

WORKERS' COMPENSATION CASE LAW UPDATE

JANUARY 2011-MARCH 2011

SIMON & HUDSON, PC

Lack of written notice not prejudicial to employer

Eli Orlan Sell v. Ozarks Medical Center, Case No. SD30544 (Mo. App. S.D. 2011)

FACTS: The claimant alleged that on May 29, 2006, he injured his back while loading a lawnmower into the back of a motorized vehicle while working for the employer. The employer denied the claim because they had not been notified of the claimant's injury until July 20, 2006.

The Commission determined that the claimant had injured his back while lifting the lawnmower. They also determined that the claimant had told the maintenance person in the shop that he had pulled a muscle in his back when he took the lawnmower in. The injury occurred on a holiday and the claimant's regular supervisor was not present and had instructed the claimant to report to the maintenance shop.

The following day, the claimant went to see his primary care physician and was prescribed medication. The claimant's wife took a note from the doctor to the employer excusing the claimant from work for the remainder of the week. The claimant returned to work the following Monday and spoke with his supervisor, at which time he told him that he was not feeling good because of the pain in his back. The supervisor did not ask him any questions regarding the back pain and told the claimant to take it easy.

The Commission determined that the claimant had not providing the employer with sufficient written notice, but that the employer was not prejudiced by the failure to receive written notice. The Commission determined that the claimant and his wife were more credible than the supervisor and that the claimant had notified the maintenance worker in the shop on the day he had been injured and that the claimant's wife had informed the supervisor that the claimant had been hurt at work and that the supervisor should contact the claimant if he had questions. The Commission determined that the claimant had provided substantial evidence that the employer had actual knowledge of the accident because the supervisor knew of the claimant's work-related injury.

The employer appealed, contending that the 2005 amendments to the statute eliminated the exception to the rule requiring written notice. Even if the exception existed, verbal notice to the claimant's supervisor was not notice to the employer.

HOLDING: The Court of Appeals opined that the statute retained the exception to the written notice rule for cases where the employer was not prejudiced by failure to receive the notice. Therefore, that exception still existed. In addition, the Court held that the Commission's decision

that the employer was not prejudiced by the lack of written notice was supported by substantial evidence. Finally, the Court held that notice or knowledge is imputed to the employer when it is given to a supervisory employee. Therefore, since the claimant's supervisor had actual knowledge of the work injury, that knowledge was imputed to the employer.

Owner/Operator not an employee

David Parsons v. Steelman Transportation, Inc., Case No. SD30485 (Mo. App. S.D. 2011)

FACTS: The claimant was an over-the-road truck driver who developed a hernia on July 2, 2007 when he was pulling panels out of a flatbed trailer. Steelman Transportation, Inc. denied that the claimant was an employee at the time of the alleged injury because he was an owner/operator and was operating under a lease purchase agreement. The Commission determined that the claimant was working as an independent contractor under a lease purchase agreement with Steelman Transportation, Inc. and was not a employee for the purposes of the Workers' Compensation Statute.

The claimant's attorney appealed on three points. He argued that the lease purchase agreement should have been inadmissible because it was a statement under 287.215 which was not provided to the claimant. He also argued that he was injured while in the trailer of the vehicle which was not owned by the claimant. Finally, he argued that he was not operating within a commercial zone as required by the Statute because he was outside the State of Missouri.

HOLDING: The Court of Appeals affirmed the Commission's decision. The Court held that the lease purchase agreement had been entered into by the claimant well before his injury and was therefore not a statement for the purposes of the Workers' Compensation Statute. The Court also held that the fact that the claimant was injured in the trailer was immaterial because the truck and trailer were intended to operate as a single unit. In addition, the Claimant could not vacillate between his status as an independent contractor and that of an employee. Finally, the Court held that Steelman Transportation, Inc. presented sufficient evidence that it was operating in a commercial zone as required by the statute.

Permanent Total Disability Claim - SIF

Ronald Michael v. Treasurer of the State of Missouri, as Custodian of Second Injury Fund, Case No. SD30365 (Mo. App. S.D. 2011)

FACTS: In this old law case, the claimant alleged permanent total disability against the Second Injury Fund. The claimant began working for UPS as a delivery driver in February 1986. On December 17, 2002, the claimant attempted to catch a heavy package that he had placed on the edge of the loading dock and felt a pop in his neck. The claimant's symptoms progressed and an MRI revealed degenerative disc disease and a small disc protrusion at C6-7. The claimant stopped working on April 28, 2003 although he had been released to work with restrictions. The claimant was subsequently diagnosed with bilateral carpal tunnel syndrome in August 2003. The claimant

filed a Claim for Compensation alleging that he was permanently and totally disabled as a result of a combination of only the two work injuries.

The claimant obtained a report from Dr. Volarich, who opined that the claimant had a 30% permanent partial disability from the disc protrusion in the neck, as well as 35% permanent partial disability of the claimant's bilateral wrists with a multiplicity factor. However, Dr. Volarich expressed no opinion regarding the claimant's employability.

The claimant did present a vocational expert who indicated that the claimant was permanently and totally disabled due to a combination of the cervical spine issues and the upper extremity injury.

The Commission determined that the claimant was not permanently and totally disabled, but was entitled to permanent partial disability from the Second Injury Fund. The Second Injury Fund would only be liable for permanent total disability if the progression of the pre-existing neck injury was caused by the last work injury.

The claimant appealed on the basis that the Commission's finding that the claimant was not permanently and totally disabled was not supported by competent and substantial evidence.

HOLDING: The Court of Appeals held that the Second Injury Fund is not liable for any progression of the claimant's preexisting disabilities that are not caused by the last work accident. Therefore, the Commission's decision was supported by competent and substantial evidence. The Court noted that the Commission found that the claimant may have been permanently and totally disabled at the date of the Hearing due to a combination of the last injury and a subsequent deterioration of the neck disability including degenerative disc disease. However, the claimant was not totally disabled on the date of the last injury, and the progression of his neck condition was not caused by the last injury, which was the carpal tunnel syndrome.

The Commission noted that the claimant's physician did not opine that the claimant was permanently and totally disabled, but instead gave permanent partial disability ratings for each of the claimant's injuries. The vocational expert had indicated that the claimant was in good general health while he had been driving and based his opinion of permanent and total disability on the complaints at the time of the evaluation, more than 5 years after the injury to the claimant's neck. Therefore, the Commission's decision was based on competent and substantial evidence and was upheld.

Exclusive Jurisdiction - Occupational Disease

Michelle K. Idekr v. PPG Industries, Inc., et al, Case No. 10-0449-CV-W-ODS, (W.D. MO 2011).

FACTS: In 2005 the state Legislature amended the workers' compensation statute. The amended statute defined an accident as An unexpected traumatic event or unusual strain identifiable by

time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.@ Some claimants have argued that this amendment removed occupational diseases from the exclusive jurisdiction of the Division of Workers' Compensation.

In this civil case filed in Federal court, the claimant alleged that while working for Harley Davidson from 2001-2009, she developed Non-Hodgkin's Lymphoma as a result of working with various paints, coatings and resins that contained benzene.

The employer filed a Motion to Dismiss because it argued that the claimant was alleging a work related occupational disease which would be under the exclusive jurisdiction of the Division of Workers' Compensation. The claimant argued that the 2005 amendments had taken occupational diseases out of the exclusive jurisdiction of the Division.

HOLDING: The District Court granted the defendant's Motion to Dismiss because it held that occupational diseases were still covered by the Missouri Workers' Compensation law. The Court held that when the legislature amended the Statute in 2005, it did not remove the portion of the Statute that referred to occupational diseases, but instead only amended it. In addition, the Missouri Supreme Court had previously approached the treatment of occupational diseases as being covered by the Statute even though there was an apparent inconsistency between requiring an accident and covering occupational diseases.

Please note that this is a Federal Court case in the Western District of Missouri which will not be binding on any Missouri state courts.

Dependant Benefits

Gary Gervich, Deceased, and Deborah Gervich v. Condaire, Inc. and Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. ED94726 (Mo. App. E.D. 2011).

FACTS: The claimant worked for Condaire as a pipe fitter. On April 6, 2006, the claimant sustained an accidental injury arising out of and in the course of his employment. He timely filed a claim for Workers' Compensation benefits but died of non work-related causes before the final hearing. The claimant's wife appeared for a Hearing for a Final Award on her husband's claim against the employer and the Second Injury Fund. The Commission determined that the claimant was permanently and totally disabled prior to his death as the result of the combination of his primary and pre-existing disabilities, and that the Second Injury Fund was liability for the claimant's permanent and total disability. The claimant's spouse argued that she was entitled to continuing benefits under *Schoemehl* which held that the injured worker's rights to compensation for PTD benefits survived to his or her dependents.

The Commission determined that the claimant's wife was her husband's sole surviving dependent, but that she was not entitled to ongoing survivor benefits. The Commission held that the spouse's rights had not Avested@ until the claimant's death in 2009, which was after the amendments that abrogated *Schoemehl*. Therefore the spouse was not entitled to ongoing benefits.

HOLDING: The Court of Appeals determined that under *Schoemehl v. Treasurer of Missouri*, the injured worker's rights to compensation for PTD benefits survived to his or her dependents. Although *Schoemehl* had been abrogated by the legislature, it still applied to the claimant's case because it was already pending before the statutory amendments. The Court determined that the claimant's dependent assumed his place for the purposes of PTD benefits when the claimant died of unrelated causes. The dependent's rights vested at the same time of the claimant's rights, which is when the claimant suffered the work-related injury.

It is important to note that this is a limited holding as *Schoemehl* has now been abrogated by Statute so that the term "Employee" excludes a deceased Employee's dependents. However, *Schoemehl* still applies to cases that were already before the Division prior to the amendment to the Statute on June 26, 2008.

Commission Trends

Old Law (pre-August 28, 2005)

Over the last 3 months, the Commission has ruled on 33 old law cases. They reversed or modified 8 of those cases.

An ALJ's attempt to Order an Employer to Provide Care Through a Specific Doctor

In **Douglas Kaempfer v. G.A. Rich & Sons, Inc.**, Injury No.: 01-057079, the Commission agreed that the claimant established he was entitled to future medical care to cure and relieve him of his work-related injury and the employer was to provide the same. However, the Commission did not agree that the ALJ could order the employer to furnish additional medical aid under the control and discretion of a specific doctor. The Commission also determined that certified and sealed records of the Social Security Administration were relevant and material evidence to show the claimant's injuries were disabling to some extent and therefore should have been admitted into evidence.

An Employer's Cry for Help: Credit for paying an Athlete's Medical Benefits

In **Central McClellion v. Kansas City Chiefs**, Injury No.: 02-046057, the Commission agreed that the employer should receive a dollar for dollar credit against any disability benefits owed based on the salary continuation benefits paid pursuant to a contract. However, the Commission disagreed that medical benefits paid pursuant to the contract should not be included in the dollar for dollar credit. The Commission determined that under the Statute there was no dispute that the employer of professional athletes under contract are entitled to full credit for wages or benefits paid to the employee after the injury including medical, surgical, or hospital benefits against all Workers' Compensation benefits, explicitly including medical expenses.

Calculating Second Injury Fund Liability

In **Jeff Honer Roofing v. Continental Western Insurance**, Injury No.: 02-149305, the Commission determined that the Second Injury Fund is liable for the differential rate for each week that the employer would theoretically pay permanent partial disability payments, with the amount of the claimant's settlement with the employer being irrelevant. In this case, the ALJ determined the employee sustained 30% permanent partial disability of the body as a whole, amounting to 120 weeks of compensation, but the ALJ used the dollar amount of the employee's settlement with the employer to find that the Second Injury Fund must pay the differential rate for 176 3/7 weeks. The Commission therefore modified the award to reflect the Second Injury Fund paying the differential rate for 120 weeks.

Determining of a Date of MMI

In **Patricia Key v. Aldi, Inc.**, Injury No.: 96-44234A, the Commission found that when an employee receives a significant amount of treatment after being released at MMI and then was subsequently given another MMI date by the same treating physician, the Second Injury Fund should be responsible for the difference between the permanent total disability and the permanent partial disability benefits beginning at the most recent MMI date. The Commission found that Dr. Boland's opinions recommending treatment, including 3 additional surgeries, after initially releasing the claimant at MMI, is not something a doctor would recommend for a patient at MMI, and therefore the Commission determined that the claimant was actually at MMI when Dr. Boland re-released her, after her last surgery.

Medical Causation Needed for Second Injury Fund Liability for Enhanced PPD

In **Wilbert Shepherd v. Yellow Transportation**, Injury No.: 05-041995, the Commission found that in order for the Second Injury Fund to have liability for enhanced PPD, a claimant must show that his injuries are medically causally related to his/her employment. The Commission agreed that because Dr. Berkin's report was not admitted into evidence, his deposition was not offered until the record closed, and Dr. Volarich's report and deposition offered no opinion as to whether there was a causal relationship between his job duties and his carpal tunnel syndrome, there was no evidence in the record of an expert medical opinion establishing a medical causal relationship between the claimant's work duties and his carpal tunnel syndrome. Therefore, the Commission determined that he had failed to establish he sustained a compensable occupational disease and as a result, the claimant's claim against the Second Injury Fund failed.

A Retroactive Opinion stating the Employee was Unable to Work Lacks Credibility

In **Kelley Courtney v. McDonald's Restaurant**, Injury No.: 99-040243, the Commission disagreed with the ALJ allowing temporary total disability benefits. The Commission agreed that the claimant suffered an injury in 1999 and worked for 3 years with work restrictions placed by Dr. Kennedy. Then in 2003 the claimant suffered an aggravation of her prior injury and never returned to work, however, no doctor took the claimant off work. Furthermore the claimant admitted that she did not work for the employer after her 2003 injury because of a change in ownership. The

Commission found that Dr. Cohen's subsequent 2004 opinion that the claimant was in fact unable to work from her date of injury in 2003 was not persuasive.

Dr. Cohen was also of the opinion that the claimant was permanently and totally disabled. However, the Commission found that the opinion of Dr. Kennedy, the claimant's treating doctor, and Dr. Chabot, who both provided a rating of 25% PPD as a result of the work injury were more credible than the opinions of Dr. Cohen.

The Nature and Extent of Second Injury Fund Liability

In **Joe Edwards v. Honeywell International Inc.**, Injury No.: 03-102872, the Commission disagreed with the ALJ who found that the employee's permanent total disability was a result of the physical residuals from his primary 2003 injury and subsequent 2004 injury he suffered at home. The Commission determined that Dr. Stuckmeyer's opinion, stating that the claimant had pre-existing injuries including 20% PPD of the right elbow and 20% PPD of the cervical spine before the primary 2003 injury, was credible. The Commission therefore concluded that the claimant met his burden of proving the presence of actual and measurable disabilities at the time the work injury, and therefore was permanently and totally disabled due to a combination of his primary injury and his pre-existing injuries.

In **Jamey Blake v. Leo O'Laughlin, Inc.**, Injury No.: 04-103113, the Commission determined that the claimant did meet his burden of establishing Second Injury Fund liability. The Commission determined that Dr. Rope's opinion stating that the claimant suffered from a preexisting seizure condition and a pre-existing permanent partial disability of 20% of the lower back which constituted hindrances or obstacles to employment, was credible. The Commission also noted that the record contained no expert medical or vocational evidence suggesting the claimant was in fact permanently and totally disabled as a result of his work injury considered in isolation.

Spousal Nursing Awards Must be Based on More Than Speculation

In **John Hoff v. St. Clare R-XIII School District**, Injury No.: 00-081801, the Commission noted that the courts require spousal nursing awards be based on more than speculation. The Commission determined that the claimant's wife provided limited testimony on the amount of care she provided on a daily basis, and Dr. Katz's estimation of the amount of care the claimant needed was too speculative. Therefore, the Commission found there was insufficient evidence to warrant an increase of spousal nursing compensation for this time period.

The Commission also found that a claimant is entitled to the difference between the cost of a modified vehicle and the average cost of a new mid priced sedan, and increased costs of sales tax estimated by a claimant should not be taken into account.

The Commission also found that spousal nursing is a medical expense not covered under the code and thus the appropriate rate of interest is 9% per annum, for which the employer is liable. The

Commission recognized that the parties stipulated that the employer previously made a payment of interest for spousal nursing at the rate of 10%. The employer then asked for a credit in light of its previous payment. However, the Commission found that since the employer failed to suggest an appropriate amount of such credit, the Commission declined to set the appropriate rate under the law. The Commission further determined that an attorney's lien does apply to the Award of spousal nursing care.

New Law

The Commission heard appeals on 31 new law cases in the last 3 months. Of those cases, the Commission modified, reversed or supplemented opinions in 14 of those cases.

Claimant's Burden of Proof for Permanent Partial Disability

In **Lindell L. Mole v. Martin Marietta Materials Incorporated**, Injury No.: 06-057515, the Commission determined the claimant met his burden of proof and therefore should be awarded permanent partial disability. Dr. Volarich was of the opinion that the claimant's disability was medically causally related to the accident and provided a rating of 22.5% permanent partial disability, however, Dr. Volarich testified that he could not say what portion of the 22.5% rating was due to the claimant's pre-existing conditions because the claimant had no symptoms before his work injury. Due to the fact that Dr. Volarich would not assign permanent disability to the claimant's pre-existing conditions, the Commission determined that he, in not so many words, assigned 0% disability for his pre-existing condition and 22.5% permanent partial disability due to the claimant's work-related condition. Therefore, the Commission concluded that Dr. Volarich's report was sufficient evidence for the employee to meet his burden of proof.

When Claimant is Entitled to the Cost of the Proceedings Against the Second Injury Fund

In **Angie Bridges v. Home Depot**, Injury No.: 06-043009, and **Andrea Lingle v. Rider Integrated Logistics**, Injury No.: 07-114432, the Commission, in identical Awards, found that the employee was not entitled to an Award of attorney's fees and costs against the Second Injury Fund. The Commission found that the general rule is that the cost of a proceeding before the Division or Commission shall be paid out of the state treasury from the Fund, however, the exception is that the Division or the Commission may assess the whole costs of the proceedings upon a party who, without reasonable ground, brought, prosecuted, or defended a proceeding before the Division or Commission. The Commission determined that in both cases, the record failed to disclose evidence sufficient to support a finding that the Second Injury Fund acted with a sort of egregious or outrageous conduct.

An Administrative Law Judge's Disregard for the Ratings

In **Wade Jenkins v. University of Missouri**, Injury No.: 06-100307, the Commission agreed that an ALJ can arrive at percentages of disability that are below those of a medical expert such as Dr. Volarich. However the Commission determined that the ALJ's reapportionment for pre-existing

disabilities was error because it was based on his own conjecture or his own mere personal opinion which was unsupported by sufficient, competent evidence. In this matter, after disregarding the ratings of Dr. White, Dr. Concannon, and Dr. Volarich, the ALJ found overall ratings of 25% of the left shoulder and 18% of the left elbow, and 14% disability in the left shoulder and 9% disability in the right elbow relating to the work injury. The Commission determined that there was no evidence in the record to support that the claimant had any pre-existing problems which constituted a hindrance or obstacle to his employment. The Commission further noted that the only expert that discussed pre-existing disability was Dr. Volarich, who said the claimant did not have any pre-existing disability.

What Qualifies as Evidence to the Contrary@

In David First v. Gray Eagle d/b/a D&D Distributers, LLP, Injury No.: 07-034786, the Commission found the claimant to be permanently and totally disabled. The only expert medical opinion was given by Dr. Volarich who opined that the employee was permanently and totally disabled as a direct result of his work-related injury in combination with his pre-existing medical conditions. Mr. England, the only vocational expert to present an opinion, also found that the claimant was totally disabled. The Second Injury Fund did not offer any evidence to the contrary. The only evidence to the contrary@ the ALJ relied upon was evidence that the claimant returned to work for a brief period of time after his last injury and continued to enjoy leisure activities such as golf and motorcycle riding. The Commission determined that the decision of the ALJ to deny the employee permanent total disability benefits was not supported by substantial and competent evidence.

Notice and When an Employer is Prejudiced by the Lack Thereof

In Kenneth Williams v. Missouri Department of Social Services, Injury No.: 06-057024, the Commission determined that the employer was prejudiced by the claimant not providing notice within 30 days of his injury. The Commission stated that the underlying purpose of the notice requirement is to ensure that the employer will be able to conduct an accurate and thorough investigation of the facts surrounding the injury and has the opportunity to minimize the employee's injury by providing prompt medical treatment. The Commission determined that the employer was in fact prejudiced because if the claimant had given notice of his April injury before June, the employer could have treated the claimant's skin condition which progressively worsened, causing the claimant to undergo several leg surgeries and be treated for a staph infection. The Commission concluded that if the employer had notice they could have investigated and sent the claimant to the appropriate specialists before his condition worsened.

The Prevailing Factor of a Claimant's Injury

In Danny Whiteley v. City of Poplar Bluff, Injury No.: 06-103269, the Commission determined that the ALJ relied heavily on the claimant's previous workers' compensation claim settlement and his chiropractic records in denying this cervical spine claim. The Commission also noted that the ALJ admitted that none of the medical records prior to 2006 refer to the employee's neck or

cervical spine and were actually referencing the claimant's thoracic spine. Also, Dr. Cantrell, the employer's medical expert, agreed that the claimant's neck was basically asymptomatic and conceded that the cervical sprain/strain was a new injury which occurred at work. The Commission found that the overwhelming weight of evidence suggests that the work accident was the prevailing factor in the cause of the claimant's cervical condition and any finding to the contrary is not supported by the competent and substantial evidence.

What Activities at Work Actually are Arising Out of and in the Course of Employment

In **Sandy Johme v. St. John's Mercy Medical Center**, Injury No.: 08-069091, the Commission determined that the injury the claimant sustained while making coffee did arise out of and in the course of her employment. The Commission determined that the rationale of the personal comfort doctrine is that humans have basic needs that must be met throughout the work day and the benefit of tending to those needs, benefits not only the employee, but the employer as well. The Commission determined that the doctrine is consistent with the statutory definition of an injury arising out of and in the course of employment. The Commission determined that it is clear that the claimant's accident was the prevailing factor in causing the employee's injury, and the injury also did not come from a hazard or risk unrelated to the employment.

The Commission rationalized that the claimant was not required to make coffee as part of her job, however, it was neither prohibited nor discouraged by the employer, which is demonstrated by the fact that the employer provided the coffee pot and supplies for its workers to use. Therefore, the Commission found that the claimant's act of making coffee inured the employer's benefits and the coffee was available to all employees for their comfort. The Commission also determined the employee did not depart long from her assigned duties and her method of making the coffee was not unusual or unreasonable. Therefore the Commission found that the employee's activity of making coffee was incidental to and related to her employment.

In **Ricky D. Wilson, Jr. v. Ricky Wilson, Jr.**, Injury No.: 08-117815, the Commission found that the claimant did not meet his burden in establishing that his injury arose out of and in the course of his employment. The relevant facts follow. The claimant was both the employer and employee. The claimant was involved in a single vehicle accident and due to memory problems, the claimant was unable to recall what happened on the date of his injury. Therefore, testimony of others he had spoken with that morning and the day prior was the basis of determining whether his accident arose out of and in the course of his employment and based on that testimony the Commission found the following.

The Commission found that the general rule is that an injury arises in the course of the claimant's employment if the accident occurs within the period of employment at a place the employee may reasonably be, while he is in furtherance of the employer's business or performing activities incidental to employment. The Commission found that the claimant had a business meeting, however, before that meeting and at the time of the accident he was traveling in a different direction for a personal hunting trip before his business meeting. The Commission determined that had the employee canceled his personal hunting trip, he would not have been where he was when

the accident occurred. Therefore, the Commission determined that the claimant's deviation from the employer's business prevents him from recovering under the Dual Purpose Doctrine.

The Commission also determined that the employee's accident is not compensable under the Mutual Benefits Doctrine which requires that an injury must have occurred during the performance of an act for the mutual benefit of the employer and the employee, that is, where some advantage to the employer resulted from the employee's conduct. The Commission determined that there was no substantial benefit to the employer, being the owner of a company which transports mobile homes, by the claimant deviating from his route in order to go deer hunting. The Commission concluded that the claimant's plan to deer hunt alone did not provide a benefit to the employer sufficient to justify application of either the Dual Purpose or Mutual Benefit Doctrines.

Ability to Compete in the Open Labor Market

In **William Cook v. Buckley Potter Company**, Injury No.: 07-100923, the Commission agreed that the employee was unable to compete in the open labor market before he suffered the work-related injury. The Commission admitted that the employee's following arguments in support that he was not permanently and totally disabled before this work-related injury could be persuasive: (1) he competed for the position in the same manner as other applicants and (2) the employer selected the claimant for the position. However, the Commission determined that the claimant did not inform the employer about his significant back problems, that he was receiving Social Security Disability, or that he took Darvocet daily to cope with his pain. Therefore, the Commission found that it cannot be said that the employer purposely hired the employee in his then present physical condition.