TEMPORARY AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 15-035903

Employee: Wayne Francisco

Employer: Mega Industries Corporation

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. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction
The parties asked the administrative law judge to decide the sole issue whether employee has forfeited his benefits under the Missouri Workers' Compensation Law based on a refusal to take, at the request of the employer, a test for a non-prescribed controlled substance as defined by § 195.020 RSMo, in violation of the employer's policy that clearly authorized post-injury testing.

The administrative law judge determined that on May 13, 2015, employee refused to take, at the request of the employer, a test for a nonprescribed controlled substance, as defined by § 195.010 RSMo, and that employer had a policy at the time that clearly authorized post-injury testing. The administrative law judge concluded that employee thereby forfeited his benefits under the Missouri Workers' Compensation Law.

Employee filed a timely application for review with the Commission alleging the administrative law judge misapplied the drug test statute in denying benefits to a seriously injured employee who did, in fact, take the requested drug test.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact
Employee worked for employer for about a year and a half as a concrete finisher and a laborer. The parties stipulated, at the outset of the hearing, that on May 13, 2015, employee sustained an injury by accident arising out of and in the course of his employment. Specifically, employee was attempting to lift, with two other workers, a steel flue weighing approximately 400 pounds. Employee was lifting one end of the flue, when, without warning, the workers at the other end dropped the flue. Employee heard a pop in his back, accompanied by the immediate onset of severe pain.

There is no evidence on this record to suggest that employee was under the influence of alcohol or any nonprescribed controlled substance at the time the accident occurred, nor any evidence to suggest that the occurrence of the accident had any connection, whatsoever, to employee's use of alcohol or any nonprescribed controlled substance.

Employee's foreman, Steve Toth, directed employee to a nearby clinic, where employee submitted to a breathalyzer test. Next, personnel at the clinic asked employee to urinate into a cup, for purposes of providing a urinalysis. Employee began to panic, as he remembered that he had smelled the odor of marijuana at a nightclub he visited over the weekend. Employee does not use marijuana. But to employee's understanding, if he had smelled marijuana, it was just as if he had ingested it. Employee's panic overtook him, and he left the examination room.[1]

Employee approached Mr. Toth, who was elsewhere in the clinic. Personnel at the clinic requested that the two return to the examination room, and have their conversation there; the two complied. Employee informed Mr. Toth he didn't know if he could take the test because he might have marijuana in his system.

According to employee's testimony, Mr. Toth shook his head and simply responded, "I don't know what to tell you. I can't help you." *Transcript*, page 21. Mr. Toth, in his testimony, conceded he was unable to recall the specific words he used in this conversation with employee. Mr. Toth, however, believes he said something like the following, "You need to take it for—you know, our company policy is you need to take the drug test. It's in your best interest." *Transcript*, page 23. As more fully discussed below, we deem the evidence on this point insufficiently developed to support an affirmative finding that Mr. Toth unequivocally and unmistakably *requested* that employee submit to the urinalysis at that time. Instead, it appears to us that the actual request that employee urinate into a cup was delivered by personnel at the health clinic,[2] and that thereafter, at best, Mr. Toth merely reminded employee, in generalized terms, of what employer's policy required. We so find.

After speaking with Mr. Toth, employee again tried to calm down and submit to the drug test. He was unable, however, to overcome his feelings of panic. So, employee left the clinic, and went home.

Employer's post-injury drug testing policy provides, in relevant part, as follows:

> [A]ll employees with a workplace injury or who were involved in a workplace injury will be required to take a drug screen and alcohol breathalyzer test. … Tests will be performed by regional testing labs in accordance with State and/or Federal law. Refusal of an employee to take a Test will result in immediate removal from service and will result in

[1] Employee credibly testified that he has been diagnosed with bipolar disorder, for which he has taken prescription medications in the past. He was not, however, taking medication or receiving any other type of treatment for this condition during the time period leading up to May 13, 2015. Owing to the absence of any medical testimony or other evidence on the topic, we decline to make a finding that employee's bipolar disorder played a role in his actions on May 13, 2015. We deem it appropriate, however, to note employee's credible testimony in this regard.

[2] There is no evidence on this record to support a finding that the personnel at the health clinic were agents of employer.

> disciplinary action up to and including termination. … A positive drug screen and/or alcohol breathalyzer test after a workplace accident can limit or disqualify the employee's claim for workers' compensation benefits.

Transcript, page 39.

We note that employer's policy is silent with regard to the actions by an employee that may be deemed a refusal to submit to a drug test. Specifically, we note the absence of any temporal restriction or timeframe wherein employees are required to either assent or decline a requested drug test. We note also the absence, on this record, of any evidence that the breathalyzer exam or the proposed urinalysis of May 13, 2015, were conducted (or were to be conducted) in accordance with state and federal law.

On May 14, 2015, employee received a phone call at his home from Craig, another foreman. Craig instructed employee that if he wished to remain employed, he needed to submit to a urinalysis. Employee agreed to Craig's request to take the test. We find that employer first unequivocally requested that employee submit to a urinalysis on May 14, 2015. We find that employee did not refuse to submit to that drug test, but agreed to take it. The result of that drug test was negative.

Employer initially accepted its liability for the workplace accident of May 13, 2015, and provided employee with authorized medical treatment and the payment of weekly temporary total disability benefits. However, at some point, employer stopped providing workers' compensation benefits.

Employee remains in need of medical treatment. Owing to the disabling effects of the work injury of May 13, 2015, employee has been unable to return to work since that date. Employee has been unable to seek additional medical treatment, because he cannot afford it.

Conclusions of Law

Forfeiture of benefits pursuant to § 287.120.6(3) RSMo

The parties stipulated that employee sustained a compensable injury by accident on May 13, 2015, but employer advances an affirmative defense alleging that employee forfeited his benefits pursuant to § 287.120.6(3) RSMo by refusing to take a drug test at the request of employer. Section 287.808 RSMo provides as follows:

> The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Pursuant to the foregoing, it was employer's burden to prove its affirmative defense that employee forfeited the compensation to which he is otherwise unquestionably entitled on the basis of what has been stipulated to be a compensable work injury. Section 287.120.6(3) provides as follows:

> The voluntary use of alcohol to the percentage of blood alcohol sufficient under Missouri law to constitute legal intoxication shall give rise to a rebuttable presumption that the voluntary use of alcohol under such circumstances was the proximate cause of the injury. A preponderance of the evidence standard shall apply to rebut such presumption. An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section 195.010, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

It was employer's burden to prove the following factual propositions are more likely to be true than not true: (1) that employer requested employee take a test for a nonprescribed controlled substance, (2) that employee refused to take the test, and (3) that employer's policy clearly authorized post-injury testing.

With regard to the first element, we have found the evidence in this matter insufficiently developed to support an affirmative finding that employer unequivocally requested that employee submit to a drug test on May 13, 2015. Instead, we have found that the personnel at the health clinic—who were not shown on this record to be agents of the employer—delivered the initial request that employee urinate into a cup, and that thereafter employer's first unequivocal request that employee submit to a drug test occurred when the foreman, Craig, called employee on May 14, 2015. We have found that employee did not refuse that request.

Employee did discuss the proposed urinalysis with his foreman, Mr. Toth, on May 13, 2015. Mr. Toth, however, was unable to remember the specific words he used when speaking with employee, and we have found that, at best, Mr. Toth merely reminded employee, in generalized terms, of what employer's policy required. A generalized reminder regarding employer's policy is, in our view, materially different than a specific request from Mr. Toth that employee return to the examination room and urinate into a cup, especially when we are asked to apply § 287.120.6(3) to impose a total forfeiture of benefits for a work injury that is, otherwise, unquestionably compensable.

With regard to the second element of "refusal," we have noted that, while employer's policy certainly contained a provision relating to post-injury testing, that same policy is silent with regard to the actions by an employee that may be deemed a refusal to submit to a drug test. The legislature specifically invoked the "clear" terms of employer's policy in crafting the language of § 287.120.6(3), which suggests to us that a careful review of the policy itself is appropriate in determining whether the circumstances at issue clearly constitute the obligatory "request" by the employer and/or "refusal" by the employee.

Here, employer's policy did not contain any temporal restriction or timeframe wherein employee was required to either assent to or decline a requested drug test. As a result, even if we were to find the evidence sufficient to permit us to infer a request by the employer from Mr. Toth's interactions with employee on May 13, 2015, we would conclude that, at worst, employee *temporarily delayed* in agreeing to submit to the drug test, and then ultimately agreed to undergo the test the very next day. In other words, we would find that employee did not, ultimately, refuse employer's request to submit to a drug test.

To be clear, we recognize the importance of obtaining a timely drug screening after the occurrence of a workplace accident, especially in cases where there is evidence that an employee's use of alcohol or a nonprescribed controlled substance may have played a role in causing an injury. By the same token, we recognize that an employee's delay or equivocation might, in another case, be grounds for finding an affirmative refusal to take a test, thus triggering the forfeiture provisions of § 287.120.6(3). But where employer's policy provides no guidance with respect to the actions by an employee that may be deemed a refusal to submit to a drug test, or any temporal restrictions or timeframe wherein an employee may be required to either assent to or decline a requested drug test, we are not persuaded by the evidence before us to make that factual finding in this case.

In sum, based on the evidence before us and our factual findings with respect to same, we conclude that the refusal/forfeiture provisions under § 287.120.6(3) are inapplicable in this case. We conclude that employee did not forfeit his benefits under Chapter 287.

Because the parties stipulated that on May 13, 2015, employee sustained an injury by accident arising out of and in the course of his employment, we further conclude that, pursuant to § 287.120.1 RSMo, employer is liable to provide the benefits and compensation under Chapter 287 to which employee may be entitled, including, but not limited to, that medical treatment that may reasonably be required to cure and relieve the effects of his work injuries.

Award

We reverse the award of the administrative law judge. Employee did not forfeit his benefits by application of § 287.120.6(3) RSMo.

Employer is hereby ordered to pay the benefits and compensation to which employee may be entitled under Chapter 287, including, but not limited to, that medical treatment that may reasonably be required, pursuant to § 287.140 RSMo, to cure and relieve the effects of his work injuries.

Any past due compensation shall bear interest as provided by law.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

The award and decision of Administrative Law Judge Robert B. Miner, issued March 30, 2016, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 7th day of February 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Wayne A. Francisco Injury No.: 15-035903

Employer: Mega Industries Corporation

Additional Party: None

Insurer: Travelers Indemnity Company of America

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

Hearing Date: January 8, 2016 Checked by: RBM

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: May 13, 2015.

5. State location where accident occurred or occupational disease was contracted: St. Joseph, Buchanan County, Missouri.

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? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was lifting a heavy piece of construction material when he injured his back.

12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Not determined.

14. Nature and extent of any permanent disability: Not determined.

15. Compensation paid to-date for temporary disability: $4,267.08.

16. Value necessary medical aid paid to date by employer/insurer? $21,098.35.

17. Value necessary medical aid not furnished by employer/insurer? Not determined.

18. Employee's average weekly wages: $759.37.

19. Weekly compensation rate: $506.26 for temporary total disability and $451.02 for permanent partial disability.

20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None. Employee forfeited benefits under the Workers' Compensation Law (Chapter 287, RSMo) by refusing to take a test for a nonprescribed controlled substance at the request of Employer pursuant to section 287.120.6(3), RSMo. Employee's claim is denied.

Unpaid medical expenses: None.

No weeks of temporary total disability (or temporary partial disability).

No weeks of disfigurement.

No weeks of permanent partial disability from Employer.

TOTAL FROM EMPLOYER: None.

22. Second Injury Fund liability: None.

23. Future requirements awarded: None.

No attorney's fee is awarded to the claimant's attorney.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Wayne A. Francisco Injury No.: 15-035903

Employer: Mega Industries Corporation

Additional Party: None

Insurer: Travelers Indemnity Company of America

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

Hearing Date: January 8, 2016 Checked by: RBM

PRELIMINARIES

A non-section 287.203, RSMo hardship hearing was held in this case on Employee's claim against Employer on January 8, 2016 in St. Joseph, Missouri. Employee, Wayne A. Francisco, appeared in person and by his attorney, Michael R. Lawless. Employer, Mega Industries Corporation, and Insurer, Travelers Indemnity Company of America, appeared by their attorney, Brent M. Johnston. The Second Injury Fund is not a party in this case. Michael R. Lawless deferred a request for attorney's fee in connection with the January 8, 2016 hearing. It was agreed that post-hearing suggestions would be due on January 22, 2016.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about May 13, 2015, Wayne A. Francisco ("Claimant") was an employee of Mega Industries Corporation ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.

2. On or about May 13, 2015, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Travelers Indemnity Company of America ("Insurer").

3. On or about May 13, 2015, Claimant sustained an injury by accident in St. Joseph, Buchanan County, Missouri, arising out of and in the course of his employment.

4. Employer had notice of Claimant's alleged injury.

5. Claimant's Claim for Compensation was filed within the time allowed by law.

6. The average weekly wage was $759.37, the rate of compensation for temporary total disability is $506.26 per week, and the rate of compensation for permanent partial disability is $451.02 per week.

7. Employer/Insurer has paid $4,267.08 in temporary total disability benefits.

8. Employer/Insurer has paid $21,098.35 in medical aid.

9. At the time of Claimant's May 13, 2015 accident, Employer had a policy that clearly authorized post-injury testing for nonprescribed controlled substances pursuant to section 287.160.6 (3), RSMo.

ISSUES

The parties agreed that there is a dispute on the following issue:

1. Did Claimant forfeit benefits under the Workers' Compensation Law (Chapter 287, RSMo) by refusing to take a test for a nonprescribed controlled substance at the request of Employer pursuant to section 287.120.6(3), RSMo?

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

1—U.S. Healthworks Instant Drug Screen dated March 13, 2015
2—U.S. Healthworks Instant Drug Screen dated March 15, 2015
3—Employer's Substance Abuse Policy

Employer offered no exhibits at the hearing.

Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

The Post-Hearing suggestions have been considered.

Findings of Fact

Claimant testified he is 39 years old and is not now employed. He was last employed on May 13, 2015 as a concrete finisher/laborer for Employer. He worked for Employer for one-and-one-half years before May 13, 2015. He had worked in construction all of his adult life.

Claimant started work for Employer at 7:00 a.m. on May 13, 2015. May 13, 2015 was a Wednesday. Claimant sustained an injury at work on May 13, 2015 at 7:30 a.m. when he and two co-workers were working on a new sidewalk. Claimant was lifting one side of a 400-pound piece of construction material that was three feet by six-to-seven-and-one-half feet. The two co-workers were lifting the other side. While Claimant was lifting, the co-workers began throwing the piece of construction material and Claimant's back popped. Claimant's co-workers heard his back pop.

Steve Toth, Claimant's foreman, was at the work site when Claimant was injured. Claimant reported the injury to Mr. Toth. Mr. Toth and Claimant then went to U.S. HealthWorks. Claimant testified he may have driven himself to HealthWorks on May 13, 2015.

When Claimant arrived at U.S. HealthWorks, Mr. Toth asked him to take a breathalyzer. Claimant agreed to take the breathalyzer and took it. Claimant acknowledged that Exhibit 2, a record from U.S. HealthWorks dated May 13, 2015, shows he took the breathalyzer test.

Mr. Toth also asked Claimant to urinate in a cup for a urinary analysis (UA) drug test. Claimant testified he was anxious at that time and started to panic. Claimant started having a panic attack after he took the breathalyzer test.

Claimant testified he told Mr. Toth that he had marijuana in his system and Mr. Toth replied he did not know what to tell Claimant.

Claimant testified he refused to take the drug test on May 13, 2015 that Mr. Toth requested Claimant take after the May 13, 2015 injury. Claimant was at U.S. HealthWorks for twenty minutes before he refused to take the test. Claimant testified he declined to take the drug test because he was worried that he would test positive for marijuana if he took the drug test because he had been exposed to second-hand marijuana smoke at the Riot Room the weekend before the injury, and people on the patio where he was sitting had been smoking marijuana.

Claimant acknowledged Exhibit 2 states that he refused to be tested for drugs.

At the time of the May 13, 2015 injury, Claimant knew that Employer had a policy that he had to submit to a drug test after an accident. Claimant agreed that Mr. Toth told him on May 13, 2015 that he had to take the drug test.

Claimant testified he had bipolar at the time he sustained his May 13, 3015 injury and that he had been diagnosed with bipolar several times. The last time he was

diagnosed with bipolar was in 2012. He has not taken medication for that condition for three to four years because of the expense. Claimant offered no medical records in evidence documenting he had been diagnosed with bipolar disorder.

When Claimant was at home on May 14, 2015, he received a call from his foreman, Craig. Craig told Claimant that if he wanted to be employed with Employer, he had to go and take the drug test. Claimant returned to U.S. HealthWorks on May 15, 2015 and took the drug test.

Claimant received three to four epidural shots with steroid injections in June 2015, and then his treatment was shut off.

Claimant has received a Christmas card and a birthday card from Employer since the injury at work. He testified he wants to return to work, but he is not able to do so because of his back.

Claimant believes he still needs medical treatment.

The Court notes that a brief recess of about three minutes was taken during Claimant's cross-examination. Claimant appeared red in the face and began breathing heavily immediately prior to the recess. Claimant left the courtroom briefly and when he returned, his face was still red. He continued to breathe heavily for a short time after he returned to the courtroom.

I find this testimony of Claimant to be credible unless otherwise discussed later in this Award.

James Anski testified on behalf of Claimant. He is a neighbor of Claimant and socializes with Claimant. He knows Claimant well.

Mr. Anski was aware of Claimant's May 13, 2015 injury. He and Claimant went to the Riot Room before Claimant's injury. They were on the patio outdoors at the Riot Room where people were smoking marijuana. Mr. Anski testified that he never knew Claimant to be a marijuana user.

I find this testimony of James Anski's to be credible unless otherwise discussed later in this Award.

Frank Steven Toth testified on behalf of the Employer. He goes by the name Steve. He has worked for Employer for three years. He is Construction Manager and On-site Superintendant and has had those positions for those three years.

Mr. Toth is familiar with Claimant. He is aware of Claimant's injury that occurred on May 13, 2015. Mr. Toth was working that day.

Claimant reported his May 13, 2015 injury to Mr. Toth that day. Mr. Toth called the office and made arrangements for Claimant to go to the clinic. Claimant followed Mr. Toth to U.S. HealthWorks clinic the same day as the accident.

Mr. Toth and Claimant had a conversation when they arrived at the clinic on May 13, 2015. Claimant told Mr. Toth that he did not want to take a drug test because he was around marijuana the weekend before. Claimant told Mr. Toth he had marijuana in his system. Mr. Toth told Claimant that he needed to take a drug test per Employer's policy.

Claimant at first agreed to take the test, and he filled out paperwork at the clinic. Claimant went down a hall to take the drug test. Claimant returned fifteen to twenty minutes later and told Mr. Toth, "I can't take it." Claimant then walked out and left the building. Claimant did not take a drug test on May 13, 2015. The drug test Claimant refused to take was to identify controlled substances.

I find Mr. Toth's testimony to be credible.

Counsel stipulated during the January 8, 2016 hearing that Exhibit 1, Employer's Drug Policy, was in effect on May 13, 2015, the date of Claimant's accident.

Employer Exhibit 1, Employer Substance Abuse Policy in effect at the time of Claimant's May 13, 2015 accident states in part: "All new applicants are required to take a drug screen and alcohol breathalyzer (Test). Additionally all employees with a workplace injury or who were involved in a workplace injury will be required to take a drug screen and alcohol breathalyzer test." Exhibit 1 also states in part: "Tests will be performed by a regional testing lab in accordance with State and/or Federal Law. Refusal of an Employee to take a Test will result in immediate removal from service and will result in disciplinary action up to and including termination."

Exhibit 2 is an Instant Drug Screen Consent and Report Form of U.S. HealthWorks dated May 13, 2015 pertaining to Claimant. Exhibit 2 notes the "Reason for Test" is "Post-Accident. Exhibit 2 also states in part: "Donor refused to be tested." Exhibit 2 also states in part: "Pt. left @10:53 a.m. w/o Drug Screen or treatment for injury."

Exhibit 3 is an Instant Drug Screen Consent and Report Form of U.S. HealthWorks dated May 15, 2015 pertaining to Claimant. The time of the drug screen is noted to be: "12:15." Exhibit 3 states in part: "Test results negative drug screen."

Rulings of Law

Based on the substantial and competent evidence, the stipulations of the parties, and the application of the Workers' Compensation Law, I make the following Rulings of Law:

Section 287.808, RSMo[1] provides:

> The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.800, RSMo provides:

> 1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.
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> 2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.120.6(3), RSMo provides:

> 6. (3) The voluntary use of alcohol to the percentage of blood alcohol sufficient under Missouri law to constitute legal intoxication shall give rise to a rebuttable presumption that the voluntary use of alcohol under such circumstances was the proximate cause of the injury. A

[1] All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc*., 20 S.W.3d 579, 585-86 (Mo.App. 2000). *See also Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

preponderance of the evidence standard shall apply to rebut such presumption. An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section 195.010, RSMo,[2] at the request of the employer shall result in the forfeiture of

[2] Section 195.010, RSMo provides in part:

195.010. The following words and phrases as used in this chapter and chapter 579, unless the context otherwise requires, mean:

. . . . . .

(24) "Marijuana", all parts of the plant genus Cannabis in any species or form thereof, including, but not limited to Cannabis Sativa L., Cannabis Indica, Cannabis Americana, Cannabis Ruderalis, and Cannabis Gigantea, whether growing or not, the seeds thereof, the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination;

(25) "Methamphetamine precursor drug", any drug containing ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts, optical isomers, or salts of optical isomers;

(26) "Narcotic drug", any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical analysis:

(a) Opium, opiate, and any derivative, of opium or opiate, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation. The term does not include the isoquinoline alkaloids of opium;

(b) Coca leaves, but not including extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(c) Cocaine or any salt, isomer, or salt of isomer thereof;

(d) Ecgonine, or any derivative, salt, isomer, or salt of isomer thereof;

> benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

The Missouri Supreme Court stated in *Greer v. SYSCO Food Servs.,* 475 S.W.3d - 655 (Mo. banc 2015) at 666:

> 'Workers' compensation law is entirely a creature of statute, and when interpreting the law the court must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and give effect to that intent if possible.' *Templemire v. W & M Welding, Inc.,* 433 S.W.3d 371, 381 (Mo. banc 2014) (quoting *Greenlee v. Dukes Plastering Serv.,* 75 S.W.3d 273, 276 (Mo. banc 2002)). If a statute's language is unambiguous, this Court "must give effect to the legislature's chosen language." *State ex rel. Young v. Wood,* 254 S.W.3d 871, 873 (Mo. banc 2008). Only when the language is ambiguous will the Court resort to other rules of statutory construction. *Goerlitz v. City of Maryville,* 333 S.W.3d 450, 455 (Mo. banc 2011). 'There is no need to resort to statutory construction to create an ambiguity where none exists.' *State v. Moore,* 303 S.W.3d 515, 521 (Mo. banc 2010).[2]
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> 2
> This Court recognizes section 287.800.1 requires that all workers' compensation statutes are to be construed strictly. However, this Court need only apply strict construction when the statute's language is ambiguous and this Court requires guidance in ascertaining the legislature's intent. Here, section 287.149's plain and ordinary meaning is apparent, and the requirement that the statute be construed strictly does not affect the analysis.

The Court in *Allcorn v. Tap Enterprises, Inc*., 277 S.W.3d 823 (Mo.App. 2009) stated at 830-31:

> While this strict one-day application of the 'time of injury' requirement may seem harsh, it is mandated by the 2005 amendment to section 287.800. Prior to this amendment, it has been stated that

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(e) Any compound, mixture, or preparation containing any quantity of any substance referred to in paragraphs (a) to (d) of this subdivision;

> '[t]he purpose of Workers' Compensation Law is to "place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment and, consequently, the law should be liberally construed so as to effectuate its purpose and humane design."' *Rogers v. Pacesetter Corp.*, 972 S.W.2d 540, 542-43 (Mo.App.1998). Therefore, '[a]ny question as to the right of an employee to compensation must be resolved in favor of the injured employee.' *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552, 557 (Mo.App.2006) (quoting Rogers, 972 S.W.2d at 543). However, under the current requirements of section 287.800, not only is the law to be strictly construed, but it is also required that the evidence shall be weighed 'impartially without giving the benefit of the doubt to any party.' Section 287.800. The legislature by this amendment has made it abundantly clear that previous cases which have applied a liberal construction of the law to resolve questions in favor of coverage for the employee should no longer be followed. Thus, the time of injury as stated in a purported notice is either strictly within the relevant period within which the employee was injured or it is not. The fact that the alleged time of injury was one day or one year outside that time period makes no difference in the strict application of section 287.420. Claimant's first point is denied.

Exhibit 1 contains Employer's drug testing policy in effect at the time of the May 13, 2015 accident. It provides in part: "All employees with a workplace injury or who were involved in a workplace injury will be required to take a drug screen and alcohol breathalyzer test."

The parties stipulated that at the time of Claimant's May 13, 2015 accident, Employer had a policy that clearly authorized post-injury testing for nonprescribed controlled substances pursuant to section 287.160.6 (3), RSMo, and I so find.

The evidence clearly shows Claimant refused to take a drug test on May 13, 2015 that was requested by Employer, and I so find. Steve Toth on behalf of Employer credibly testified he requested Claimant take a drug test at U.S. HealthWorks on May 13, 2015 soon after the May 13, 2015 accident per Employer's policy. Claimant admitted he refused to take a drug test on May 13, 2015 after his May 13, 2015 work accident. Exhibit 2 confirms Claimant refused to be tested on May 13, 2015, and that Claimant left U.S. HealthWorks at 10:53 a.m. on May 13, 2015 without a drug screen. I find Claimant knew of Employer's policy requiring post-injury drug testing when he refused to take the requested drug test on May 13, 2015.

The word "refuse" is defined as:

Full Definition of *refuse*

re.fused re.fus.ing
transitive verb
1 : to express oneself as unwilling to accept [*refuse a gift*] [*refuse a promotion*]
2 : a : to show or express unwillingness to do or comply with [*refused to answer the question*]
b: deny [*they were refused admittance to the game*]
3 obsolete : give up, renounce [*deny thy father and refuse thy name—Shakespeare*]
4 of a horse : to decline to jump or leap over
intransitive verb
: to withhold acceptance, compliance, or permission

http://www.merriam-webster.com/dictionary/refuse.

Claimant asserts that Employer was not prejudiced by Claimant's refusal to take a drug test on the date of the accident, May 13, 2015, because a subsequent test done on May 15, 2015 was negative. I disagree. Section 287.120.6, RSMo does not require an employer to prove prejudice for an employee's failure to take the test for controlled substances.

Section 287.120.6, RSMo does not provide for exceptions or excuses for refusing to take a drug test. Claimant feared he would test positive for drugs, and refused to take the drug test. He claims he was exposed to second hand marijuana smoke, but that does not justify his refusal to take the test. Drug tests are intended to determine whether employees test positive for numerous drugs, not just marijuana. Claimant's refusal to take the drug test on May 13, 2015 prevented a determination of whether Claimant tested positive for controlled substances on the day of the accident. The fact that the drug test taken on May 15, 2015 was negative does not establish that Claimant would not have tested positive for a controlled substance on May 13, 2015. A test taken two days later might not have revealed the presence of controlled substances on the day of the accident.

I find and conclude that the language of section 287.120.6(3), RSMo is not ambiguous. I find and conclude that Claimant refused to take a test for a nonprescribed controlled substance, as defined by section 195.010, RSMo, on May 13, 2015 at the request of the Employer, and that Employer had a policy at the time of Claimant's May 13, 2015 accident that clearly authorized post-injury testing. I find and conclude that

Claimant's taking a drug test two days after he refused to take the test on May 13, 2015 did not negate or invalidate his earlier refusal to take the test on the date of the accident. I find and conclude that Claimant forfeited benefits under the Missouri Workers' Compensation law (Chapter 287.28 RSMo) by refusing to take a test for nonprescribed controlled substance at the request of Employer pursuant to Section 287.120.6(3), RSMo. Claimant's claim is denied.

No attorney's fee is awarded to Claimant's attorney.

This award is final and is subject to immediate appeal.

Made by: ___/s/ Robert B. Miner_____
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation