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MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

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Claim Compensable Because Claimant Not Equally Exposed to That *Particular* Dirt Clod

Young v. Boone Electric Cooperative, Case Nos. WD76567 & WD76568 (Mo. App. Ct. 2015)

FACTS: The claimant injured his left knee in 2008 when, while walking to his truck at a job site, he stepped on a "frozen dirt clod" and his knee buckled and popped. Of note, the claimant also did some farming in his spare time. The Commission found the knee injury compensable and stated that the employer/insurer failed to identify evidence that the claimant was equally exposed to dirt clods in his normal nonemployment life.

HOLDING: On appeal, the employer/insurer argued that the claimant failed to prove that the risk from which his injury arose (stepping on a dirt clod) was work related because he worked on a farm and therefore, was equally exposed to that risk. The court stated the claimant injured his knee because he was at work, not merely while he was at work. The court also stated the claimant was not equally exposed to the hazard of slipping on dirt clods at that *particular* work site where his injury occurred. Therefore, the claim was found compensable.

Injury on Inclined Parking Lot Compensable Because it was Not a Risk Claimant was Equally Exposed to in Normal Non-Employment Life

In **Cotner (Deceased) vs. Southern Personnel Management, Inc., Injury No. 11-042143**, the claimant was a 68 year old shuttle bus driver. On June 2, 2011, the claimant's employer requested that he perform an inspection of a possibly defective front air conditioning unit. In the course of that inspection, the claimant squatted down and upon returning to a standing position, he stepped backwards and fell, injuring his right hip, neck, and right shoulder. The claimant testified that he may have slipped on a pebble or perhaps his foot stuck to the pavement.

At the hearing, the employer/insurer asserted that the claimant's injury came from a risk to which he would be equally exposed in normal non-employment life. The ALJ disagreed with this noting that 1) it was very hot on the date of injury and parts of the pavement in the area of the accident had been repaired with tar or asphalt sealant, 2) the claimant had to bend forward and

squat in order to listen to the air conditioning compressor, and 3) when he stood up and began to fall backwards on the pavement, he stumbled backwards a greater distance due to the downhill slope nature of the pavement he was on. Therefore, the ALJ found the claim compensable.

On appeal, the Commission affirmed the ALJ's decision. On appeal, the employer/insurer argued that the ALJ's identification of various factors which may have contributed to the claimant's fall, demonstrated that the ALJ engaged in speculation as to the specific risk or hazard which caused the claimant's injuries. The Commission disagreed and stated the claimant did testify that the slope of the parking lot accelerated his falling backwards. The Commission then stated that squatting down on a significant incline and subsequently stumbling or falling is not a risk that claimants would be equally exposed to in normal non-employment life. Therefore, this matter was deemed compensable.

Claim Not Compensable Because Claimant was Equally Exposed to Force of Wringing out a Rag in her Normal Non-Employment Life

In **Pressley vs. Homewood Suites, Injury No. 09-094722**, the claimant testified that she developed a "lump" on the back of her left hand near her wrist in May 2008. On February 28, 2009 she was wringing out a cleaning rag when she felt a pop in her left wrist. She reported the injury but did not seek treatment until four months later, when while at home, she felt a pop in her index finger and shooting pain from her wrist to her elbow. She reported the injury to her employer who sent her to BarnesCare. The doctor at BarnesCare did not know if her injury was work related. She was referred to Dr. Feinstein, who performed surgery. He was not asked to provide a causation opinion. The employer reported the injury to the insurer and the insurer issued a denial letter on November 6, 2009, after Dr. Feinstein had performed surgery.

Interestingly, the claimant's attorney wrote Dr. Feinstein a letter requesting information about the injury. Dr. Feinstein responded that it would be unusual for the claimant to sustain the injury she did (a ruptured tendon) from a low grade activity such as wringing out a cleaning rag. The doctor went on to state that the claimant had pre-existing arthritis and bone spurs which weakened her tendon and made it more prone to injury from minor trauma, such as wringing out a rag. Dr. Feinstein later testified that the work incident was not the prevailing factor in causing her injury but rather her preexisting osteoarthritis was the prevailing factor in causing her injury. Dr. Volarich, the claimant's expert, opined that the work incident was the prevailing factor in causing a left wrist strain injury and aggravation of arthritis, which required surgery. At a hearing, the ALJ found Dr. Feinstein's causation opinion more credible and denied benefits.

On appeal, the Commission affirmed the ALJ's ruling that the claim was not compensable based on Dr. Feinstein's opinion that wringing out a wet rag would not involve enough force to cause her injury. The Commission also stated that the simple action of wringing out a wet rag was a risk that the claimant would be equally exposed to in her normal nonemployment life. Therefore, the claim was denied.

The Commission acknowledged the claimant's job duties as a house cleaner involved repetitive

and strenuous use of her hands but stated that she did not provide expert testimony identifying such job duties as the prevailing factor in her injury. Additionally, she made clear in both her brief and oral argument that she was pursuing an accident theory as opposed to an occupational disease.

Claim Compensable Because Claimant was Not Equally Exposed to Sidewalk With Steep Drop-Off

In **Narens vs. Lincoln University, Injury No. 12-025345**, the claimant was leaving work, walking to the Lincoln University parking lot where she parked her car. She was walking on the right side of the sidewalk and stepped to the side to avoid a group of students walking towards her. When she stepped to the right, she stepped off the sidewalk and fell, injuring her left ankle. The claimant was injured on property owned and controlled by the employer. Photos of the location where she fell indicated a difference in the height of the ground between the sidewalk and the grassy area next to the sidewalk where she stepped to avoid the students. At a hearing, an ALJ found that the claimant sustained a compensable injury.

On appeal, the employer/insurer argued that the claimant was not injured in the course and scope of her employment because 1) she was on her way home for the day and 2) she was equally exposed to the risk source as she would have walked on crowded sidewalks in her normal non-employment life. The Commission disagreed with both of these arguments. The Commission stated that the claimant was in the course and scope of her employment because although she was heading home she was on premises owned and controlled by the employer so the extension of premises doctrine applied. The Commission also stated that while the claimant would have been exposed to the risk source of walking on crowded sidewalks in a normal non-employment life, she was not equally exposed to the risk of walking on a crowded campus sidewalk with a steep drop off. The Commission also noted that the record established the claimant's supervisor subsequently fell at the same location due to the same conditions and therefore, this supported the fact that the steep drop off posed an increased risk.

Employer/Insurer Unable to Prove Claimant's Injury was Idiopathic so Injury Found Compensable

In **Campbell (Deceased) vs. Trees Unlimited, Inc., Injury No. 11-033989**, the claimant was the owner of the insured. The claimant's job duties included working as a salesperson. He frequently traveled during the mornings making sales calls and performing other duties. He would then typically return to his Joplin office in the afternoon. The claimant had made calls into the office on the date of injury three times before 10:00 a.m. At noon, the claimant was involved in a fatal single vehicle auto crash 7.5 miles south of Joplin. The only testifying witness to the accident estimated the claimant was traveling about 70 miles per hour when the claimant's vehicle moved from the right lane, into the left lane, and then drove into the median and straight down the median. The witness stated that the claimant did not swerve or use his brakes and told the investigating officer that it appeared that the claimant had fallen asleep while driving. The investigating officer stated that the claimant's vehicle traveled a total of 499 feet

before coming to a stop. He further stated that statements from witnesses and observations of the claimant's body showed a possibility that he was deceased prior to impact but that could not be positively determined. Toxicology tests following the accident were essentially negative.

Several experts testified, some on behalf of the claimant, some on behalf of the employer/insurer, and some neutral. None of the experts were sure whether the claimant had a heart attack or was possibly deceased prior to the motor vehicle accident but none ruled it out. Essentially, the experts were unsure what the claimant's health condition was immediately preceding the accident and no autopsy was ever performed.

At a hearing, the ALJ stated that at the time of the accident, the claimant was in a place and area which he would normally work from and there was no evidence he was on any kind of deviation or distinct personal errand. Therefore, the ALJ found he was within the course and scope of his employment at the time of the injury. The ALJ also held that the employer/insurer failed to demonstrate the claimant died of idiopathic causes as their own expert testified that it would be speculative whether the claimant was already deceased at the time of the accident. Death benefits were awarded as were funeral expenses. On appeal, the Commission summarily affirmed.

Claim Denied Because Expert Failed to Use Proper Standard

In **Shackleford vs. SAB of TSD of the City of St. Louis, Injury No. 10-087428**, the claimant, a school teacher, was writing on a whiteboard when a student threw a ping pong ball-sized wad of sunflower seed hulls wrapped in crumpled paper, which struck the claimant in the head and she felt radiating neck pain. Prior to the work incident, she had injured her neck in a motor vehicle accident in 1998 and was offered surgery but chose to treat conservatively. She also injured her neck and right arm in 2006 after she fell and was diagnosed with cervical radiculopathy, which was also treated conservatively. The employer/insurer's expert, Dr. Randolph, stated that her radicular symptoms stemmed from degenerative changes which preexisted the work injury and although she sustained a contusion to the head, there was no permanent structural injury. The claimant's expert, Dr. Volarich, felt that the work injury aggravated the claimant's underlying degenerative disc disease. At a hearing, an ALJ found that the claimant did not sustain a compensable injury because of her expert's opinion that she simply had aggravated a preexisting condition.

On appeal, the Commission affirmed but clarified that the claimant may recover compensation for aggravation of a pre-existing condition if the work injury is the prevailing factor causing such aggravation.

Editor's Note: It appears the Commission is saying that if Dr. Volarich would've opined that the work injury was the prevailing factor in aggravating her pre-existing condition, the claim may have been compensable.

ATFL Tear Found Compensable Despite Employer/Insurer's Expert's Opinion that

Condition was Not Work Related

In **Ambrozetes vs. Smurfit Stone Container Enterprise d/b/a Rock Tenn, Injury No. 09-111355**, the claimant injured his right ankle when he was struck by falling stock in November 2009. Authorized treatment was initially provided with BarnesCare who believed the claimant had plantar fasciitis, a condition that was not work related, and thereafter no treatment was provided. Subsequently, the claimant treated on his own and underwent surgery after a March 2011 MRI showed a chronic tear of the right ATFL as well as a split of his peroneal tendon. Dr. Krause, the employer/insurer's expert, believed that the claimant sustained a sprain/strain of the ankle as a result of the work injury and the surgery he underwent was not required to cure and relieve the effects of the work injury. The claimant presented the testimony of Drs. Schmidt, Shuter, and Woiteshek, all of whom felt that surgery was required to cure and relieve the claimant from the effects of the work injury. At a hearing, the ALJ found the claimant's experts more credible and awarded reimbursement for the claimant's past medical expenses as well as 20% PPD referable to the right ankle. On appeal, the Commission affirmed.

Employer/Insurer Liable For PTD Benefits Despite Conservatively Treated Work Injury

In **Rickerson vs. Camdenton R-3 School District, Injury No. 10-020677**, the claimant fell while vacuuming steps, sustaining an injury to his right hip, thigh, and an annular tear in the low back. He treated conservatively. The claimant's expert, Dr. Koprivica, gave him restrictions which put him in the medium physical demand level. The claimant was 55 years old as of the hearing, only attended school through 9th grade, and his vocational history only included manual labor positions. In 1975 or 1976, the claimant underwent back surgery which caused him to be out of work for approximately 1-1.5 years but he stated that he fully recovered thereafter and had no difficulty returning to manual labor after that surgery. Dr. Koprivica assessed 30% PPD referable to the work injury but believed that the claimant was permanently and totally disabled based on his vocational profile. He assessed no preexisting permanent partial disability. Dr. Lennard, the employer/insurer's expert, assessed 20% disability, 8% referable to the work injury, and 12% referable to pre-existing degenerative changes and his prior lumbar surgery. Mr. Swearingin, the claimant's vocational expert, testified that she was PTD based on Dr. Koprivica's restrictions. Mr. England, the employer/insurer's expert, believed that the claimant may be able to return to work or may be PTD, depending on which of the various physicians' restrictions were used.

At a hearing, the ALJ found the claimant's experts more credible and held that the claimant was PTD as a result of the work injury in isolation. Liability was imposed solely on the employer/insurer. The ALJ also awarded future medical treatment. On appeal, the Commission affirmed.

Fund Liable for PTD Benefits Based On Pre-Existing Degenerative Changes in Operative Note

In **Pointer vs. City of Marshall, Injury No. 10-037444**, the claimant was injured in May 2010

when a ladder he was working on kicked out causing him to fall and land on the concrete, injuring his low back, left leg, and left shoulder. The claimant had numerous prior injuries including a left total knee replacement and a fusion from L4-S1. Following the work injury, the claimant initially received authorized treatment and was placed at MMI in November 2010. The claimant wanted additional treatment so he saw his primary care physician, who referred him to Dr. Highland. Eventually, Dr. Highland performed unauthorized surgery on the claimant's back from L3-S1. Dr. Koprivica, the claimant's expert, opined that he was permanently and totally disabled based on the work accident alone, as did the claimant's vocational expert, Mr. Cordray. However, both Dr. Koprivica and Mr. Cordray conceded on cross examination that the evidence could sustain a finding that the claimant was permanently and totally disabled as a combination of his preexisting conditions and work injury.

At a hearing, the employer/insurer argued that the claimant merely sustained a sprain/strain as a result of the work injury and his treatment with Dr. Highland, including his surgery, was not necessary to cure and relieve the effects of the work injury. The ALJ noted that he found it odd that both Dr. Koprivica and Mr. Cordray opined that the claimant was PTD as a result of the work injury in isolation. The ALJ found the April 2011 operative note of Dr. Highland, who performed the claimant's unauthorized back surgery, particularly persuasive. The ALJ noted that Dr. Highland's post operative diagnoses were degenerative disc disease of the lumbar spine; status post posterior fusion L3-S1; retrolisthesis and spinal stenosis at L2-3; and foraminal stenosis at L1-2 on the left. The ALJ noted that the first, second, and fourth post operative diagnoses, per Dr. Highland's testimony, all pre-existed the work injury. Additionally, Dr. Highland testified that he could not say with reasonable certainty that the third post-operative diagnosis was caused by the work injury. Therefore, the ALJ found that the claimant was PTD as a combination of the work injury and his preexisting disabilities.

The ALJ also denied the claimant's request for reimbursement of the expenses he incurred while treating with Dr. Highland. The ALJ again focused on the post operative diagnoses of Dr. Highland and found that the work injury merely caused a sprain/strain. Therefore, the claimant's treatment with Dr. Highland, including his surgery, was to address his pre-existing conditions and not to cure and relieve the effects of the work injury. On appeal, the Commission summarily affirmed.

PTD Liability Imposed on Second Injury Fund Despite Claimant's Post-Injury Return to Accommodated Employment for Three Years

In **Green vs. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 07-131505**, the claimant was a 57 year old phlebotomist at the time of her injury. In September 2007, she was injured at work and sustained injuries to her left knee, left ankle, and left foot as well as her right elbow. She underwent knee and ankle/foot surgery. Following the work injury, she did return to work for the same employer but was moved to less strenuous positions. She was accommodated and was allowed to sit as needed and placed in positions which required minimal physical exertion. She never resumed full duty or responsibilities. In April 2010, her employment was terminated due to inability to meet the physical requirements of her job, and

thereafter, she remained unemployed.

She did have preexisting conditions and injuries. In 2003, she developed a bulging disc in the low back and underwent steroid injections. The claimant had also been taking anti-depressants for a number of years prior to the work injury. He psychiatric expert, Dr. Schmidt, stated that she had long-standing personality disorder which typically develops in early adulthood. She also alleged that she had preexisting bilateral carpal tunnel syndrome although the records of Dr. Markway indicated that the doctor performed tests and found no evidence of carpal tunnel syndrome and there were no other notations in the prior medical records regarding hand or elbow problems. However, Dr. Koprivica, the claimant's expert, believed that based on the claimant's reports to him and her positive Phalen's test as noted in the prior records, that she did have preexisting bilateral carpal tunnel syndrome. The claimant's vocational expert believed that she was permanently and totally disabled due to a combination of her preexisting conditions and the work injury. (Please note it does not appear the Second Injury Fund had an expert, so the opinions of the claimant's experts were unopposed).

After settling her work injury for 26% disability of the body, the claimant proceeded to a hearing against the Fund. At a hearing, the ALJ found the claimant did have preexisting psychiatric disability and preexisting disability in her back but did not find Dr. Koprivica's opinion that the claimant had preexisting bilateral carpal tunnel syndrome persuasive. The ALJ found that the claimant was PTD as of the time of the hearing but stated that she failed to show that she was PTD through a combination of her work injury and preexisting conditions, noting she continued to work following the work injury. Therefore, the ALJ only imposed a load on the Fund.

On appeal, the Commission modified the Award and found that the Fund was liable for PTD benefits. The Commission basically stated that the claimant's expert's opinion that she was PTD due to the work injury and her preexisting conditions was not contradicted (again, the Fund did not have a report). Therefore, the Commission found no basis for rejecting those opinions and held that the claimant was PTD due to her preexisting conditions and work injury in combination.

Fund Liable for PTD Benefits Because Claimant's Testimony and Experts Found More Credible

In **Ponticello vs. D&D Distributors a/k/a Gray Eagle Distributors, Injury Nos. 10-054964 & 11-108606**, the claimant sustained a compensable injury to his right shoulder in 2010 and underwent surgery. He was released to full duty on December 13, 2010 by Dr. Burke, the authorized treating physician. He then attempted to return to work as a delivery driver, but due to persistent symptoms, took a lighter job as a forklift operator. In August 2011, the claimant was unloading beer when he slipped, grabbed a handrail and injured his left shoulder and elbow. He later underwent surgery for cubital tunnel syndrome as a result of the second injury. Dr. Volarich, the claimant's expert, assigned work restrictions referable to each of his two injuries. At the time of the hearing, the claimant was 60 years old. He left school in 7th grade and never obtained a GED. He also attended a special school as a child because he had learning difficulties.

The claimant was unable to perform math problems, and could not read a book or write a paragraph. Mr. England, the claimant's vocational expert, believed that he was not employable due to his physical problems and limited academic background. Ms. Kane-Thaler, the employer/insurer's vocational expert, believed the claimant was employable in a semi-skilled category and found multiple jobs that the claimant could obtain. At a hearing, the ALJ found that the claimant was not PTD but did impose a load on the Second Injury Fund.

On appeal, the Commission modified the Award and found that the claimant was PTD as a combination of his preexisting injuries and the last work injury. The Commission stated that there was a battle of the experts but they found the claimant's testimony regarding his complaints and limitations to be persuasive. They also found Mr. England's opinion more persuasive than Ms. Kane-Thaler's opinion because of the claimant's age, poor academic background, and lack of transferable skills.

Commission Retains Jurisdiction Over Issues Left Open in the Stipulations

State ex rel. ISP Minerals, Inc., v. The Labor and Industrial Relations Commission, Case No. SC94478 (Mo. S. Ct. 2015)

FACTS: The claimant sustained an injury at work and filed a claim. He later settled his claim with the employer/insurer. The stipulations stated the parties would "leave future related pulmonary med. care open" and further provided for "[a]uth med. care through Dr. Jos. Ojile..." Subsequent to the settlement, the employer refused to pay for inhalers prescribed by Dr. Ojile because the employer's physician determined those medications were not necessary. (The employer's physician is not specified).

The claimant then filed a request for hearing with the Commission to determine whether the employer was required to pay for the inhalers. The Commission entered an Order determining that it had jurisdiction to determine the employer's liability for future medical care. The employer then filed a writ asserting that the settlement agreement between the parties divested the Commission of jurisdiction over the issue of future medical care. Specifically, the employer cited several cases wherein the Missouri courts held that after the parties had settled their claims, the Commission no longer has jurisdiction over those claims.

HOLDING: The Supreme Court of Missouri reviewed the cases cited by the employer and noted that those cases were inapplicable. Essentially, the Court stated that in none of those cases did the parties leave future medical open and later attempt to litigate that issue. In a fairly short opinion, the Court stated that the Commission retains jurisdiction over the claim to the extent that the stipulations left the claim "open."

60 Day Rule Does Not Apply to Medical Fee Disputes

In **Phillips vs. Allied Systems, Ltd. d/b/a Georgia Allied, Medical Fee Dispute No. 13-00712**, Dr. Frevert, the authorized treating physician, sought reimbursement for medical expenses from

the employer and submitted an affidavit detailing the expenses. The employer objected to admission of the affidavit, stating that Dr. Frevert did not provide it to the employer at least 60 days prior to the hearing. The ALJ and Commission both admitted the affidavit over the objection. The Commission stated the requirement that the employer be provided a complete medical report at least 60 days prior to the hearing is inapplicable to proceedings to resolve medical fee disputes. The employer also objected to the affidavit on the grounds that no foundation had been laid to establish Dr. Frevert was qualified to give an opinion on the fairness and reasonableness of the medical charges. The Commission also disagreed with this argument noting that the doctor had been practicing for 24 years and believed his qualifications enabled him to opine as to the reasonableness and fairness of the charges. Therefore, the employer was ordered to reimburse Dr. Frevert for treatment rendered.

Claimant Failed to Meet Burden on Injuries Which Occurred After Her IME

In **Reynolds vs. Treasurer of Missouri as Custodian of Second Injury Fund, Injury Nos. 12-000434, 12-019268, 13-048443**, the claimant sustained work injuries in May 2008, October 2011, January 2012, March 2012, and July 2013. The claimant saw Dr. Volarich in May 2011 for an IME, at which time the doctor addressed the claimant's May 2008 injury to the left ankle but did not address the injuries that occurred in 2011, 2012, or 2013. The claimant settled all of his claims with the employer/insurer and then proceeded to a hearing against the Second Injury Fund for his January 2012, March 2012, and July 2013 claims. At the hearing, the ALJ basically found that the claimant failed to meet his burden of proof because he submitted no expert medical opinion regarding those injuries. On appeal, the Commission affirmed.

ALJ and Commission Can Disregard Wage Statement and Set Their Own Average Weekly Wage if They Believe that Would Be Fair and Just

In **Holmes v. City of Farmington, Injury No. 10-049057,** the claimant was a part-time firefighter who was injured when he was ejected from a firetruck. Prior to his injury, he occasionally filled in for full-time firefighters but part-time firefighters were not given scheduled hours so his work schedule varied. The claimant worked a total of 11 hours in the three months leading up to his work injury. At a hearing, the ALJ determined that the claimant was "actually employed" for less than two weeks and the wages of a similarly situated employee should be used. The ALJ then determined that the wages of a full time fireman should be used to determined the claimant's average weekly wage. The ALJ awarded TTD and PPD benefits.

On appeal, the Commission agreed with the ALJ's determination of the average weekly wage but disagreed with her reasoning. They noted that the claimant was clearly employed for two weeks prior to the work injury and therefore, the wages of a similarly situated employee should not be used. However, the Commission stated that Statute allows them broad discretion to set the claimant's average weekly wage if there are exceptional facts presented. The Commission stated if the claimant's actual wages were used in the 13 weeks leading up to his injury, his TTD rate would be at the statutory minimum of $40.00 per week. They believed this was an exceptional circumstance because $40.00 per week was not a fair and just amount and the claimant faced the

exact same risks faced by full-time firefighters. The Commission agreed that his average weekly wage should be that of a full-time firefighter and awarded $15,109.32 in unpaid TTD benefits.