

SIMON LAW GROUP, P.C.
WORKERS' COMPENSATION CASE LAW UPDATE
JULY 2011-SEPTEMBER 2011

Permanent Total Disability - SIF

Mark Tombaugh v. the Treasurer of the State of Missouri as Custodian of Second Injury Fund, Case No. WD73171 (Mo. App. W.D. 2011)

FACTS: The claimant was involved in two separate incidents in which he sustained an injury to his neck while on the job. While treating for his neck, he found out that he had a heart condition which had not been previously diagnosed, but it existed prior to the claimant's work injury. He also had other pre-existing injuries, including disabling orthopedic conditions to multiple body parts.

The claimant filed a Second Injury Fund claim, alleging that he was permanently and totally disabled. The claimant's expert, Dr. Koprivica provided a report noting that the claimant had 35% PPD to the body as a whole as a result of the work injury and 25% PPD to the body as a whole due to the claimant's pre-existing heart condition, along with other partial disabilities with reference to the other body parts. He was of the opinion that among the claimant's pre-existing conditions, his condition to his heart was of the greatest significance and found the claimant was permanently and totally disabled. Dr. Koprivica also was later deposed and testified that the claimant was totally disabled, even taking the heart condition out of the equation.

The Division found that claimant's heart condition did not trigger the liability of the Fund because it was not a measurable, pre-existing disability of such seriousness as to constitute a hindrance or obstacle to his employment prior to the work-related accident and, therefore, found the Fund had no liability with respect to the heart condition. The Division did find the Fund liable for PPD based on his pre-existing orthopedic conditions but did not address the doctor's final conclusion that claimant's pre-existing condition in combination with the work-related injuries rendered him totally and permanently disabled, even when the heart condition was excluded from the equation. The Commission affirmed the Division's decision.

HOLDING: The claimant argued that the Commission erred in denying him permanent and total disability in that its conclusion that Dr. Koprivica's assessment of the claimant's permanent total disability included the cardiac condition was not based on substantial and competent evidence because the doctor testified that even excluding the cardiac condition the claimant was totally disabled.

The Court found that it was possible the Commission found that the doctor's report and his initial testimony were credible but that his final statement was not, however, from a review of the record, it appeared likely that the Commission failed to consider the doctor's final statement as opposed to rejecting it as not credible. Therefore, the Court did not find there was enough information to

properly affirm or overturn the denial PTD benefits, and therefore instructed the Commission to clarify whether it made a credibility determination with regard to Dr. Koprivica's statement that the claimant was totally and permanently disabled even excluding the heart condition.

Credibility of Doctors' Opinions

Kathleen Elmore v. Missouri State Treasurer as Custodian of the Second Injury Fund, Case No. SD30906 (Mo. App. S.D. 2011)

FACTS: The claimant, a registered nurse, worked in a hospital for over 20 years. In 1999, she underwent back surgery but continued to have back problems and in 2000, the claimant was diagnosed with fibromyalgia. In August 2003, she began experiencing problems with her right hand and underwent 3 hand surgeries from February 2004 to March 2005. The claimant testified that her back pain and fibromyalgia worsened after developing problems with her hand. The claimant settled her workers' compensation claim for disability to her hand at 33 1/8%.

The claimant was examined by Dr. Paff at her attorney's request, and he believed the claimant had 10% greater overall disability when her occupational injury was considered in combination with her back and fibromyalgia disabilities. The claimant's vocational expert, Phillip A. Eldred, believed that the claimant was not employable in the open labor market and was permanently and totally disabled.

The Fund's vocational expert, James England, opined that the claimant was still employable as she was highly marketable if one considered her overall work background, experience, training.

An ALJ determined that the claimant's combined disability was 10% greater to her body as a whole as a result of her occupational injury along with her pre-existing disabilities and ordered the Fund to pay the claimant \$13,882.00 as PPD benefits. The Commission affirmed this decision and the claimant appealed asserting that the Commission erred in rejecting her claim that she was permanently and totally disabled because the claimant's expert was more credible as a matter of law than witnesses relied on by the Commission.

HOLDING: The Commission found that the opinions of Mr. England were more persuasive in that Mr. England applied the restrictions of Dr. Paff which were in evidence, as opposed to Mr. Eldred who based his opinion in part upon the restrictions of Dr. Shoemaker's report which was not in evidence and was completed before the claimant's last surgery.

The claimant then argued that the medical information Dr. Eldred relied on was actually in evidence since it was set out in his report which was introduced into evidence without objection, and, therefore, argued that the Commission cannot, as a matter of law, find Mr. Eldred less credible than Mr. England on the grounds that Mr. Eldred had relied on information that was not in evidence. The Court then noted that the Commission made no statement that Mr. Eldred's testimony and report was not considered. Instead the Commission summarized Mr. Eldred's evaluation and the doctors he relied upon when reaching this opinion. Therefore the Court found that the Commission did not err

as a matter of law in finding the testimony from Mr. England and Dr. Paff more persuasive than that of Mr. Eldred.

Safety Violation of an Employer - The Scaffolding Act §292.090

Terry Hornbeck v. Spectra Painting, Inc. and Treasurer of the State of Missouri, Second Injury Fund, Case No. ED 95680 (Mo. App. E.D. 2011)

FACTS: The claimant was a painter and drywall taper who unsuccessfully tried to reach the roof by scaling a ladder that had been placed on top of a small scaffold, at which time the ladder and scaffolding collapsed, and he fell approximately ten feet to the concrete below. He was then taken to the hospital complaining of pain in his feet, legs, back and left shoulder. The claimant visited with three different physicians provided by the employer, Drs. Paletta, Aubuchon and Chabot, however they were unable to diagnose the physical cause that correlated with the pain expressed by the claimant, and therefore he was released from care in April 2007. However in October 2007, because of his continued complaints, he began treating with other doctors through his own insurance.

In January 2008, the claimant filed a Motion for Hardship Hearing, and the Administrative Law Judge found the claimant had reached MMI, was not entitled to future medical treatment, unpaid medical expenses or TTD benefits, that the employer did not violate the Scaffolding Act and thus was not liable for a 15% penalty and finally his injuries sustained on November 9, 2006 resulted in a PPD of 20% of the left biceps, 5% for each foot, and 2.5% of the total body as a whole for the lower back and application of a 5% multiplicity factor was warranted.

On cross-appeal the employer argued that the Commission erred in awarding claimant a 15% enhancement to his award after finding a violation of the Scaffolding Act. In order to show entitlement to a 15% enhancement of benefits, the claimant is required to establish (1) the existence of the statute applicable to the facts surrounding the work injury, (2) violation of that statute by the employer and (3) a causal connection between the violation and compensable injury.

HOLDING: The Commission affirmed the ALJ's decision except for the ALJ's finding of a Scaffolding Act violation and ordering a 15% enhancement of claimant's award. The Commission found and the Court agreed that the Scaffolding Act is clearly applicable to the facts surrounding claimant's injury. The Court looked to *Propulonris v. Goebel Construction Company* where that Court held that in the absence of an exculpatory showing on the part of the employer, the fall of a scaffold is prima facie evidence of negligence on the part of the employer and a violation of the statute. The Court noted that the employer presented no such exculpatory evidence and therefore the Commission was correct in finding a violation of the Scaffolding Act.

The Court also determined that the 15% penalty should be assessed to all "compensation." The Court found that TTD benefits, medical benefits, and PPD benefits all are compensation, however, the Court did note that the penalty does not apply to amounts ordered from the Fund.

A Safety Violation - Employer Does Not Always Have to Prove Prior Discipline

Eddie Thompson v. ICI American Holding f/k/a National Starch & Chemical, Case No. WD72374 (Mo. App. W.D. 2011)

FACTS: The claimant sustained injury to three fingers on his right hand when he and another employee attempted to replace three broken drive belts on a “blending blower.” The claimant and his co-worker cut the electrical power to the blower prior to beginning work on the belts, but they failed to eliminate the reverse air flow to the blower. As a result, the sheave continued to rotate and instead of shutting off the air valve, claimant and his co-worker inserted a broom into the machine to stop the sheave from rotating, the broom handle broke shortly thereafter at which time claimant sustained his injuries.

Employer argued that the claimant caused his own injury by failing to follow the lockout rules which required that workers completely de-energize and isolate a piece of equipment from energy sources before any maintenance or repair work is conducted on the equipment.

The ALJ awarded the claimant \$72,834.39 for TTD, PPD, and medical costs but assessed a 37.5% reduction to the award based on the finding that his injury was caused by his failure to follow the lock-out rules. Claimant appealed arguing there was no evidence that employer enforced the lock-out rules against violators of those rules prior to his accident, and by its very nature, prior safety rule instruction does not constitute prior safety rule enforcement.

HOLDING: The Court found the statute does not require evidence that an employer enforced its safety rules by imposing discipline upon employees who violated the rules, instead the statute requires the employer make reasonable efforts to cause its employees to obey or follow the rules. Here, the employees were actively and repeatedly trained on these rules, they were given written tests on the rules and they were warned of discipline up to, and including, termination if they failed to comply.

The Court found that the training materials, as well as the testimony of the witnesses proved that the employer made a reasonable effort to cause its employees to obey and follow the rules. Furthermore the Commission is not required to conclude that the employer failed to make reasonable efforts to cause its employees to obey or follow safety regulations simply because the record lacks evidence of previous discipline for safety violations. The decision of the Commission therefore was affirmed.

The Exclusivity Provision and Occupational Disease Claims

State ex rel. KCP&L of Greater Missouri Operations Company v. The Honorable Jacqueline Cook, Circuit Court Judge, 17th Judicial Circuit Court, Case No. W. D. 73462 (Mo. App. W.D. 2011)

FACTS: Claimant worked for employer for thirty-four years and alleged that he was exposed to asbestos during the course of his employment for the employer and this exposure directly and

proximately caused his methoselioma. He asserted claims against the employer for premises liability and negligence. The employer asserted as an affirmative defense that claimant's claims were barred because of his exclusive remedy, if any, under Missouri Workers' Compensation and filed a motion for summary judgment. The claimant then argued that pursuant to the 2005 amendments to the Act only claims arising out of an "accident" as defined in §287.020.2 are subject to the Act's exclusivity provision and his claims do not involve an accidental injury. The Trial court denied employer's motion for summary judgment.

HOLDING: The Court found that Workers' Compensation Law distinguishes between two general categories of compensable injuries (1) injuries by accident and (2) injuries by occupational disease. The plain language of the exclusivity provisions of §§287.120.1 and .2 limits those sections to apply to injuries or death caused "by accident." The Court stated that the current version of the Act specifies that the reviewing courts shall construe the provisions of the chapter strictly and under strict construction the Court cannot add injuries by occupational disease to §§287.120.1 and .2 when the provisions unambiguously refer only to injuries caused "by accident."

Therefore the Court found that the trial court did not err in denying the motion for summary judgment because the exclusive remedy provisions do not apply to his claims as they only apply to an injury "by accident" and claimant's injury does not arise from an "accident."