.1 RSMo defines an "employer" as follows:

> 1. The word "employer" as used in this chapter shall be construed to mean:
>
> (1) Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;
>
> (2) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation, or quasi-corporation, or cities under special charter, or under the commission form of government;
>
> (3) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter unless election is made to become subject to the provisions of this chapter as provided in subsection 2 of section 287.090, except that construction industry employers who erect, demolish, alter or repair improvements shall be deemed an employer for the purposes of this chapter if they have one or more employees. An employee who is a member of the employer's family within the third degree of affinity or consanguinity shall be counted in determining the total number of employees of such employer.

We have found that employer did not have five or more employees on October 25, 2013; that employer did not make election to become subject to the provisions of Chapter 287 as provided in § 287.090.2 RSMo; and that employer was not engaged in the construction industry. As a result, we must conclude that employer cannot be deemed an "employer" pursuant to § 287.030, that employer was not operating subject to the Missouri Workers' Compensation Law on October 25, 2013, and that employer cannot be held liable for any compensation herein pursuant to § 287.120.

Accordingly, we are constrained to dismiss this claim for lack of subject-matter jurisdiction. All other issues are moot.

Decision
Employee's claim is dismissed because he was not working for an employer subject to the Missouri Workers' Compensation Law at the time he sustained the injuries for which he claims compensation herein.

The award and decision of Administrative Law Suzette Carlisle is attached solely for reference.

Given at Jefferson City, State of Missouri, this 1st day of August 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

Reid K. Forrester, Member

DISSENTING OPINION
Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

After a careful review of this procedurally unusual matter, I am convinced that the Commission majority errs in denying this claim based on their finding that employer cannot be deemed an "employer" for purposes of § 287.030 RSMo. Instead, because the administrative law judge issued a temporary award, and because the Commission does not have regulatory authority to review temporary awards on the basis of an appeal filed by the employee, I would enter an order remanding this matter to an administrative law judge for further proceedings.

The procedural history of this claim reveals significant confusion on the part of all involved. The Commission majority operates under the assumption that employee had the evidentiary burden, in the context of an uncontested claim, to prove that the employer identified in his claim for compensation is appropriately deemed an "employer" for purposes of § 287.030. I disagree with this assumption for several reasons.

First, employee's claim for compensation alleged that he was "in the employment" of "employer" Russ Jackson Transportation on October 25, 2013, the date he was injured. Because employer never filed an answer to employee's claim for compensation, these factual propositions are deemed admitted. See 8 CSR 50-2.010(8)(C). It follows that employee was not required to put on evidence to prove these propositions, and that the Commission is without authority to rule in a manner contrary to the pleadings set forth in employee's claim for compensation. See *T.H. v. Sonic Drive in of High Ridge*, 388 S.W.3d 585 (Mo. App. 2012).

Second, the record of the first hearing before the administrative law judge reveals that the question whether employer had five or more employees was never mentioned, much less specifically identified as an issue for the administrative law judge's determination. Because employer was in default, employee proceeded to hearing for the sole purpose of putting on his evidence with regard to the measure of benefits to which he was entitled. See *Transcript*, page 5. The administrative law judge was specifically authorized to enter a default award pursuant to 8 CSR 50-2.010(12)(B), because employer failed to appear or defend this claim, despite the Division giving employer proper notice of these proceedings. In this context, and because there was no dispute as to the existence of a valid employment relationship, it appears that employee would not have been permitted to put on evidence as to that question, because pursuant to 8 CSR 50-2.010(14), "parties shall ... present evidence only on **contested** issues."

It is obvious to me that employee's counsel understood that any issue as to whether there was a valid employment relationship was to be resolved in employee's favor on a default basis; otherwise, such evidence would have been adduced. The administrative law judge appears to have been operating under the same understanding, as she did not provide any legal conclusions as to this issue, or render her award on this basis. Consequently, I believe the Commission majority has exceeded its authority by delving into an issue not identified for the hearing. See *Lawson v. Emerson Electric Co.*, 809 S.W.2d 121 (Mo. App. 1991) and *Boyer v. National Express Co., Inc.*, 49 S.W.3d 700 (Mo. App. 2001).

Third, employee did not raise the issue whether employer had five employees in his application for review, nor has he been given an opportunity to brief the issue or otherwise respond to the Commission majority's concerns. As a result, the Commission majority is without authority to reach that issue or deny this claim on that basis. See *Anhalt v. Penmac Pers. Servs.*, 505 S.W.3d 842 (Mo. App. 2016). I acknowledge that the Commission did previously remand this matter to the administrative law judge for the taking of evidence with regard to matters of jurisdiction. But the Commission's order of remand did **not** identify any issue with regard to whether employer had five employees on the date of injury; for this reason, I do not regard it as sufficient to obviate the due process problem of the Commission majority entering an award on an issue that no party to these proceedings has raised or briefed.

With regard to that order of remand, upon further review, I am convinced the Commission should have simply dismissed employee's application for review with an order concluding that the administrative law judge's award was temporary or partial. The majority's decision states that this matter is submitted to the Commission for determination pursuant to § 287.480 RSMo. But conspicuously absent from the Commission majority's decision is any explanation of the Commission majority's implicit conclusion that it has authority pursuant to that statute to consider an employee's application for review of a temporary or partial award.

To reiterate, the administrative law judge expressly found that employee was not at maximum medical improvement, and for that reason, she held that she could not determine the issues of permanent partial disability or future medical treatment. Accordingly, she entered what amounts to a temporary or partial award under § 287.510 RSMo, as she was fully authorized to do. At that point, employee's remedy was to secure the evidence regarding maximum medical improvement, permanency, and future medical, and request another hearing for entry of a final award. Instead, employee filed an application for review with the Commission. But the Commission's rule 8 CSR 20-3.040 prevents the Commission from accepting employee's application for review:

> (1) Whenever an administrative law judge issues a temporary or partial award under section 287.510, RSMo, the same shall not be considered to be a final award from which an application for review (see 8 CSR 20-3.030) may be made. The time for making an application for review shall not commence until a final award is issued by the administrative law judge in cases where a temporary or partial award has been issued.
>
> (2) Any party who feels aggrieved by the issuance of a temporary or partial award by any administrative law judge may petition the commission to review the evidence upon the ground that the applicant is not liable for the payment of any compensation and especially setting forth the grounds for the basis of that contention and where the evidence fails to support findings of the administrative law judge as to liability for the payment of compensation. The commission will not consider applications or petitions for the review of temporary or partial awards where the only contention is

> as to the extent or duration of the disability of the employee for the reason that the administrative law judge has not made a final award and determination of the extent or duration of disability.

Employee does not allege, in his application for review, that he is not liable for the payment of any compensation, nor could he logically do so. Rather, his position is that the administrative law judge erred in **not** awarding any compensation. Consequently, his remedy lies before the Division upon further proceedings for entry of a final award. Assuming, for the sake of argument, that employee was required to prove that employer had five or more employees in order to establish the Division's subject-matter jurisdiction over his claim, it does not necessarily follow that the Commission is authorized to now take up and render a final award on that basis.

I would enter an order declaring that the administrative law judge's award is temporary or partial for purposes of § 287.510, and that employee's application for review cannot be accepted for review by the Commission because it does not satisfy the narrow regulatory exception under 8 CSR 20-3.040. I would return this matter to the Division for further proceedings, including clarification whether employee is required to put on proof, in the context of a hearing for a default award, as to undisputed issues such as whether employer had five employees on the date of injury.

Because the Commission majority has decided otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee:	Timothy Mealer	Injury No.: 13-085074
Dependents:	N/A	Before the Division of Workers' Compensation Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Russ Jackson Transportation	
Additional	Second Injury Fund (Denied)	
Insurer:	Uninsured	
Hearing Date:	December 14, 2015	Checked by: SC

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: October 25, 2013
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? No
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was hit in the mouth with a piece of equipment and damaged three upper, front teeth.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Three teeth
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: $0
16. Value necessary medical aid paid to date by employer/insurer? $675.00

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: N/A

19. Weekly compensation rate: $446.85

20. Method wages computation: (Attorney opening statement)

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: Denied

TOTAL: NONE

23. Future requirements awarded: NONE

Said payments to begin 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: Attorney Dorothy Smith

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Timothy Mealer
Dependents:	N/A
Employer:	Russ Jackson Transportation
Additional	Second Injury Fund (Denied)
Insurer:	Uninsured

Injury No.: 13-085074

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

STATEMENT OF THE CASE

Claimant, Timothy Mealer, requested a hearing for a final award to determine the liability of Russ Jackson Transportation ("Employer") for permanent partial disability ("PPD") benefits, and past and future medical expenses for an injury he alleged occurred on October 25, 2013 while at work.

On December 14, 2015, Claimant appeared for the hearing in person and by counsel, Attorney Dorothy Smith, at the Missouri Division of Workers' Compensation Office in St. Louis. Employer failed to answer the claim or appear in person or through legal counsel, and remained in default by the end of the hearing.[1] The Second Injury Fund is a party to this case but did not participate in the proceeding, and is to remain open.

Court reporter Stacy Benoist recorded the proceedings. The record closed after presentation of the evidence. After the hearing, Claimant submitted a memorandum of law. At the time the award was written, there had been no communication from the Employer.

ISSUES

Claimant identified the following issues for disposition:

1. Is Employer liable for past medical expenses totaling $4,564.89?

[1]All references in this award to the Employer also include the Insurer unless otherwise stated. Statutory references in this award are to the Revised Statutes of Missouri (RSMo Supp 2013) unless otherwise stated.

2. What is the nature and extent of Employer liability for permanent partial disability benefits? ("PPD")

3. Is Employer liable for future medical expenses?

EXHIBITS

Claimant offered the following exhibits which were admitted into evidence:

Claimant's Exhibit 1 Dr. Mark Kramer, DDS – Records/bills.
Claimant's Exhibit 2: Des Peres Hospital medical bills.
Claimant's Exhibit 3: David A. Durham, DMD –surgical extraction bill.
Claimant's Exhibit 4: Proposed expenses for dental implants.
Claimant's Exhibit 5: Employer's change of address.
Claimant's Exhibit 6: Notice of Hearing sent by the Division of Workers' Compensation.

To the extent there may be marks or highlights contained in the exhibits, they were present when they became a part of the record, and were not placed there by the undersigned administrative law judge. Any objections not expressly ruled on during the hearing or in this award are now overruled. The Court takes judicial notice of the Division's record.

FINDINGS OF FACT

All evidence was reviewed but only evidence that supports this award is discussed below.

1. Mr. Russ Jackson hired Claimant in St. Clair, Missouri as a driver. On October 25, 2013, Claimant transported grain for Employer from St. Clair, Missouri to Madison, Illinois. To release the load, Claimant pulled on the wet tarp bar, but it snapped back, hit him in the face, and injured three upper front teeth. The teeth were broken at the gum line. At the hearing, the Claimant demonstrated three missing teeth.

2. Claimant contacted Mr. Jackson, who completed the run, and Mrs. Jackson took Claimant home. Later that day, Claimant received pain medication during an emergency room visit.

3. On numerous occasions, Claimant asked Employer to pay for his medical treatment, but Mr. Jackson refused because he did not believe he was required to have workers' compensation insurance because he had less than five employees. Claimant believes the business is now closed.

4. Mark A. Kramer, DDS, unsuccessfully attempted to remove the roots of the damaged teeth, but could not due to damage to Claimant's gums.

5. David A. Durham, DMD, an oral surgeon, removed the remaining three teeth on October 31, 2013. Employer paid $675.00 toward the total amount owed for the surgery.

6. Dr. Kramer prescribed partial dentures which did not fit properly and irritated Claimant's gums. In April 2014, Dr. Kramer treated Claimant for periodontal maintenance, noted Claimant's gums were not fully healed, and heavy bleeding was present. In May 2014, Dr. Kramer adjusted the dentures and recommended Claimant return if needed. No other treatment records are in evidence.

7. If Claimant continues to wear dentures, Dr. Kramer predicted Claimant will need at least two replacements during his lifetime at a cost that could exceed $5,000.00.

8. After multiple unsuccessful attempts to fit Claimant with partial dentures, Dr. Kramer referred Claimant to David A. Durham, DMD, for an implant consultation. Dr. Durham estimated the cost of implants to be $7,785.00.

9. On May 13, 2015, Attorney Smith reported a change of address to the Division for Employer to: Russ Jackson Transportation, 490 Baker Rd., P.O. Box 132, St. Clair, MO 63077-2537.

10. Judicial notice is taken of the Division's records. On September 4, 2015, the Division received a hearing request from Attorney Smith for a final award to be issued. The Division sent a Notice of Hearing via U.S. mail to Russ Jackson Transportation at the Baker address listed in paragraph 8 above. The Hearing Notice was not returned, and the record contains no answer to the claim for compensation and no entry of appearance by an attorney on behalf of the Employer.

RULINGS OF LAW

Based upon the competent and substantial evidence, I find:

Claimant's testimony was credible. Division records contain no answer filed on behalf of the Employer. Therefore, any allegations of fact contained in the claim are deemed admitted pursuant to 8 CSR 50-2.010(8) (B).

I find Claimant was an employee of the Employer and suffered an injury to three upper front teeth which arose out of and in the course of his employment on October 25, 2013.

Employer and Claimant operated under the Missouri Workers' Compensation Law, but Employer's liability was not insured. It is not clear from the evidence how many employees worked for the company on October 25, 2013. Jurisdiction is proper in St. Louis County and the claim for compensation was timely filed on November 12, 2013.

1. Employer is not liable for past medical expenses

Claimant asserts Employer is liable for past medical expenses totaling $4,564.89. The claimant in a workers' compensation proceeding has the burden to prove all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. 2008). "Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). (Citations omitted).

An employer is responsible for the payment of reasonable medical fees incurred as a result of a work-related injury. Chapter 287.140.1 states the employer has the right to authorize treatment and select the treating physician at the employer's cost. If the employer refuses to provide treatment, the employee is free to seek treatment on his own and assess the costs to the employer. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 84-85 (Mo. App. 1995).

Once an employee testifies that his visits to the medical providers were the product of his injury and identifies the bills, which relate to the professional services rendered as shown by the medical records in evidence, a factual basis exists for the award of the bills. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W. 105 (Mo. Banc 1989).

Here, Claimant testified he received dental treatment for the October 2013 work injury from Drs. Kramer and Durham and from an emergency room, and Employer paid $675.00 toward the oral surgeon's bill. Claimant submitted medical bills into evidence, but he did not identify

the bills as being related to treatment for his teeth from the October 25, 2013 work injury. Also, Claimant did not identify the hospital where he received treatment after the work injury.

In addition, medical records in evidence listed the balance owed Dr. Kramer as $1,972.00 which is inconsistent with the balance stated in the brief ($2,678.00).

I find Employer had notice of Claimant's need for treatment, and demand for treatment, but failed or refused to provide adequate medical treatment. Therefore, Claimant was free to seek treatment on his own and assess the cost to the Employer. However, I find Claimant did not meet his burden to identify a factual basis for the award of the medical bills related to the October 25, 2013 work injury. Therefore, Employer is not responsible for Claimant's past medical expenses.

2. Employer is not liable for permanent partial disability benefits

In a post-hearing brief, Claimant asserts Employer is liable for PPD benefits at the rate of $446.85 for 3.75 weeks, totaling $1,675.69 for the loss of three teeth. Claimant further asserts Employer is liable for approximately 17 weeks of disfigurement totaling $7,785.00. According to Claimant, Employer should pay PPD totaling $9,460.69.

"'Permanent partial disability' means a disability that is permanent in nature and partial in degree... ." Mo.Rev.Stat. § 287.190.6(1). *Cardwell v. Treasurer of State of Missouri,* 249 S.W.3d 902, 910 (Mo. App. 2008). Claimant has the burden of proving all elements of the claim, including accrual of permanent partial disability. *Id.*

The Missouri workers' compensation statute does not use the phrase "maximum medical improvement." However, many cases have used the maximum medical improvement standard to determine the beginning date for permanent disability benefits. *Id.* at 909. *(Citations omitted)*

After reaching the point where no further progress is expected, it can be determined

whether there is either permanent partial or permanent total disability and benefits may be awarded based on that determination. *Id* at 910. One cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. *Id.*

Here, there is no medical evidence in the record that Dr. Kramer or Dr. Durham opined Claimant had reached maximum medical improvement or released him from care for this injury. In April 2014, Claimant's gums had improved but were not completely healed and he had heavy bleeding. May 5, 2014 is the last treatment record in evidence. At that time, the dentures were adjusted and Claimant was instructed to follow up as needed.

Medical evidence in this case is consistent with Claimant's testimony that Dr. Kramer has adjusted the dentures numerous times for improper fit and discomfort. During the hearing, I observed Claimant was not wearing dentures.

I find Claimant did not meet his burden to show he has reached maximum medical improvement and that his residual complaints are permanent in nature. Therefore, an award for permanency cannot be made. Also, it should be noted the claim for compensation did not contain an average weekly wage or disability rate.[2]

3. No future medical benefits are awarded

Having found Claimant did not prove he had reached maximum medical improvement from the October 25, 2013 injury, I find future medical benefits cannot be determined.

Also, Drs. Kramer and Durham proposed tooth replacements and associated costs, but did not opine treatment was needed because of the October 25, 2013 work injury. When future medical benefits are to be awarded, the medical care must flow from the accident, via evidence of

[2] During the opening statement, Attorney Smith said Claimant should be at the maximum rate, $446.85 because Employer did not provide a wage statement. Claimant did not testify about his earnings during the hearing.

a medical causal relationship between the condition and the compensable injury, before the employer is held responsible. *Mickey v. City Wide Maintenance,* 996 S.W.2d 144, 149 (Mo.App.1999).[3]

CONCLUSION

Employer is not liable for past medical expenses. The evidence does not show Claimant has reached maximum medical improvement; therefore, permanent partial disability benefits and future medical benefits cannot be determined.

I certify that on 3-2-16, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By mp

Made by: Suzette Carlisle

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

DIVISION OF WORKERS' COMPENSATION
DEPARTMENT OF LABOR
INDUSTRIAL RELATIONS

[3] The case was overruled by *Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. banc 2003) on grounds other than those for which the case are cited. No further reference will be made to *Hampton* in this award.