

**FINAL AWARD DENYING COMPENSATION**

(Affirming Award and Decision of Administrative Law Judge by Separate Decision)

Injury No.: 20-094915

Employee: Gordon Johnson

Employer: RBX Transportation Inc.

Insurer: Dakota Truck Underwriters

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.

The Commission has reviewed the briefs submitted by the parties in this case. Although the Commission recognizes the importance of oral argument, the issues presented in this case may be determined without oral argument.

Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the ALJ's award and decision dated January 10, 2024, and awards no compensation in the above-captioned case. We write this separate decision to address the issue of the Second Injury Fund's (Fund) Motion to Dismiss.

The Fund requests that it be dismissed as a party because, it alleges, employee's Application for Review did not state specifically why the findings and conclusions of the ALJ were not properly supported relative to Fund liability, as required by 8 CSR 20-3.030(3)(A).

In relevant part, 8 CSR 20-3.030(3)(A) provides:

An application for review of any final award, order, or decision of the administrative law judge shall state specifically the reason the applicant believes the findings and conclusions of the administrative law judge on the controlling issues are not properly supported. It shall not be sufficient merely to state that the decision of the administrative law judge on any particular issue is not supported by competent and substantial evidence.

The Fund also requests that we find the issue of Fund liability abandoned, as employee failed to argue the issue in his brief. Specifically, the Fund claims that employee's brief fails to identify Fund liability as an issue in dispute, provide any factual or legal reason why benefits against the Fund should be awarded, and does not include a detailed conclusion that seeks specific relief against the Fund. The Fund's motion states that it seeks relief under 8 CSR 20-3.030(5)(C)-(D) but cites language from 8 CSR 20-3.030(5)(E).

In relevant part, 8 CSR 20-3.030(5)(E) states:

The petitioner's brief shall contain a fair and concise statement of facts without argument, with citations to the pertinent pages of the transcript supporting each factual assertion....The briefs shall identify the issues in dispute and address

Employee: Gordon Johnson

those issues only, state concisely the factual or legal support of the party's positions, and contain a conclusion in detail as to the decision, award, or action requested from the commission. Upon its own motion, or upon motion by any interested party, the commission may, in its discretion, decline to consider any brief or any portion of a brief that is not filed in accordance with these rules or where it appears the party has engaged in dilatory practice or other conduct prejudicial to the efficient and timely adjudication of the appeal.

Under § 287.220.3 RSMo, the statute applicable to employee's 2020 injury, employee was required to establish a compensable injury that is an occupational disease combined with a qualified preexisting disability to result in permanent total disability (PTD) against the Fund. A Fund claim is necessarily derivative from employee's primary work injury claim.

Here, paragraph eight of employee's Application for Review states that the ALJ erred in failing to determine Fund liability for PTD, without a statement of how the ALJ erred. Additionally, employee's brief does not set forth facts in support of or argue the issue of Fund liability, and it does not put forth what relief is sought against the Fund.

Despite these deficiencies we deny the Fund's Motion to Dismiss. The ALJ determined employee's primary work injury claim is not compensable. We affirm that determination. As such, there is no derivative claim against the Fund, and the Motion to Dismiss is moot.

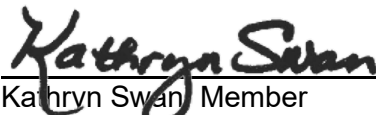
The ALJ's award and decision, issued January 10, 2024, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17<sup>TH</sup> day of September 2024.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

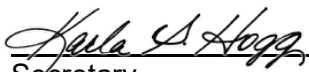


  
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Rooney J. Campbell, Chairman

  
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Kathryn Swan, Member

  
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Lauren Arthur, Member

Attest:

  
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Paula A. Hogg  
Secretary

## AWARD

Employee: Gordon Johnson

Injury No. 20-094915

Dependents: N/A

Employer: RBX Transportation, Inc.

Insurer: First Dakota Indemnity Company

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

Hearing Date: September 6, 2023  
The record closed October 6, 2023

Checked by: KAE

### 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? No.
4. Date of accident or onset of occupational disease: October 8, 2020.
5. State location where accident occurred or occupational disease was contracted: Greene 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? No.
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 doing his normal work duties as a load coordinator/night dispatcher. He alleges to have contracted Covid as an occupational disease.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Body as a whole is alleged.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$1,073.71

- 19. Weekly compensation rate: \$715.81/530.05
- 20. Method wages computation: By stipulation of the parties.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:
  - Unpaid medical expenses: \$0.00
  - 0 weeks of temporary total disability (or temporary partial disability): \$0.00
  - 0 weeks of permanent partial disability from Employer / Insurer: \$0.00
  - No permanent total disability benefits from Employer.
- 22. Second Injury Fund liability: None.

**TOTAL: \$0.00**

- 23. Future requirements awarded: None.

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

Employee: Gordon Johnson

Injury No. 20-094915

Dependents: N/A

Employer: RBX Transportation

Insurer: First Dakota Indemnity Company

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

Hearing Date: September 6, 2023  
The record closed October 6, 2023

Checked by: KAE

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on September 6, 2023. The parties were afforded an opportunity to submit briefs or proposed awards. The record has been completed and submitted to the undersigned as of October 6, 2023.

The employee appeared personally and through his attorney, Randy C. Alberhasky. The Employer/Insurer appeared through their attorneys, Patricia L. Musick and Michael D. Mayes. The Second Injury Fund appeared through its attorney, Sheila Skulborstad, Assistant Attorney General.

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

- (1) On October 8, 2020, the employer was subject to the Missouri Workers' Compensation Act.
- (2) On October 8, 2020, the employer's liability under Missouri Workers' Compensation was fully insured by First Dakota Indemnity Company.
- (3) On October 8, 2020, the employee was working subject to the Missouri Workers' Compensation Act.
- (4) The alleged occupational disease occurred in Greene County, Missouri. The parties have agreed to venue for this hearing in Greene County, Missouri.
- (5) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

- (7) The claimant's average weekly wage is \$1,073.71, which leads to a TTD rate of \$715.81 and a PPD rate of \$530.05.
- (8) No temporary total disability benefits have been paid.
- (9) The employer/insurer have paid no medical expense.
- (10) The claimant's attorney, Randy C. Alberhasky, is seeking an attorney's fee of 25% of any benefits awarded to employee.

The issues to be resolved by hearing include:

- (1) Did the employee sustain an occupational disease on October 8, 2020 that arose out of and in the course and scope of his employment with employer?
- (2) Did employee sustain an occupational disease out of the course and scope of his employment which was the cause of any injuries or disabilities he has sustained?
- (3) Is the employer/insurer responsible for any past medical expense?
- (4) Is the employer/insurer responsible for any future medical treatment?
- (5) Is the employer/insurer responsible to employee for any past temporary total disability?
- (6) Has the employee sustained any current disability as a result of a compensable occupational disease, and if so, what is the nature and extent of that disability?
- (7) Is the Second Injury Fund liable to employee for any benefits?

### **EVIDENCE PRESENTED**

The employee testified at the hearing in support of his claim. Also, the employee presented the testimony of Zach Mayes, Philip Eldred (vocational expert), Dr. P. Brent Koprivica, and Derek Mortensen. In addition, the employee offered for admission the following exhibits which were admitted:

- Exhibit 1 – Medical records – Cox Cardiology
- Exhibit 2 – Medical records – CoxHealth
- Exhibit 3 – Medical records – CoxHealth
- Exhibit 4 – Medical records – Cox Pulmonology
- Exhibit 5 – Medical records – CoxHealth
- Exhibit 6 - Medical records – CoxHealth
- Exhibit 7 - Medical records – CoxHealth
- Exhibit 8 - Medical records – CoxHealth at Home
- Exhibit 9 – Medical records – Select Specialty Hospital

Exhibit 10 – Billing records – CoxHealth  
Exhibit 11 – Billing records – SSH Springfield  
Exhibit 12 - Dr. P. Brent Koprivica report  
Exhibit 12A – CV of Dr. P. Brent Koprivica  
Exhibit 13 – Dr. P. Brent Koprivica addendum report  
Exhibit 14 – Dr. P. Brent Koprivica addendum report  
Exhibit 15 – Philip Eldred report  
Exhibit 15A – CV of Philip Eldred  
Exhibit 16 – Claim for Compensation  
Exhibit 17 - Second Injury Fund Answer  
Exhibit 18 – Employer/Insurer Answer  
Exhibit 19 – RSMo. 287.215 letter  
Exhibit 20 - RSMo. 287.215 letter  
Exhibit 21 - RSMo. 287.215 letter  
Exhibit 22 - RSMo. 287.215 letter  
Exhibit 23 – RBX, Inc. email  
Exhibit 24 – Deposition of Dr. P. Brent Koprivica dated 8.18.23  
Exhibit 25 – Deposition of Philip Eldred dated 8.7.23  
Exhibit 26 – Deposition of Lora Hutson  
Exhibit 27 – Deposition of Gordon W. Johnson dated 3.29.21  
Exhibit 28 – Deposition of Trent Reichert dated 5.3.23  
Exhibit 29 – Aaron Morris text messages

The employer/insurer presented testimony of Ed Castillo, Dee Prater, Jim Keltner, Cheri Lenhoff, Paul Weaver, and Dr. David McKinsey. In addition, the employer/insurer offered the following exhibits which were admitted:

Exhibit A – Deposition Trent Reichert  
Exhibit B – Deposition James Keltner  
Exhibit C – Deposition Charles Phillips  
Exhibit D – Deposition Patrick Blasi  
Exhibit E – Deposition Dr. Cantrell  
Exhibit F – Deposition Benjamin Hughes  
Exhibit G – Deposition Records Custodian Select Specialty Hospital  
Exhibit H – Deposition Dr. Koprivica  
Exhibit I – Curriculum Vitae Dr. David McKinsey  
Exhibit J – Medical – Dr. McKinsey  
Exhibit K – Medical - Dr. McKinsey  
Exhibit L - Medical - Dr. McKinsey  
Exhibit M - Medical - Dr. McKinsey  
Exhibit N - Medical - Dr. McKinsey  
Exhibit O – Article 1 Missouri Medicine  
Exhibit P – Article 2 Missouri Medicine  
Exhibit R – Email – Employer email  
Exhibit S – Deposition Michelle Gordon  
Exhibit T – Signed and notarized Cox settlement agreement

Exhibit U- Pictures of luncheon from Facebook  
Exhibit V – Pictures of luncheon from Facebook

The exhibits A-P and R-V were admitted. There was no Exhibit Q offered.

The Second Injury Fund offered the following exhibit which was admitted:

Exhibit i - Deposition of Gordon W. Johnson dated 4.7.23.

In addition, I have stated on the record that the Legal File is hereby made a part of the record by judicial/administrative notice.

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

## **DISCUSSION**

### *Background and Course of Treatment*

Employee worked for RBX Transportation as a driver and later as a night dispatcher and a load coordinator for the last 5-6 years before he got Covid. The last two jobs were done in the office in Strafford, Missouri, working from a desk and a computer. (Testimony, Gordon Johnson) It was described that there were 4-5 desks in this area. The room where these desks were was part of a larger room where there were other facets of the Operations Department working. (Testimony, Zach Mayes) Employee testified he was working around 57 hours/week at RBX near the time leading up to October 2020. (Testimony, Gordon Johnson)

On October 8, 2020, Employee began feeling achy and feverish during his work shift. On October 9 he received a message from Zach Mayes indicating that Mr. Mayes had tested positive for Covid. (Testimony, Gordon Johnson) Mr. Mayes was a night dispatcher who would take over for Employee and their shifts would overlap by about 15 minutes. Mr. Mayes reported having symptoms of fever and achiness during his overnight shift of October 8-9 and went to get a Covid test upon leaving work October 9 which came back positive. (Testimony, Zach Mayes)

Employee tested positive for Covid on October 10 and by October 16 his symptoms had worsened enough he had to be hospitalized. (Ex. 7, p.6602) While hospitalized in Cox South Hospital he was placed on a ventilator because of severe pneumonia in both lungs. (Ex. 7, p.5498) He had a tracheotomy on October 31 because he couldn't be weaned off the ventilator. (Ex. 7, p. 6226, 6528) He was transferred to Select Specialty Hospital in Springfield for longer term care to assist in weaning off the ventilator on December 4, 2020. (Ex. 7, p. 6235; Ex. 9, p.11) He was able to wean off the ventilator by December 9 and was discharged home on December 22, 2020. (Ex. 9, p.19)

After discharge he had a stent placed in his trachea on February 4, 2021, to assist in keeping it open. (Ex. 7, p.5) He did well with the stent and it was removed on July 29, 2021. He followed with Dr. John Bentley, who noted him to have some paralysis in the right vocal cords



and a raspiness in his speech. By February 2, 2022, Dr. Bentley reported his sinus symptoms had markedly improved. (Ex. 5, p. 50-51)

He also continued to follow with a pulmonologist, Dr. Mitchell Ahrens. Dr. Ahrens saw him on September 28, 2022, noting he used oxygen due to shortness of breath with exertion. His pulmonary function tests did not show significant airway obstruction. High resolution CT scans showed an improvement in the opacities in the lungs, but there were still chronic fibrotic changes that were stable and not progressing. (Ex. 3, p. 5-7)

### *Prior Medical Conditions*

Prior to contracting Covid, the medical records show the Employee had some prior health history. He had a heart condition that required two separate catheterization and stenting procedures in 2011. He did not have any additional acute issues, but stopped driving a truck and continued to take medication for his coronary artery disease.

Employee also started showing high blood sugar readings in 2012 and was diagnosed with type 2 diabetes in 2013. His family physician, Dr. Stephen Holmes, tried to control it with diet and medication, but the office notes reflect he was under suboptimal control through much of the 2010s. (Ex. 6) He had some improvement from 2016-2018, but by July 2019 his blood sugars were above the goal and on July 29, 2020 (Ex. 6, p. 222), he was ordered to start taking insulin. (Ex. 6, p. 5, 16-17)

### *Work Conditions and Covid*

For the last 4-5 years of his employment with RBX Transportation, Employee worked in the operations room as a load coordinator and night dispatcher. He had a desk in a part of the operations room where there were 3-4 other desks for employees doing the same jobs. (Testimony, Gordon Johnson)

When the Covid pandemic started in March 2020, both employees and management from RBX testified that they tried several different things to deal with it. At first, they started a schedule where half of the employees would work from home every day on a rotating schedule. CEO James Keltner testified that they learned that working separately didn't work well as they needed to be together where they could collaborate in person on the job. Mr. Keltner along with other management employees (Testimony James Keltner) Dee Prater and Ed Castillo testified that RBX made masks available and had a policy that employees were to wear masks in the building when they were in an open area or not alone in an individual office. (Testimony Dee Prater, Ed Castillo) Dee Prater also testified that he purchased a fogging machine in the spring of 2020 that was used by RBX to clean the ductwork. (Testimony, Dee Prater) They also testified hand sanitizer was located around the building. They would have monthly driver appreciation dinners, but after Covid, they started having masked servers provide food. The last one of those dinners before Mr. Johnson contracted Covid was September 18, 2020. (Testimony, James Keltner, Exs. U and V)

The use of Covid-prevention strategies was disputed by Employee along with other employees Zach Mayes and Derek Mortenson. Those employees said that the company never enforced any policy to wear a mask in the building and after initially having masks set out, they were not replaced or replenished. Employee and Mr. Mayes testified that they rarely saw anyone at the office wearing a mask. Derek Mortenson testified that he saw Employee wearing a mask almost all the time. (Testimony Gordon Johnson, Zach Mayes, Derek Mortenson)

There was testimony that there were 12-15 employees at RBX that were out sick in October 2020. Mr. Mortensen testified that he got sick in October after Employee did, but he did not get tested for Covid so he doesn't know if he had Covid. (Testimony, Derek Mortenson) Mr. Castillo testified that he worked in a front office and almost always wore a mask, but contracted Covid. He started feeling symptoms on October 9 or 10 and tested positive on October 11. (Testimony, Ed Castillo) Dee Prater testified that he started showing symptoms on October 20, tested positive for Covid and was hospitalized for 5 days. (Testimony, Dee Prater)

Zach Mayes testified that when he would come into work, his time would overlap with Employee's time for about 15 minutes. Since he was taking over the dispatches from Employee, the two would usually sit together at a desk talking to each other and looking at the computer for any issues that had arisen or activities that were ongoing that Mr. Mayes needed to know about. He testified he would either be sitting next to Employee or standing just behind him looking at the computer screen with him. Mr. Mayes said they would be about 4 feet apart. Neither he nor Employee would be wearing a mask at this time. Mr. Mayes started showing Covid symptoms during his October 8-9 shift and was tested the morning of October 9. When he tested positive, he immediately texted Employee about it since they worked in close proximity. (Testimony, Zach Mayes)

No one could identify an RBX office employee who had Covid before Employee and Mr. Mayes. (Testimony, Gordon Johnson, Zach Mayes, Ed Castillo, Dee Prater, James Keltner) Mr. Mayes discussed having a meeting with a manager named Scott Chastain who appeared feverish and was congested. When Mr. Mayes asked him about how he was feeling during a meeting they had one morning before he got sick, Mr. Chastain said he thought he was getting over flu, but he was never tested for Covid so no one knew whether he had Covid or not. (Testimony, Zach Mayes) Jim Keltner said that he worked closely with Mr. Chastain through the day and could not recall him ever being sick. (Testimony, James Keltner) Employee mentioned seeing Mr. Chastain at work and appearing ill in the week before he contracted Covid. (Testimony, Gordon Johnson) Mr. Chastain was not present at the hearing and no testimony from him was presented.

Employee testified that whenever he was out in the community during that time period he always wore a mask because of mask mandates. He would go to Wal-Mart, Sams Club and a gas station daily and go inside. He testified these interactions were for no more than about 15 minutes each and limited to no more than 2-3 hours/week. He did not go out to eat, visit family or go to the grocery store. They would get their groceries by online orders that were brought to their vehicle. (Testimony, Gordon Johnson)

*Expert testimony*

Employee presented the testimony of two experts, Dr. P.Brent Koprivica and vocational expert Phillip Eldred.

Dr. Koprivica performed a medical evaluation of Employee at the request of his attorney on September 12, 2021. He took a history from Employee regarding his condition, history and information regarding his working conditions at RBX Transportation. Part of that history included a report from Mr. Johnson that 15-20 people got sick around the same time Mr. Johnson did and that he started developing symptoms a couple of days after hearing that Zach Mayes had tested positive for Covid. (Testimony, Dr. Koprivica). However, Dr. Koprivica did not have any information about when any other individuals referenced by Mr. Johnson became symptomatic or if they even had Covid. (Ex. H, Deposition of Dr. Koprivica p. 11, l. 15 – p. 14, l. 17)

Dr. Koprivica admitted that if Zach Mayes started showing symptoms the same date as Mr. Johnson, it was possible Mr. Johnson was the initial source of the infection. (Ex. H, p. 14, l. 18 – p. 15, l. 2) He would also need to know how many days Mr. Johnson was symptomatic before he tested positive on October 10, which he did not know. (Ex. H, p.15, l. 24 – p. 16, l. 9)

Dr. Koprivica testified that Covid-19 is an ordinary disease of life to which the general public is exposed outside of employment. (Ex. H, p. 21, l. 19-22) Dr. Koprivica testified that he believed Employee's Covid was compensable because the exposure he described at RBX Transportation exposed him to a greater risk of getting Covid than that experienced in the general population. He was then presented with a hypothetical question asking him to assume Employee worked 57 hours a week with 8-10 people not wearing masks approximately 3-6 feet apart, that he also spent about an hour a week at Kum & Go, Walmart and Sam's with a mask on and not getting within 6 feet of anyone, that he and 2 others who tested positive for Covid began having symptoms on October 8-9, 2020, that he and another were exposed to Scott Chastain on October 5, 2020, who was having Covid-like symptoms. Based on that hypothetical and those assumptions, he believed that the exposure to Scott Chastain at work prior to October 8 would be when Employee acquired Covid. He also stated that the outside exposure was not as great as the exposure at work and that duration was a factor as well as being masked outside of work and not wearing a mask at work. (Testimony, Dr. Koprivica) He also admitted that all of his opinions expressed in his report rely on Zach Mayes having symptoms before Mr. Johnson. (Ex. H, p. 16, l. 9 – 16)

Dr. Koprivica testified at the hearing that now Mr. Johnson is pointing to Scott Chastain and not Zach Mayes as the source of his Covid. He said that he first heard about the potential Chastain exposure at the hearing. (Testimony, Dr. Koprivica).He also said that even though Chastain was not tested for Covid, he still thought it was probable Employee was infected at work. He also added that Employee was at MMI before he examined him on September 12, 2021. However, he testified at his deposition that he was aware of information regarding Scott Chastain from the history provided by Mr. Johnson at his evaluation and that there was no confirmation Scott Chastain had Covid. (Ex. H, p. 11, l. 15 – p. 12, l. 3)

Dr. Koprivica believed Employee was totally disabled from performing any work. He identified prior industrial disability from a history of insulin dependent diabetes that would make

him unable to be a truck driver. However, he believed the permanent total disability was all as a result of Covid and its sequelae alone. (Testimony, Dr. Koprivica)

Phillip Eldred testified as a vocational expert. He interviewed Employee and reviewed his medical records. He testified that because of the Employee's exertional limitations and use of oxygen he could not successfully compete for jobs in the open labor market. He believed the oxygen would restrict his movement beyond what employers would generally allow to be able to perform the duties of any employment. He acknowledged Employee had done work in the past that allowed him to develop work skills, but those were not transferable to semi-skilled jobs. For example, if he were to try to attempt a sedentary job as a dispatcher, he would not be able to learn how to use a computer there within 30-90 days. He acknowledged that Dr. Koprivica had made no specific limitations in his report and that Dr. Cantrell had set out specific limitations. However, even at Dr. Cantrell's limitations, he would not be able to work because of a need to be on oxygen. (Testimony, Phil Eldred)

Employer/Insurer presented testimony from three experts, Dr. Russell Cantrell, Dr. David McKinsey and vocational expert Ben Hughes.

Dr. Cantrell performed a medical evaluation of Employee on June 7, 2022, at the request of Employer/Insurer. He took a history and reviewed medical records. In the history, Employee said he believed he contracted Covid from Zach Mayes because they didn't wear masks at work. After a physical examination, he stated that he did not believe Employee's Covid was compensable as his occupational activities were not the prevailing factor in the cause of his disease. He stated that Covid was an ordinary disease of life to which the general public is exposed and the work exposure could not be said to be the cause. (Ex. E. p. 21, l. 6-20) He noted that the other employees who sat in Employee's pod of desks did not contract Covid after he did.

Dr. Cantrell believed that Employee has a 13% PPD for his prior heart condition and a 13% PPD for his prior insulin-dependent diabetes. (Ex. E, p. 25, l. 17 – 23) He noted these, along with being obese, were all factors that put him at increased risk of serious consequences from Covid. He believed that Employee had a 20% PPD for the Covid (Ex. E, p. 24, l. 22 – p. 25, l. 16) plus another 5% PPD as a result of the tracheal stenosis that resulted from Covid treatment. However, he reiterated that these were not as a result of any work-related condition. Dr. Cantrell believed Employee would need to alternate sitting and standing every 1-1/2 to 2 hours and not do any prolonged walking. (Ex. E, p. 27, l. 5 – 18) He believed that if Employee were deemed totally disabled, it would be due to a combination of the prior heart and diabetes problems with the Covid.

Ben Hughes testified by deposition as a vocational expert. He reviewed medical records and deposition testimony and met with Employee on December 1, 2022. In taking the history, he noted that Employee reported good computer skills as he used a computer at home for shopping online and Facebook. (Ex. F, Deposition of Ben Hughes, p. 12, l. 22 – p. 13, l. 2) Mr. Johnson reported being able to do all of the basic activities on his computer. Mr. Hughes also noted the different medical restrictions. He acknowledged Employee would be unemployable under Dr. Koprivica's work limitations. (Ex. F., p. 16, l. 9 – 14) However, according to the restrictions of Dr. Cantrell, Employee would be able to do light work. (Ex. F. p. 16, l. 15 – p. 17, l. 2), Those jobs would include returning to his prior position as a load coordinator. Otherwise, he could be a dispatcher, customer service representative or alarm system monitor. (Ex. F, p. 87-88)

Dr. David McKinsey is an infectious disease physician in the Kansas City area. He has written scholarly articles on Covid and been requested to appear on local news media to appear and talk about issues with Covid. He reviewed Employee's medical records and depositions. (Testimony, Dr. McKinsey)

Dr. McKinsey stated Employee had increased risk of Covid because of his age, obesity, high blood pressure, diabetes and coronary artery disease. The stents that had been placed in 2011 would also be a risk for complications from Covid. He also testified that Covid was an ordinary disease of life by October 2020 in the Springfield area. There were around 100 new cases being reported daily in October 2020 in Greene County. The fact that Covid was called a "novel coronavirus" simply meant that it was a new virus that had never been seen before January 2020. It did not mean that it had not become an ordinary disease of life by October 2020. (Testimony, Dr. McKinsey)

Dr. McKinsey did not believe there was evidence that Employee contracted Covid at work. Since he and Zach Mayes began developing symptoms at the same time, Dr. McKinsey stated it would be improbable that either one gave Covid to the other. He did not believe the unidentified reports of people at RBX having Covid would be considered an outbreak and that simply going out into the public in September/October 2020 would put a person at high risk of getting Covid, even if they were wearing a common surgical mask. (Testimony, Dr. McKinsey)

## FINDINGS AND CONCLUSIONS

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

### **I. Claimant did not sustain an occupational disease on or about October 8, 2020 arising out of and in the course and scope of employment.**

Claimant was diagnosed with Covid after a positive test on October 10, 2020. According to his medical records and his own testimony, he first noticed symptoms on October 8, 2020. His claim is as an occupational disease. An occupational disease is defined under RSMo. §287.067.1 as "an identifiable disease arising with or without human fault out of and in the course and scope of employment." The statute further provides "ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable." There is an exception that allows an "ordinary disease of life" to be compensable only if "it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

In analysis of the statutory language, I find that Covid is not only an identifiable disease, but on the date of injury was an ordinary disease of life to which the general public is exposed. The testimony of Dr. McKinsey with regard to how widespread Covid was in the greater Springfield area was instructive and the most credible. Dr. Koprivica, Employee's chosen expert,

testified that Covid is an ordinary disease of life. (Ex. H, p. 21, l. 19-22) Dr. Cantrell also testified Covid was an ordinary disease of life. (Ex. E. p. 21, l. 6-20) Thus, the testimony of all three medical experts was consistent on this issue and supports the finding and conclusion. The position taken by claimant that since Covid was called a “novel coronavirus” is not persuasive as the term “novel” in the scientific community simply identified it as a virus that had not been seen before and did not describe how prevalent it was in the general community.

Since Covid is an ordinary disease of life to which the general public is exposed, the claim can only be compensable if Mr. Johnson’s Covid had its origin in a risk connected with his employment at RBX. Based on the analysis below, there was no risk identified from working as a load coordinator/night dispatcher at RBX that caused Mr. Johnson to contract Covid.

In determining whether or not the claimant sustained an occupational disease, he must show both that the disease “arose out of” and “in the course of employment” which are separate tests. *Simmon v. Bob Mears Wholesale Florist*, 167 S.W.3d 222, 225 (Mo. App. 2005). In order to meet the “arising out of” test, the disease must be a natural and reasonable incident of the employment with a causal connection between the nature of the duties or conditions under which the employee works and the resulting disease. *Vickers v. Missouri Department of Public Safety*, 283 S.W.3d 287, 291 (Mo. App. W.D. 2009). The separate test of “in the course of employment” refers to the time, place and circumstances of the employee’s injury. *Simmons* at 225. There is simply insufficient evidence to be able to state that employee’s Covid arose out of the conditions of his job at RBX or that it occurred while he was in the scope of his employment at RBX.

In researching this matter, there are no reported decisions in Missouri regarding an employee claiming to have contracted Covid at work in the scope of a workers’ compensation claim. Missouri has, however dealt with contagious diseases in the context of a workers’ compensation case.

In *Vickers*, supra, the claimant was an employee doing laundry for residents at a Missouri Veterans’ Home when she contracted a rare bacteria known as C diff. The court concluded that her work handling the clothes, linens, bed sheets, and blankets of the residents when some of them had been determined to have been infected with C diff was a sufficient hazard of the job to find that the disease arose out of the employment.

Similarly, in *Smith v. Capital Region Medical Center*, 412 S.W.3d 252 (Mo. App. W.D. 2013) the claimant developed hepatitis after working 37 years as a lab technologist in a hospital drawing blood. The court determined that much of this was done before modern safety precautions, such as wearing gloves, not orally suctioning blood from glass straws onto slides, and using face shields were implemented. Therefore, the court determined the nature of the job duties was an inherent risk for the development of hepatitis-C.

The common thread of those cases is that there was a risk inherent in the performance of those jobs that exposed those employees to the hazard of contracting that disease, simply by the normal performance of their job duties. Here, there is nothing about the job of a load coordinator or night dispatcher that would inherently increase the employee’s risk of developing Covid. Like many similar jobs, Mr. Johnson primarily did a job working at a desk with a computer and a telephone. He had limited interactions with a small group of the same people on a daily basis, rather than dealing with members of the general public.

Mr. Johnson argues we should compare the exposure to Covid at work against the exposure to Covid in Employee's activities away from work, contending that there was greater exposure at work which should make this a compensable case. However, Missouri has set up a different set of factors for an occupational disease to be compensable than an accident. The consideration of comparing the exposure in and away from employment is only applicable to an accident under R.S.Mo. Sec 287.020.3(2), but not applicable to an occupational disease case under R.S.Mo. Sec. 287.067.1 & .2. Lankford v. Newton County, 517 S.W.3d 577, 582 (Mo.App.S.D. 2017). The Court there noted that the claimant merely had to show the disease he suffered was not an "ordinary disease of life to which the general public is exposed outside of the employment." Id. The evidence here clearly shows that Covid was an ordinary disease of life to which the general public was exposed outside of employment in October 2020. The argument comparing the different exposures to Covid from work life and non-work life is simply not applicable or relevant to the elements of Employee's occupational disease claim or his burden of proof here.

While Missouri has not dealt with Covid as a worker's compensation matter, the courts of other states have. In New York, the courts have determined that, while Covid can be compensable under their workers' compensation law, the claimant must meet their burden to show either a specific exposure to Covid or a prevalence of Covid in the work environment, such as workers with significant contact with the public in communities with high rates of infection. Holder v. Office for People with Developmental Disabilities, 188 N.Y.S 3d 754 (App.Div. 3<sup>rd</sup> Dept. 2023). In Holder, the employee worked as a house manager at a group home. However, there was no evidence of either residents or fellow employees who had been infected with Covid before him, leading to a decision that he failed to meet his burden of demonstrating that he contracted Covid-19 in the course of his employment. Holder, at 757.

In West Virginia, an employee of Raytheon Corporation alleged Covid came from his work conditions. The employee worked in a plant of workers that were in close proximity to one another and he alleged he was exposed to and contracted Covid during an outbreak among employees between October 2-12, 2020, when he and 8 others tested positive. He alleged it started when a shipping manager came to work after being exposed to Covid at home and then caused it to spread throughout the plant. The court found that Covid was a disease of life to which the public at large was exposed and his work exposure was not "incidental to the character of the business, and that it did not have its origin in a risk connected with the employment." Hutchison v. Raytheon Corporation, 2023 W.L. 2568817 (W.Va. CT. App. March 20, 2023). I find this case analysis insightful to the findings in the present claim as this set of facts and the legal standard is nearly identical to the Missouri statute at issue.

Labor Commissions in other states have also had to rule on compensability of Covid cases with the majority of states finding Covid was not a compensable occupational disease. Cheryl L. Rapp v. Chugach Elec Co., 202128184, 2023 WL 341299 (Jan. 13, 2023) (Alaska); Donna Geels v. Friendship Community Care, Inc. WCC No H005785, 2023 WL 248995 (March 7, 2023) (Arkansas); Maria Castillo v. LCL Food Services, 2023 WL 3244874 (May 1, 2023) (Florida); Car'reyana Baker v. Sumpter Enterprises, Inc 2022 WL 510195 (Feb. 15, 2022) (Florida); John Nelson v. Nano LLC, AP-00-0472-082, 2023 WL 1768566 (Jan. 4, 2023) (Kansas); Misty Donohoe v. Newsouth Neurospine, 2107300-R-4647, 2023 WL 3145633 (Apr. 17, 2023) (Mississippi); Jonathan Gullo v. Brown's Monument LLC, A22-0149, 2023 WL 2866275 (Mar. 8, 2023) (Pennsylvania); Terri Lang v. Anderson County School District, SCWCC File No: 2105707, 2022

WL 20211045 (June 10, 2022) (South Carolina); *Karen Franken v. Smithfield Foods Inc*, HF 84 2021/22, 2022 WL 3336624 (South Dakota); *Jason Ross v. Parkfairfax Condo.*, VA02000037789, 2023 WL 3947692 (June 2, 2023) (Virginia); *Estate of Ernest Royal v. Georgia Pacific Wood Products*, VA 00001776694, 2022 WL 2190031 (June 2, 2022) (Virginia); *Latesha Holloman v. Sentara Healthcare*, VA 02000036565 (May 13, 2022) (Virginia).

The case law from Missouri dealing with contagious occupational diseases leads me to find that Employee has not sustained his burden of proving he contracted Covid arising out of and in the course and scope of his employment. Both medical experts testified that there was nothing unusual about the claimant's work as a load coordinator or night dispatcher that was a special risk for developing Covid. There is an insufficient link between Employee's contraction of Covid as a "rational consequence" with its origin flowing from a risk connected with the work Mr. Johnson performed at RBX. His work did not inherently expose him to Covid. Further, there is no evidence that his Covid arose out of and in the course of his employment. Employee has been unable to identify anyone who developed symptoms or was exposed to Covid at work before he was. The only other person to have tested positive before him was Zach Mayes, but they both testified they started showing symptoms on the same day, October 8, 2020. The medical testimony from both employer and employee's medical experts establishes that neither would be able to make a connection between the exposure to each other and claimant developing Covid. Employee's contention that there were 15-20 others at RBX with Covid at or around the same time as him or that Scott Chastain had Covid and was the source of any exposure is unfounded and purely speculative. No evidence supports those claims. Finally, to the extent Dr. Koprivica opined that Employee's Covid was related to his employment, those opinions were based on inaccurate facts and as such, based on an inadequate foundation and carries no weight. The claimant bears the burden of proving all necessary elements of his claim, and I find the weight of the credible evidence leads to a finding that Gordon Johnson did not sustain an occupational disease on or about October 8, 2020 arising out of and in the course and scope of his employment with RBX Transportation, Inc.

**II. The Claimant did not sustain an occupational disease out of the course and scope of his employment which was the cause of any injury of disability he alleges.**

The claimant has the burden of proof to show that his employment was the cause of his disease and disabilities. I find that he has not met the burden to show credible evidence that Covid was the cause of his disease and disabilities.

The claimant has three theories of how he contracted Covid. He claims an employee named Scott Chastain came to work with cold and flu-like symptoms approximately one week before he contracted Covid. Mr. Johnson did not produce Mr. Chastain as a witness at trial. While the CEO, Jim Keltner, who worked closely with Scott Chastain, does not remember it, another employee testified regarding Mr. Chastain having cold and flu symptoms. Both Zach Mayes and Gordon Johnson admitted they never knew whether Mr. Chastain had Covid or not and testified that he did not get tested. Therefore, this cannot succeed as a theory of causation as it remains unknown whether Mr. Chastain had Covid, a common cold, allergies, flu, or various other diseases that could cause those symptoms. Mr. Johnson's claim is purely speculative and is rejected.



The second theory advanced by claimant is that there were 15 to 20 other employees at the shop who had Covid about the same time. This is the history that was given to claimant's IME physician, Dr. Koprivica. However, at the hearing, no one was identified as having developed Covid symptoms at RBX before claimant did. Dee Prater testified that his Covid symptoms began on October 20, 2020. Ed Castillo testified that his Covid symptoms began October 9 or 10, 2020. Neither of them, nor CEO Jim Keltner, could identify anyone at RBX who had Covid before Gordon Johnson did. Even Zach Mayes, as discussed below, testified his symptoms developed at the same time as the claimant and not before him. Since none of the other people could be identified with having Covid before Gordon Johnson, this theory cannot support a finding of causation and is again purely speculative.

The third theory is that claimant specifically identified Zach Mayes as a source of Covid because Mr. Mayes immediately notified claimant when he tested positive for Covid on October 9. This was the background and history provided to Dr. Koprivica. However, the hearing evidence showed that both Mr. Mayes and Mr. Johnson developed Covid symptoms on the same date, October 8, 2020. When looking at that additional fact, both medical experts agreed it would be impossible to state whether another individual who began showing symptoms on the same date as the subject individual would be a source of their infection. Therefore, there is no objective evidence to support that theory and it also cannot support a finding of causation.

At the hearing, Zach Mayes testified about a night mechanic who had Covid before he and Mr. Johnson did. First, this mechanic worked at night only and since Mr. Johnson worked during the day and the mechanic rarely came into the main office, any exposure would be unlikely. More importantly, however, this individual was not present, did not testify, and no medical evidence was presented to support the claim. As such, this theory is also rejected as speculative.

To successfully prove a compensable case, Mr. Johnson would have to identify a source of Covid that existed at RBX before he contracted Covid. The record simply does not provide any source of Covid before October 8, 2020. Therefore, I find claimant has failed in his burden to prove his employment was the cause of his occupational disease and disabilities.

**III. The employer/insurer are not responsible for past medical expenses.**

Because I find the claimant does not have a compensable claim, the Employer/Insurer is not responsible for past medical expenses.

**IV. The employer/insurer is not liable for future medical expenses/treatment.**

Because I find the claimant did not present a compensable worker's compensation claim, the Employer/Insurer would not be responsible for any future medical care or treatment.

**V. The employer/insurer are not responsible for any past TTD.**

Because I find that claimant did not present a compensable worker's compensation claim, I do not find the Employer/Insurer are responsible for any past TTD.

**VI. Claimant sustained no compensable permanent disability resulting from this claim.**

Because I found the claimant did not present a compensable worker's compensation claim, I find he is not entitled to receive any compensation for permanent total disability.

**VII. The Second Injury Fund is not liable to claimant for any benefits.**

Because I find no compensable claim, there is no liability of the Second Injury Fund.

I certify that on Jan 10 2024  
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: Naomi Pearson

Made by: Kevin A Elmer  
Kevin A. Elmer  
Administrative Law Judge  
Division of Workers' Compensation

