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## **MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE**

**July 2020 – September 2020**

### **Fall Not Compensable Because Stairs Were Risk Source Claimant Equally Exposed to In Nonemployment Life**

#### **Marks v. Missouri Department of Corrections, Case No. WD 82956 (Mo. App. 2020)**

**FACTS:** The claimant worked as a corrections officer and on November 9, 2016 he was descending a staircase while conducting a security check when he missed a step and felt his right knee twist. He completed an Incident Report and noted that at the time of the injury he was not responding to a code or other emergency situation, was not distracted, was not carrying anything, there were no offenders in the area, there was nothing on the floor and there was nothing wrong with the steps. When asked what may have caused the injury the claimant answered that he stepped off the step wrong.

At a hearing the claimant testified that he was injured when he became distracted and looked back to check on a coworker who was helping the claimant conduct a security check. He testified he was concerned about the coworker's safety and the risk posed by offenders who might have remained in their cells after being released for a meal. He confirmed that he was required to ascend and descend stairs at the apartment complex where he lived.

The ALJ denied the claim. He did not find the claimant credible as his testimony was inconsistent with the statements he provided almost immediately after the accident. The ALJ found that the accident occurred when the claimant missed a step and did not arise out of and in the course of the employment. The claimant appealed and the Commission affirmed. The claimant appealed again.

**HOLDING:** The Court noted that in the past the courts have conducted a "risk source analysis" between an employee's work activities at the time of injury and the relative risk of injury in the employee's nonemployment life. The Court has applied a two-part test which first requires identification of risk source of the claimant's injury, that is, the activity that caused the injury and then a comparison of that risk source or activity to normal nonemployment life.

The claimant first argued that the Commission erred because it should have determined that the risk source of his injury was walking down the stairs while conducting the security check for criminal inmates in a correctional housing unit. However the Court noted that the claimant failed

to offer credible evidence that would support a conclusion that this activity increased a risk of injury beyond the risk the claimant was exposed to in his normal nonemployment life.

The claimant also argued that the Commission erred in finding that he was equally exposed to the risk source of descending stairs in his normal nonemployment life. He argued that the Commission improperly compared the risk source of his injury, walking down the stairs, to the risk of injury he faced in his normal nonemployment life because the quality, quantity and nature of the stairs as well as the observance required of the claimant in traversing those stairs was not equal to the risk he faced descending stairs in his normal nonemployment life. The Court did not agree and noted there was no credible evidence upon which the Court could rely to conclude that he faced an increased risk of injury descending stairs while at work.

The Court noted that while it was clear that the claimant was injured at work descending stairs during a security check that does not in and of itself establish that the claimant's injury occurred in the course of employment. The Court found that the Commission's determination that the claimant's injury resulted from a risk source to which he was equally exposed to in his nonemployment life was supported by sufficient, competent and substantial evidence and therefore confirmed the Commission's decision.

#### **CNA's Bilateral Carpal Tunnel Syndrome Compensable Despite Other Risk Factors**

#### **Hill v. Caring Hearts Inc and Guarantee Insurance Company and Liquidation c/o Missouri Insurance Guaranty Association, Injury No. 11-109031**

**FACTS:** The claimant was a certified nurse's aide and had worked for the employer since 2005 or 2006, with her last day of work being July 3, 2012. The claimant began working as a bath nurse and homemaker for the elderly and disabled and began experiencing problems with her hands during 2008. As her workload increased, requiring her to work, at times, 14-hour days, seven days a week, the claimant's hands became increasingly symptomatic and weak.

She treated with Dr. Dysarz, who diagnosed carpal tunnel syndrome March 29, 2011. Then on June 17, 2011, Dr. Dysarz diagnosed right cubital tunnel syndrome and recommended an EMG which revealed prolonged median nerve latencies at both wrists, consistent with bilateral carpal tunnel syndrome.

In May of 2013, the claimant was evaluated by Dr. Brown, who opined that her work-related activities were not the prevailing factor in causing her carpal tunnel syndrome. He attributed the cause of her carpal tunnel syndrome to other risk factors including a history of Ehlers-Danlos Syndrome, which is a condition in which connective tissues may be loose and more elastic than normal; being over the age of 50; and the possibility of rheumatoid arthritis. The employer then refused to authorize any further treatment.

The claimant, having no insurance coverage, was unable to work a bath nurse or a homemaker and struggled to obtain treatment for the injury. She ultimately obtained Social Security Disability with Medicaid coverage. She began treating with Dr. Osei, who performed surgery for

right carpal tunnel release and excision of a volar ganglion cyst on June 30, 2015. Dr. Osei performed a left carpal tunnel release on August 4, 2015.

The claimant was subsequently evaluated by Dr. Berkin, who opined that her job duties were the prevailing factor in causing the bilateral carpal tunnel and ganglion cyst to her right wrist.

The ALJ found that the claimant's job duties were the prevailing factor in causing the resulting medical condition and disability and the treatment that she underwent was related back to her job duties. He also awarded 148 weeks of TTD or \$118,260.28. He assessed 20% of the left hand, 25% of the right hand and a 5% load.

**HOLDING:** The Commission reviewed the evidence and considered the whole record and found that the Award of the ALJ was supported by competent substantial evidence and therefore, the Award and decision of the ALJ was affirmed.

### **Claimant Awarded Future Medical Treatment in Accordance with Expert Testimony**

#### **Fuwell v. Missouri Department of Corrections, Central Accident Reporting Office and Treasurer of the State of Missouri as Custodian of the Second Injury Fund, Injury No. 13-087198**

**FACTS:** On November 21, 2013, the claimant was performing his usual duties which included checking doors of the facility and while descending the stairs his boots, which were wet from walking outside, slipped out in front of him.

He was then referred by the employer to Dr. Taylor, who ordered an MRI and he was referred to Dr. Boutwell for pain management. The claimant also treated with Dr. Crabtree and Dr. Leonard who recommended conservative treatment. He then saw Dr. Robson, for an IME and he recommended surgery which he believed flowed from the work injury.

After a Hardship Hearing wherein the claimant was awarded treatment, he underwent that surgery and was placed at MMI with permanent restrictions. Dr. Volarich assessed 15% of the lumbar spine and 5% of the cervical spine. He also assessed pre-existing disability of 10% of the lumbar spine, 15% cervical spine, and 15% of the right knee. However he believed the claimant was perm total as a result of the last injury alone. He did recommend continuing medications.

Dr. Koprivica performed an IME at the request of the employer and he believed that the claimant was perm total as a result of the last injury along with his pre-existing conditions.

Mr. Eldred believed that the claimant was permanently and totally disabled as a result of the work injury. Mr. Hughes testified that the claimant was not permanently and totally disabled but if it was found that he was, it would be due to his pre-existing conditions in combination with his primary injury.

The ALJ concluded that Dr. Volarich and Mr. Eldred were credible and therefore found that the claimant was permanently and totally disabled and the employer/insurer were responsible for all

compensation and the Fund had no liability. The ALJ also found that the claimant was entitled to future medical treatment, as the authorized treating physician, Dr. Robson, and Dr. Volarich both identified the need for ongoing prescription medication and Dr. Volarich also identified other treatment such as a future need of the replacement of the orthopedic fixation. The employer then appealed.

**HOLDING:** The Commission found that the Award of the ALJ was supported by competent and substantial evidence and therefore, the Commission affirmed the Award and decision of the ALJ.

### **Dependents Denied Benefits as No Evidence in Award Showing Dependency of Wife or Children On Date of Injury**

#### **Lawrence, II (Deceased), Lawrence, Lawrence and Lawrence v. Treasurer of the State of Missouri, Custodian of the Second Injury Fund, Case No. WD83123 (Mo. App. 2020)**

**FACTS:** The claimant filed a Claim for work-related injuries on May 11, 2005. He settled his claim with his employer and then went to a hearing against the Fund and the ALJ denied benefits. The Commission affirmed but the Court of Appeals reversed and awarded PTD benefits. On March 11, 2019, the claimant passed away from causes unrelated to his work-related injury. On May 16, 2019, the claimant's wife and children filed a Suggestion of Death and Motion to Substitute Parties with the Commission claiming that each were dependents of the claimant at the time of his work-related injury and, upon his death, were entitled to his PTD benefits. The Commission denied the Motion to Substitute, finding that the claimant's wife and children's status as dependents at the time of the claimant's injury had not been established in the Final Award.

**HOLDING:** The claimant's wife and children then appealed. The Court noted that the sole issue was whether the dependent status of the claimant's wife and/or children at the time of the 2005 injury was established as a matter of law in the Final Award. The Court noted that the ALJ issued a forty-nine page award on November 20, 2013 and the only references to the claimant's wife or children could be found in a two-page section addressing the claimant's current activities. The Final Award noted that the claimant's wife performed house cleaning activities and that he would drive his daughters to school. The Final Award never identified the wife or daughters by name. The Court noted that at most, the Final Award established that at the time of the hearing before the ALJ in 2013, the claimant lived with his wife and two daughters. These findings in no manner establish "as a matter of law" that any of these individuals were dependents of the claimant at the relevant time, the claimant's date of injury. Therefore, the Court denied the claimant's wife and children's Motion to Substitute and were denied benefits.

### **The Claimant Failed to Prove his Pre-Existing Disabilities Combined with His Work Injury Rendering Him PTD**

#### **Bennett v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. ED108713 (Mo. App. 2020)**

**FACTS:** The claimant filed two claims against his employer, one relating to an injury that occurred on August 14, 2013 with respect to his right knee and the other relating to an injury to his left hand and ribs, which occurred on March 24, 2014. He did have a prior right shoulder injury in 1999 when he resolved for 25% disability. He settled both of his claims against the employer and proceeded to a hearing against the SIF for perm total benefits.

Following a hearing, the ALJ denied both claims against the Fund. The claimant appealed and the Commission affirmed the decision of the ALJ. The claimant again appealed.

**HOLDING:** The claimant argued that the Commission erred in denying him PTD benefits from the Fund because his injuries from his March 2014 incident, combined with his pre-existing injuries, made the claimant unable to compete in the open labor market. He furthered argued that the Commission's decision was against the weight of the evidence and/or not supported by sufficient competent evidence. The Court disagreed noting that there was no evidence that the claimant's primary March 2014 work injury, combined with his 1999 right shoulder injury alone, resulting in PTD. The Court noted that the claimant's experts wrongly included pre-existing conditions that did not qualify for Fund liability under §287.220.3.

The claimant also argued that the Commission erred in denying his PPD benefits from the Fund, because his August 14, 2013 injury combined with his pre-existing injuries, resulted in a disability greater than the sum of their individual parts, but the Court again disagreed. The Court noted that Dr. Berkin, the claimant's medical expert, never addressed how the work injury which occurred in August of 2013, specifically combined with his prior disabilities. Therefore, the Court affirmed the decision of the Commission.

**Fund Found Responsible for PTD Benefits Due to No Medical Expert Testifying that Claimant PTD Due to Last Injury Alone**

**City of Jennings and Missouri Employers Mutual Insurance Company v. Williams, and Treasurer of the State of Missouri, Second Injury Fund, Case No. ED108393 (Mo. App. 2020)**

**FACTS:** On September 7, 2010, the claimant was physically attacked by an inmate. She sustained physical injuries and also was treated for insomnia, anxiety, depression and anger as a result of the work injury. The claimant did have an extensive history of psychiatric issues, including witnessing her father abuse her mother and being raped by a family member as a young teenager. She had attempted suicide one time as a teenager. Further, in 2007 and 2008, she took a year leave of absence from the employer following a stress-induced mild stroke, stemming from a series of personality conflicts with various supervisors. The claimant agreed on cross-examination that she had experienced panic and anxiety attacks weekly since her teenage years through the work injury, which she had been able to deal with her on her own. She also agreed that she had experienced episodes of untreated depression since she was a teenager through 2007, for which she would have to call in sick to work, and that she had been unable to work due to depression for two weeks prior to her stress-induced stroke in 2007. Although she was receiving treatment for depression and anxiety between 2007 and 2010, she was able to complete tasks and leave the house alone. In the years leading up to 2010, she was on full duty

with no restrictions. After the work injury, she had difficulty completing tasks, became nervous and fearful about leaving the house, especially alone, and was constantly checking to make sure doors and windows were locked.

The claimant submitted a report of Dr. Brockman, who opined that the claimant was PTD as a result of her work injury and her pre-existing psychiatric conditions. Dr. Bassett, testified on behalf of the employer and he believed the claimant had 40% psychiatric permanent partial disability, 75% of which was attributed to the work injury, and 25% of which was attributed to the pre-existing psychopathology.

The ALJ determined the claimant's work injury resulted in her pathologies of PTSD and panic disorder with Agoraphobia, which taken in isolation rendered the claimant PTD. The ALJ acknowledged the claimant's pre-existing psychiatric conditions but found she had been able to maintain work and conduct normal life activities before the work injury and therefore the employer was liable for benefits. The employer then appealed, and the Commission affirmed the Award and decision of the ALJ. The employer again appealed.

**HOLDING:** The Court found that the Commission's conclusion that her PTD was entirely caused by the work injury was not supported by sufficient competent evidence. The Court noted that while the claimant's work injury was indeed horrific, no medical expert testified that the work injury was the sole cause of the claimant's PTD and the Commission gave no explanation for rejecting the undisputed medical evidence. Therefore, the Court found that the Fund was liable for a portion of the claimant's PTD and reversed and remanded to the Commission.

**Fund Liable for PTD Benefits as All Pre-existing Disabilities Can be Considered as Claimant Had One Pre-existing Disability Which Met Fund Liability under §287.220.3**

**Treasurer of the State of Missouri as Custodian of the Second Injury Fund v. Parker, Case No. WD83030 (Mo. App. 2020)**

**FACTS:** On March 8, 2014 the claimant sustained an injury to his right elbow. On June 18, 2014, the claimant filed another claim for an injury to his neck due to his repetitive job duties of heavy lifting and looking up on a repetitive basis to trim trees. He then had surgery for his right elbow on August 13, 2014 and thereafter was released to return to work without permanent restrictions on March 26, 2015. However he never returned to work full duty thereafter. He then underwent a cervical fusion on September 3, 2015 which he related back to his job duties and the June 18, 2014 claim. The claimant also had other pre-existing disabilities and injuries leading up to the 2014 claims.

Dr. Stuckmeyer assessed 30% disability to the shoulder and 35% of the neck due to the work injuries. He reviewed Mr. Dreiling's vocational report and believed that the claimant was PTD as a result of the last injury alone. However, then he issued a subsequent report after reviewing additional information and believed that the claimant was permanent and total disability based on his pre-existing lumbar spine and knee conditions, his March 2014 upper extremity injury and the June 2014 neck injury.

The claimant settled his March 2014 and June 2014 injuries with the employer and proceeded to a hearing against the Fund for perm total benefits. The claimant's attorney submitted the report of Dr. Stuckmeyer pursuant to §287.210 as well as the medical records the doctor reviewed. The Fund did not object to the admission of the reports of Dr. Stuckmeyer at the hearing but objected to the medical records attached to the report arguing that they did not include the proper medical records affidavits. The Fund argued that §287.210.7 applies only to the admission of medical reports and does not make the accompanying medical records admissible for evidentiary purposes. The ALJ overruled the Fund's objection and admitted the exhibits and found the claimant was perm total and the Fund was responsible for benefits based on §287.220.2. The Fund appealed and the Commission affirmed. The Fund again appealed.

**HOLDING:** The Fund argued that it was incorrect to rely on §287.220.2 to determine Fund liability as it should have been based on §287.220.3 as the claimant's primary injury was after January 1, 2014. The Court agreed. The Fund then argued that the claimant failed to meet his burden under §287.220.3 and therefore the case should be remanded back to the Commission. However the Court disagreed as they felt they had enough information to make a ruling.

The Court noted that the Commission found that the claimant did have a pre-existing condition which met Fund liability as he received a settlement of 25% of the shoulder which met the 50 week threshold and it was a direct result of work-related injury. Also the claimant sustained a subsequent compensable work injury, the neck injury. The Fund argued that the experts looked at the claimant's prior lumbar spine and knee injuries when deciding that the claimant was PTD and since they did not meet the threshold for Fund liability they could not be included in determining whether the claimant was PTD.

The Court did not agree and concluded that as long as a claimant has a pre-existing disability that satisfies one of the thresholds in subsection 3 and the claimant has a qualifying subsequent primary injury than the Commission may consider less serious pre-existing injuries and disabilities as well as other characteristics of the individual in determining whether an employee is PTD. Therefore the Court concluded that since the claimant's prior shoulder injury met the threshold for Fund liability his other pre-existing conditions could be considered, in this instance the claimant's prior lumbar and knee injuries.

Finally with respect to the Fund's argument that the medical records and reports attached to the medical report of Dr. Stuckmeyer should not be admissible, the Court did not agree and believed the Dr. Stuckmeyer's complete medical report was admissible.

*[Editor's note: This matter has been transferred to the Supreme Court.]*

**Claimant Failed to Prove His One Qualifying Prior Disability and Work Injury Combined to Make Him PTD and Therefore Benefits From Fund Denied**

**Hammons v. Treasurer of State of Missouri as Custodian of the Second Injury Fund, Injury No. 16-074722**

**FACTS:** On September 7, 2016, the claimant sustained an injury to his back and underwent a left L4 hemi-laminectomy with decompression of the L4-5 and resection of the synovial cyst on March 9, 2017. He never returned to work after work injury.

He did have serious pre-existing conditions. He had a prior work-related injury to his left foot which he settled for 12.5%. He also suffered a work-related meniscus tear of his right knee in 2014. He settled that case based on 5% impairment under Kansas law. He also suffered a work-related injury to his low back resulting in an L5-S1 discectomy. He was released from care with permanent restrictions.

He also suffered numerous injuries due to a non-work-related motor vehicle accident in 2010. These injuries included fractures to his ribs, scapula, as well as fractures of the T1, T6 and C5 levels of his spine. He also suffered a pneumothorax due to this accident.

The ALJ found that the claimant was PTD, however found that the Fund did not have liability as the claimant's PTD was not a result of qualifying pre-existing injuries combined with the primary injury. The ALJ found that the only qualifying pre-existing condition under §287.220.3(2) was the claimant's prior low back injury as he received a settlement of 20.5% of the body as the other injuries did not meet the 50 week threshold. Also there was no testimony that the claimant was PTD as a result of the work injury and only this pre-existing condition as the experts believed that he was permanently and totally disabled based on all of his pre-existing conditions. The claimant appealed.

**HOLDING:** The Commission affirmed the Award of the ALJ, denying compensation. The Commission noted that strict construction of §287.220.3(2) required the claimant to prove that he was PTD due to a combination of one qualifying pre-existing disability and a subsequent compensable work-related injury. The Court noted there was no evidence in the record that suggested that the claimant was PTD as a result of the combination of the primary injury with his sole qualifying pre-existing disability that related to the lumbar spine. Therefore, the Court affirmed and adopted the Award of the ALJ.

### **Claim Against Fund Denied as PTD Arose Solely From Work Injury**

#### **Howard v. Treasurer of State of Missouri as Custodian of the Second Injury Fund, Injury No. 15-049121**

**FACTS:** On June 28, 2015, the claimant, a mortgage loan officer, went to his car to retrieve some files and while he was returning from the parking garage, a concrete slab fell from the ceiling and he was struck on the head. He developed constant headaches, dizziness and nausea, along with neck pain, returned to work for 4 days but stopped working due to difficulty reading and looking at the computer screen. He never returned to work thereafter.

Dr. Volarich assessed 40% disability to the body as a result of the work injury and the following pre-existing disabilities: 15% of each hand due to prior carpal tunnel; 15% of each elbow due to cubital tunnel and 15% of each foot due to tarsal tunnel syndrome. Dr. Bassett assessed 50%

disability due to his psychiatric conditions, 10% due to pre-existing conditions and 40% due to the work injury.

The claimant settled with the employer and pursued perm total benefits against the Fund. The ALJ denied benefits based on the fact that the claimant was permanently and totally disabled as a result of the last injury alone. He did note that the psychiatric experts did agree that the claimant had pre-existing psychiatric issues but the claimant failed to show how these issues affected his psychiatric issues after the work injury. The claimant then appealed.

**HOLDING:** The Commission noted that Dr. Volarich, the claimant's expert, issued physical restrictions that were attributable solely to the 2015 work injury. The Commission further noted that the vocational expert, Mr. Timothy Lalk, opined that Dr. Volarich's specific restriction involving the claimant's need for constant supervision in any attempt to perform any kind of work activities would by itself, render the claimant unemployable in the open job market. Based on this evidence, the Commission found as a factual matter that the claimant's current condition was solely attributable to his June 28, 2015 work injury and that the Fund was not liable for the claimant's alleged PTD. Therefore, the Commission affirmed and adopted the Award of the ALJ.

### **Employer Responsible for PTD Benefits After Right Shoulder Injury Despite Claimant's Pre-existing Condition**

#### **Shield v. Lowes Center, Inc. and Treasurer of the State of Missouri as Custodian of the Second Injury Fund, Injury No. 15-0101348**

**FACTS:** The claimant, a 72-year-old employee injured his right shoulder and underwent a mini open rotator cuff repair, biceps tendinosis, arthroscopic decompression and excision of lipoma from the anterior lateral shoulder. He returned to work after his surgery, but could no longer work in the paint department and ended up working as a greeter but found that his right hand would swell after about an hour of working at the door. He retired on January 18, 2017 "mostly" because of his right shoulder.

At a hearing, an ALJ found the claimant PTD solely due to his December 23, 2015 primary injury. The ALJ noted that Delores Gonzalez opined that the work injury was solely responsible for his lack of access to gainful employment. The Judge further noted that June Blaine initially opined that the claimant was perm total as a result of the work injury in combination with her pre-existing conditions. However, she testified that Dr. Volarich's restrictions of use of the claimant's right upper extremity for activities of daily living only would render the claimant unemployable. The employer then appealed.

**HOLDING:** The Commission noted that the ALJ based her Award on competent and substantial evidence of the record and therefore, in light of the Commission's deference to the ALJ weighing of the pivotal issue of medical causation, the Commission did not need to undertake an analysis of whether the claimant's evidence in this case was sufficient to meet the criteria for PTD against the Fund. The Commission noted that an employer is liable for PTD that is solely attributable to the claimant's compensable injury. Therefore, the Court affirmed and adopted the Award of the ALJ.

## **Due to Chronic Pain and Physical Impairment Claimant Found PTD as Result of Work Injury**

### **Gilman v. Missouri American Water Company, Travelers Indemnity Company of America and Treasurer of Missouri as Custodian of the Second Injury Fund, Injury No. 11-020246**

**FACTS:** In 1983, the claimant began working for the employer as a laborer digging ditches by hand and with a backhoe. He subsequently was promoted to construction foreman. On March 16, 2011, he was assisting in the repair of a broken water line when he inadvertently stepped into a deep hole with his right leg, jarring his back and wrenching his left leg behind him.

The claimant treated with Dr. Woodward, who believed that the work injury had caused lumbar radicular symptoms but noted that the claimant had multi-level pre-existing degenerative disc disease. He then saw Dr. Mace, who ordered a lumbar myelogram which showed an annular fissure and disc bulging at L4-5. Dr. Mace recommended no surgical intervention and returned the claimant to Dr. Woodward's care. Dr. Woodward issued a final impairment rating on November 8, 2011, assigning 5% disability for the work-related condition and 5% for the pre-existing lumbar degenerative disc disease.

The claimant then treated on his own with multiple physicians, who all recommended against surgery. On February 29, 2012, Dr. Stephens wrote that the claimant was indefinitely unable to work. He thereafter continued to treat the claimant up to the date of the hearing with a significant amount of narcotics, as well as medication for high blood pressure, memory issues, sleep disturbance, blood clots, depression and restless leg syndrome.

After the work injury, the claimant performed light duty work for a few months until July 1, 2011, when he was terminated as the employer could no longer accommodate his restrictions. The claimant had not worked since.

The ALJ noted that after the work injury, the claimant returned on light duty but was released due to being unable to perform his regular job duties and at the time, the claimant had been employed by the employer for nearly 30 years. The ALJ also noted that the claimant continued to have chronic pain and physical impairment from the work injury. Therefore, the ALJ concluded that the claimant was permanently and totally disabled as a result of the work injury and therefore, the employer/insurer was liable for PTD benefits and determined that all issues relating to the Second Injury Fund were moot. The ALJ also found that the claimant was entitled to future medical care consistent with the opinion of Dr. Koprivica, who opined that it was reasonably probable that the claimant would have ongoing future medical needs including pain management, which the ALJ found credible. The employer then appealed.

**HOLDING:** The Commission found that the Award of the ALJ was supported by competent substantial evidence and affirmed the award of the ALJ.

### **Claimant's Work as Hairdresser Prevailing Factor in Causing Mesothelioma**

**Hayden, Surviving Spouse of Marc Haden (Deceased) v. Cut-Zaven LTD and Papillon LTD, Case No. ED108695 (Mo. App. 2020)**

**FACTS:** The employee worked as a hairdresser for 47 years. He worked at multiple salons. He alleged that he used hand-held hair dryers which he believed contained asbestos. He could not remember the specific hairdryers he had used over the years. There is documentation that there were certain hairdryers that contained asbestos and most of those were discontinued as of 1979. He was diagnosed with mesothelioma on June 26, 2014 and died on April 26, 2016.

The claimant's attorney obtained a report of Dr. Hyers who concluded that the employee's mesothelioma was related back to his use of asbestos-containing hairdryers.

Cut-Zaven obtained a report of Dr. Barkman who did note the employee was diagnosed with mesothelioma but there was no comment regarding whether the disease was asbestos related. He did not believe that the employee's employment as a hairdresser was the prevailing factor in the development of his mesothelioma. He also noted that the employee's hairdryers could have been asbestos free because only certain versions and serial numbers of the hairdryers contain asbestos.

The ALJ concluded that the employee did not meet his burden of proof regarding medical causation. The judge noted that the employee could not specifically recall the types of hairdryers he used. She also noted that Dr. Hyers' conclusion that the employee's condition was work-related was simply based on the employee's deposition testimony. She found Dr. Barkman's opinion more credible. She went on to note that the employee simply presented a version of events he believes could have happened. The employee could have owned the specific serial numbers and models containing asbestos and it is also possible that he could have used one of the serial numbers that did not contain asbestos. She noted that what "could" have happened is not competent and substantial evidence of what did happen. There was no testimony confirming the employee was ever exposed to any of the specific models of asbestos-containing hairdryers during any particular time with any of the named employers. She noted that the employee's testimony lacked specificity required to prove his claim, and therefore the claim was denied. The claimant appealed.

The Commission affirmed with a supplemental opinion. The Commission noted that the ALJ denied the claim based on a finding that the opinion of Dr. Barkman was more persuasive than that of Dr. Hyers and they were not inclined to reverse the determination to deny the claim on the issue of medical causation. However, they provided a supplemental opinion with respect to the proper burden of proof in occupational disease claims. The Commission noted the case law states that the claimant is not required to present evidence of specific exposure to an occupational disease in the workplace but rather is required to submit medical evidence establishing a probability that working conditions caused the disease. The Commission noted that despite the ALJ's comments regarding specificity, they were confident that she properly understood the relevant factual and legal issues in the claim and agreed that the testimony of Dr. Barkman was more credible, and therefore affirmed the decision of the ALJ. The claimant appealed.

**HOLDING:** The claimant argued that the Commission acted without or in excess of its powers because it failed to conduct its medical causation analysis under the correct standard by adopting

Dr. Barkman's opinion that the claimant's employment was the prevailing factor in causing his mesothelioma. The Court agreed noting that Dr. Barkman based his opinion on the fact that there were no studies out there definitively showing that all mesotheliomas associated with hairdressing are associated with asbestos exposure. The Court noted that the claimant does not have to prove by a medical certainty that his or her injury was caused by an occupational disease but only that there was a probability that the working conditions caused the disease.

The claimant also argued that the Commission's determination that the claimant's employment as a hairdresser was not the prevailing factor causing his mesothelioma was not supported by sufficient and competent evidence and the Court agreed. The Court noted that Dr. Barkman's own testimony supports the conclusion that in all probability the primary factor causing the mesothelioma was the claimant's employment-based exposure as opposed to other factors, as Dr. Barkman testified that the claimant was exposed to airborne asbestos through his employment and hairdryers admitted asbestos particles. Also, the doctor testified that even brief or low-level occupational exposure can cause mesothelioma.

The claimant also argued that the Commission's determination that the claimant's date of injury was November 2013 which is when he initially had chest discomfort was not supported by sufficient competent evidence. The Court noted that the moment it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure is the date of injury in an occupational disease claim. The Court noted that in this case the claimant was not diagnosed with mesothelioma until June 26, 2014 and therefore that was the proper date of injury.

The Court concluded that the claimant's employment as a hairdresser was the prevailing factor in causing his mesothelioma and the correct date of injury was June 26, 2014. The Commission's Award was reversed and remanded to the Commission.