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MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

July 2021 – September 2021

Claimant Denied PPD For Compensable Injury as Claimant Not Credible, Testifying Inconsistently with Testimony of Treating Physicians

Sulier v. SSM Health Care Corporation, Injury No. 13-064888

The claimant testified that on September 1, 2013 she was helping a patient to a bedside commode when the patient felt like she was losing her balance and grabbed the claimant's right forearm. She said this happened twice during her shift. The claimant began treating with Dr. Razzaque who diagnosed right elbow lateral epicondylitis and referred the claimant to an orthopedic surgeon/physiatrist. The doctor noted that her condition was work-related and that the September 1, 2013 incident was the prevailing factor. She then treated with Dr. Bender who concluded the same and provided an epicondyle injection. On October 23, 2013 the doctor opined that the epicondylitis had resolved and placed the claimant at MMI.

The claimant subsequently injured her upper extremities including her left hand when she was grabbed by a combative patient on January 4, 2014. She returned to Dr. Bender who again diagnosed right lateral epicondylitis and opined that this was a new injury after the claimant reported she was fine until she had to physically hold down a patient and felt pain in her elbow. She once again underwent an injection and then was released from care on March 12, 2014. She followed up with Dr. Bender on August 5, 2014 at which time she underwent a third injection.

She was then seen by Dr. Strecker who performed a right lateral epicondylectomy on October 24, 2014. Dr. Strecker's notes indicated that the claimant had her right arm grabbed twice by a patient on January 4, 2014. She followed up with Dr. Strecker complaining of pain when swinging her right hand and wrist and that it occurred since her elbow surgery. The doctor was unable to relate these complaints to her original injury and released her from care on January 13, 2015. The doctor opined that she had a 6% permanent partial disability of the right elbow attributable to the alleged injury of January 4, 2014.

The claimant filed a Claim for Compensation alleging that on October 1, 2014 she sustained an injury to her right elbow when she was moving a patient off a toilet. The claimant then filed an Amended Claim for Compensation amending the date of injury to September 1, 2013.

On direct-examination, the claimant denied any accident occurred on January 4, 2014 and said that she had been having a continuation of elbow pain that dated back to September 1, 2013. She denied the accuracy of Dr. Strecker's and Dr. Bender's notes showing an accident occurred in January of 2014 and insisted she did not have a new injury.

Dr. Strecker testified that the claimant reported an injury on January 4, 2014 when she was attempting to assist a patient and her right arm was grabbed twice. He did not directly relate her subsequent right hand swelling and stiffness to her work injury and rated her as having 6% PPD of her right elbow attributable to the January 4, 2014 incident.

Dr. Woiteshek testified that he examined the claimant on November 12, 2016 and she provided a consistent history of the injury at work to her right elbow on September 1, 2013. However, there was no history provided concerning any other injuries to her right elbow after September 1, 2013. He diagnosed traumatic lateral epicondylitis of the right elbow medically related to the claimant's September 1, 2013 work injury and rated her as having 35% PPD of the right elbow all as a result of that date of injury.

The ALJ concluded that the claimant met her burden of proving she sustained an accident on September 1, 2013. The ALJ found that the claimant sustained a second right elbow injury while at work on January 4, 2014. The ALJ also found that the claimant was confused about the time lines of events and onset of her complaints along with histories provided to physicians and therefore the claimant could not be relied on in her testimony regarding the nature of her complaints and problems. The ALJ further found that the claimant failed to meet her burden of proof to present competent, credible and persuasive medical evidence to show that the right elbow diagnosis and disability was medically causally related to the September 1, 2013 accident. The ALJ did not find the opinions and testimony offered by Dr. Woiteshek competent, credible or reliable. He did find that the claimant sustained an accident as a result of the September 1, 2013 date of injury. However, he did not believe that the claimant had any continuing disability as a result of the same and therefore did not award any compensation. Accordingly, the claimant's September 1, 2013 right elbow claim was denied. The Commission affirmed the Award and decision of the ALJ.

Experts Who Reviewed Surveillance Found More Persuasive than Experts Who Relied on Subjective Evidence

Stratton v. R&L Carriers, Injury No. 15-079592

On October 16, 2015, claimant was involved in the delivery of freight at a local business when he slipped off the back of his truck and landed on his left foot. X-rays of the left foot revealed a mildly displaced fracture of the left calcaneus. He was seen by Dr. Bowling who recommended a bone stimulator. He then underwent an EMG report which was negative and was placed at MMI. He was then seen by Dr. Stuckmeyer for an IME and the doctor recommended he undergo a subtalar fusion. The employer's doctor, Dr. Bowling agreed that this could be beneficial but would not agree to perform it unless the claimant quit smoking which he has never done. Dr. Bowling referred the claimant to Dr. Horton, who agreed that the claimant should discontinue

smoking prior to undergoing a subtalar fusion. Dr. Horton then ordered a CT scan which showed that the fracture had healed and he did not recommend surgery.

The employer obtained surveillance of the claimant walking without difficulty, carrying groceries and using his foot to push himself into his truck without any difficulty. The employer obtained reports of Dr. Zarr and Dr. Patel who did provide the claimant restrictions and permanency but believed the claimant could work.

Dr. Stuckmeyer provided an addendum report but did not appear to have reviewed the surveillance footage provided to Dr. Patel and Dr. Zarr. At that examination, the claimant indicated a complete inability to walk on uneven ground and that he required the use of a cane to ambulate. The claimant was evaluated by Ms. Sprecker, a vocational expert who opined that the claimant retained the ability to return to the labor market. Mr. Cordray, a vocational expert retained by the claimant testified that he barely looked at the surveillance despite being specifically requested to review it and opined that the claimant was unemployable in the labor market on the basis of restrictions given by Dr. Stuckmeyer.

The ALJ found that the opinions of Dr. Patel and Dr. Zarr were more persuasive on the question of work restrictions as they reviewed the surveillance footage whereas Dr. Stuckmeyer relied on subjective evidence. The ALJ noted that the claimant testified he was incapable of bearing weight on his foot which was contrary to the surveillance. He also found that the claimant's testimony was inconsistent with medical opinions and objective findings many times. The ALJ also noted that the surveillance was an important part of the case and was never reviewed by Dr. Stuckmeyer or Mr. Cordray. The ALJ found that the claimant was capable of light duty work and that the claimant suffered a 22.5% permanent partial disability to his foot. The ALJ found that the evidence did not support a finding that the claimant was entitled to future medical care. The request for future medical care was therefore denied.

The Commission affirmed the Award of the ALJ.

Pre-existing Work Injury Involving Three Different Body Parts Which Settled for 43% or 172 Weeks Qualifies for Fund Liability as Each Body Part Would Meet 50 Week Threshold

Cantrell v. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 18-019636

The claimant sustained injury on March 16, 2018, to his right upper extremity. The treating physician released the claimant to return to work full duty on November 19, 2018. The claimant also sustained a psychological injury as a result of the primary injury. The claimant had a prior work-related right elbow injury for which he settled for 26.25 weeks, a 1998 injury to the left elbow for which he settled for 31.5 weeks, a low back and right shoulder injury in 1999, which he settled for 43% disability to the body referable to the right shoulder and low back or 172 weeks, a 2009 injury involving the right knee which he settled for 24% of the knee or 38.4 weeks and he also had preexisting psychological conditions. The ALJ found the claimant PTD and liable for benefits.

The Fund appealed and argued that none of the claimant's preexisting conditions qualified. The claimant argued that his 1999 low back and shoulder injuries for which he settled with the employer for 43% disability, constitute qualify preexisting disabilities. The Fund argued that this would not qualify because it involves three distinct body parts. The Commission noted that even if one divided the PPD three ways, each of the three body parts would have at least 50 weeks PPD and therefore, the Commission found that it did qualify. However, the Commission goes on to note that because none of the experts in the case opined that the employee was permanently and totally disabled due to the primary injury solely in combination with the disability from the 1999 injury, the Second Injury Fund is not liable for the claimant's perm total benefits as the other pre-existing conditions did not meet the threshold.

Fund Liable for Benefits as Primary Injury Combined With Three Qualifying Pre-existing Conditions to Render Claimant PTD

Wilson v. Treasurer of the State of Missouri-Custodian of the Second Injury Fund, Case No. WD84420 (Mo. App. 2021)

FACTS: On November 8, 2017, the claimant sustained an injury to his foot which required an open reduction and internal fixation. He was released from care and settled his claim against the employer for 42.5% of the right ankle. The claimant had various prior right knee surgeries, left knee, surgeries and cardiovascular issues. Dr. Volarich testified on the claimant's behalf and opined that the claimant was permanently and totally disabled as a result of the work injury and his preexisting disabilities, including the right knee, left knee and cardiovascular condition. An ALJ denied the claimant's claim for perm total benefits against the Fund as the claimant failed to sustain his burden of proof that perm total was the result of his primary injury in combination with a single preexisting disability at the 50-week threshold. The claimant appealed and the Commission affirmed and the claimant again appealed.

HOLDING: The Court of Appeals reversed the decision of the Commission noting that pursuant to *Parker*, all preexisting disabilities that qualify under one of the four eligibility criteria for Fund liability should be included when looking at perm total disability. Since the ALJ found Dr. Volarich's testimony credible in that the claimant sustained a primary injury to his foot and had a preexisting work-related right knee condition, which amounted to 56 weeks and a work-related left knee injury which resulted in 88 weeks of disability along with a cardiovascular condition, which was 35% of the body or 140 weeks and that condition aggravated and accelerated his right foot injury the Fund was liable for benefits.

When Looking at Qualifying Pre-existing Disabilities, Filing a Claim and Receiving PPD is Just One Factor to Look at When Determining Fund Liability

Phelps v. Missouri State Treasurer as Custodian of the Second Injury Fund, Case No. SD36998 (Mo. App. 2021)

FACTS: The claimant sustained a compensable work-related injury to his left shoulder on April 14, 2016. The claimant settled his claim with his employer. The claimant argued before the ALJ and the Commission that the Fund was liable for PTD benefits because his pulmonary

system/lungs along with his right knee and low back were each a qualifying preexisting disability that when combined with his primary injury resulted in his PTD.

With respect to his pulmonary system/lungs the ALJ found that he was diagnosed with asthma as a child for which Dr. Volarich assessed 30% disability to the pulmonary system. He did not file any claims for workers' compensation or any Reports of Injury with the Division. It also found he suffered a chemical exposure for which he filed a Report of Injury with the Division. He testified he was diagnosed with a chemical burn in his lungs which for which he did not receive a workers' compensation settlement. The ALJ found that the claimant did not meet his burden of proof that work was a substantial factor in causing his condition and that his chemical exposures resulted in compensable injuries. With respect to his right knee the ALJ found this was a non-work-related injury that resulted in a preexisting disability of 15% of his right knee (24 weeks) which did not satisfy the requirements of Section 287. With respect to his low back the ALJ found that he was injured in 2007 for which he underwent therapy and injections. He reinjured his back in 2015 and once again underwent therapy and injections. The ALJ found that the claimant did not meet his burden that the 2007 injury was a compensable injury as no expert addressed causation. The ALJ also found he had 11.4% preexisting disability from the 2015 injury referable to the lumbar spine which did not qualify under Section 287.

The ALJ found that there was an absence of any qualifying preexisting disability satisfying the first condition of Section 287 and therefore entered an Award denying PTD benefits.

The Commission issued a supplement opinion noting that the claimant also failed to demonstrate a single qualifying preexisting disability exclusive of any other preexisting disabilities that combined with disability from his primary injury to result in PTD. The claimant appealed.

HOLDING: The claimant argued that the Commission erred in that they increased the claimant's burden of proof by requiring a preexisting compensable injury to be one in which the claimant filed a Claim and received an Award of PPD. The Court noted that the claimant was incorrect as the Commission considered and weighed along with other evidence whether the claimant had filed a Claim or Received an Award, which was relevant though not necessarily conclusive, and so nothing in the Commission's findings or the record supported the argument that the Commission imposed a heightened requirement upon the claimant. His point was therefore denied.

The claimant also argued that the Commission erred by misinterpreting and misapplying Section 287.220.3 which he argued required determining the total weeks of permanent partial disability for each body part/affected area rather than separating recurrent injuries to the same body part/area by their particular injury and reinjury dates. The Court disagreed as this was contrary to the qualifying preexisting disability analysis recently announced by the Supreme Court in *Parker* which the Court found the Commission followed and therefore concluded they were not in error.

The claimant also argued that the Commission erred in finding that the claimant's primary injury to his left shoulder was not an injury to the opposite extremity of his right knee. The Court was not persuaded noting that an opposite extremity does not apply for a right leg and left arm, and

therefore the Commission did not err. The Commission's Award denying PTD benefits was affirmed.

Consideration of Multiple Qualifying Preexisting Disabilities Allowed in Determining PTD

Comer f/k/a Colvin v. Central Programs, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 16-085212

On November 1, 2016 the claimant sustained an injury to her low back. Dr. Bamber performed a kyphoplasty on the claimant's thoracic spine. With respect to her preexisting disabilities, she was in a prior motor vehicle accident in 1987 where she shattered the ball of her left hip. She also sustained an injury in 2006 involved a compression fracture for her thoracic spine at the T8 level for which she underwent a vertebroplasty. She sustained another thoracic vertebral fracture in 2011, this time at the T6 level. After the 2016 injury the employer hired an investigator who observed the claimant as she walked, smoked, ate, conversed, carried a plate of food, drove and stepped up and down to enter and exit a truck. He did not observe her having any difficulty getting into or out of her vehicle or walking, though he noted her gait appeared to be somewhat guarded.

The claimant presented a report by Dr. Koprivica who assessed 15% PPD of the body for the various thoracic spine fractures prior to the work injury and 25% PPD of the left hip from the 1987 motorcycle accident. The doctor suggested the claimant was PTD due to a combination of her November 2016 injury and her preexisting conditions. The employer submitted a report of Dr. Bailey who assessed 10% PPD of the body as a result of the November 2016 accident and that she had a variety of preexisting conditions. Dr. Bailey did not opine that she was totally disabled. Mr. Dreiling testified she was PTD a result of the combination of the November 2016 injury and her preexisting disabilities. Mr. Karrow testified on behalf of the employer and concluded that the claimant was employable.

The ALJ concluded the claimant had 25% PPD referable to the work injury and that she was PTD due to a combination of the November 2016 injury and her preexisting disabilities and that the Fund was liable for PTD benefits.

The Fund appealed and argued that the ALJ failed to analyze whether claimant's work injury alone caused her to be PTD. The Commission disagreed noting that no expert opined that PTD was because of the November 2016 injury in isolation and therefore affirmed that ALJ's finding that claimant sustained 25% PPD related to her November 2016 back injury. The Fund also argued that the ALJ used two preexisting injuries in combination with the primary injury rather than one. The Commission noted that *Parker* allows consideration of multiple qualified preexisting disabilities. The Fund also argued that the claimant's preexisting hip injury was non-qualifying. The Commission affirmed the finding that the radiculopathy involving the claimant's right lower extremity that resulted from her November 2016 injury qualified as opposite of her left hip despite the fact that the November 2016 back injury was rated at the body. It also found that the testimony of Dr. Koprivica was credible in that the low back injury was made worse due to the claimant's altered gait which aggravated and accelerated the same. Therefore the Commission affirmed the award of the ALJ.

Fund Not Liable for Benefits Because Prior Settlement of 15% of Body Referable to Back and Bilateral Knees Did Not Qualify as Preexisting Disability

Adams v. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 15-073485

The claimant sustained a work injury involving his right upper extremity on September 17, 2015 while working on a vehicle. The claimant settled his claim with the employer for 25% of the shoulder and 27% of the wrist. With respect to his preexisting conditions he sustained a 1984 work related injury to his left hand which he settled for 32.5% of the left hand. He also had a June 14, 2001 work related injury involving the bilateral knees and low back which he settled based on approximate disability at 15% of the body referable to the bilateral knees and low back. The stipulation failed to separate disability involving the body parts. The ALJ awarded PPD against the employer and found the Fund liable for PTD. The Fund appealed, arguing that the claimant failed to satisfy the criteria because the disability resulting from the 2001 work injury did not result in at least 50 total weeks of PPD to either the back or bilateral knees.

The Commission found that *Parker* explicitly required a claimant to demonstrate PTD solely by a combination of disability related to the claimant's primary injury and preexisting disabilities that qualify under the statute. They noted that the Court expressly rejected the notion that non-qualifying preexisting disabilities may be considered. Because the claimant's 2001 injury failed to qualify as a preexisting disability under the statute as neither condition resulted in at least 50 weeks of PPD and because no expert suggested that the claimant would be PTD in the absence of disability attributable to his 2001 work injury, the Commission concluded that the Fund had no liability. The claimant's claim for PTD against the Fund was therefore denied.

Fund Responsible for Benefits as Both Preexisting Conditions, Including Polio, Found to be Qualifying Preexisting Conditions

Wolf v. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 14-105395

The claimant's primary injury involved carpal tunnel syndrome with an onset of December 2, 2014. The claimant settled against the employer for 22.5% PPD of the right wrist and 20% PPD of the left wrist. At a hearing, the ALJ found that the claimant had 13.5% PPD of the body from a prior November 2013 work related lower back injury that met the 50-week threshold pursuant to Section 287.220.3. The ALJ also found that the claimant had a non-compensable preexisting disability relating to polio in the amount of 35% PPD of each lower extremity at the ankle, which also satisfied the 50-week requirement set out in the statute and that this disability directly and significantly aggravated or accelerated the claimant's primary injury, therefore qualifying as a preexisting disability under the statute. The ALJ concluded that the Fund was liable for PTD. The Fund appealed.

The Fund argued that the ALJ erred in considering claimant's back condition because it had not reached MMI before the claimant's primary injury. The Fund also argued that an award of PTD only is permitted when a single qualifying preexisting disability combines with a primary injury.

The Commission found that the Supreme Court's ruling in *Parker* was dispositive against these arguments as it found that a condition need not reach MMI before the primary injury and that multiple qualifying preexisting disabilities could be considered in determining fund liability. The Commission also found that Dr. Cohen's testimony constituted substantial evidence that the primary injury and the preexisting condition resulted in PTD, as the polio aggravated and accelerated the work injury, contrary to the Fund's argument that the ALJ improperly found that the claimant's polio disability met the statute threshold. The Fund also argued that the ALJ improperly considered the claimant's long history of disabling injuries without analyzing each preexisting injury separately. The Commission found that this was extraneous to the judge's ultimate finding. The Award of the ALJ was affirmed.

Commission Decision Reversed After Erroneously Asserting Own Opinion on Matter of Causation

March v. Treasurer of the State of Missouri Custodian of the Second Injury Fund, Case No. WD84377 (Mo. App. 2021)

FACTS: Around April 2015 the claimant started having problems with his upper extremities. He treated with Dr. Winston who concluded that the claimant's bilateral upper extremity complaints were work-related and provided the claimant an injection to the right shoulder as well as carpal tunnel releases. The claimant settled his claim for his bilateral upper extremity issues for 27% of the body. The claimant also had various other injuries and health conditions leading up to the last date of the injury. However, the most significant was his morbid obesity which caused symptoms of pain radiating to both legs and swollen ankles.

Despite this comorbidity, Dr. Hopkins opined that the claimant's job duties were the cause of his symptoms and he assessed 30% disability to each leg plus a 15% load. He further concluded that a combination of the claimant's preexisting condition and his disability from his job duties combined with his primary bilateral upper extremity claim resulted in PTD. The ALJ found that Dr. Hopkins' opinion was not credible and therefore the claimant did not meet his burden to establish Fund liability. The claimant appealed to the Commission who rejected the ALJ's finding and found Dr. Hopkins to be credible. However, a majority of the Commission's three-member panel concluded that it was equally likely that the claimant's pre-existing injuries resulted in the claimant's PTD and denied benefits. The claimant appealed.

HOLDING: The claimant argued that the issue determining Fund liability was one of causation and there was only one uncontradicted expert medical opinion on the topic and the Commission credited that opinion as plausible but then erroneously asserted its own opinion to deny compensation. The Court agreed noting that the conclusion that it was equally likely the claimant's PTD resulted from his pre-existing injuries was unsupported by any expert testimony and was instead simply a lay conclusion, and therefore could not constitute substantial evidence to support the Commission's Award. The Commission's decision was therefore reversed.

Claimant Failed in Burden of Persuasion as Commission Had Province to Believe or Disbelieve Witness

Anttila v. Treasurer of the State of Missouri Custodian of the Second Injury Fund Case No. SD36826 (Mo. App. 2021)

FACTS: The claimant worked as a truck driver. In 1994, he suffered on the job injuries to his left shoulder and left leg while working for Freymiller and made a full recovery. He then underwent chiropractic treatment in 2009 and 2010 for maintenance and then in 2011 and 2012 for complaints of neck, thoracic spine and left upper extremity pain. On January 3, 2014, he attempted to remove a pin from a trailer and felt a crunch in his neck and on the drive back, he began experiencing severe pain in his left arm and neck. The employer referred him to Dr. Mauldin who believed the claimant's injury was preexisting regarding his shoulder and released him from care. He then treated on his own and underwent a cervical fusion on June 12, 2014 to address a C5-6-disc herniation.

In August 2015, he filed a Claim for Compensation. At the employer's request, he was examined by Dr. Chabot who opined that the claimant's cervical spine injury was work related and rated disability of 15% to the body as a whole, 5% of which he attributed to the claimant's preexisting condition and noted he was able to return to work. The claimant filed an Amended Claim also alleging an occupational disease to the neck due to his job duties driving a truck. The claimant obtained his own physician, Dr. Paul, who examined the claimant and opined that he sustained 50% disability to the body as a whole as a result of all conditions relative to his employment with 15% due to his job duties and 35% for specific accident and resulting fusion. Dr. Paul also noted he sustained a 20% disability at the wrist for left traumatic carpal tunnel syndrome also as a result of the January 3, 2014 injury, and concluded that the claimant was PTD due to a combination of effects of the January 3, 2014 injury with prior disabilities. He was evaluated at his own request by a vocational expert, Mr. Eldred, who opined that the claimant was PTD as a result of his January 3, 2014 injury in isolation.

The ALJ found the claimant sustained 15% PPD to the cervical spine for his last occupational disease injury, 35% PPD of the cervical spine and 20% PPD for the left carpal tunnel syndrome both as a result of the specific injury. The ALJ also found he was PTD as a result of a combination of the occupational exposure injury of January 3, 2014 and the preexisting traumatic accident, which occurred earlier that day and found the Fund liable for benefits. The Fund appealed and the Commission denied the claim because he failed to demonstrate a preexisting condition that met the requirements of Section 287.220.3 as the preexisting disability (5% of the cervical spine per Dr. Chabot) did not meet the threshold requirement of a minimum of 50 weeks of PPD needed to combine with the specific accident. The claimant appealed.

HOLDING: The claimant argued that the Commission erred in reversing the ALJ's finding of two separate claims. The Court did not agree and noted that the parties stipulated as to occupational disease and the traumatic injury. The claimant also argued that the Commission erred in finding that her was not PTD. The Court noted that it is the province of the Commission to believe or disbelieve witnesses and this was a battle of the experts. The Award of the Commission was affirmed.

Employer/Insurer Responsible for PTD for 2015 Low Back Injury Despite Subsequent Neck Injury in 2016 Because Despite Continuing to Work Claimant was Highly Accommodated After 2015 Injury

Watson v. Tuthill Corporation & Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 15-036120

The claimant, a 58-year-old Senior Service Technician, sustained an injury to his low back. He had worked for the employer for 28 years. His job did involve heavy lifting. Dr. Cunningham, the authorized treating physician, performed an L4-5 fusion. Thereafter, he treated with Dr. Woodward. On February 1, 2016, the claimant sustained a subsequent injury involving his neck, for which he treated conservatively. He returned to work from January 2016 until April 20, 2016, when he retired. He was subsequently placed at MMI for the 2015 low back injury on July 18, 2016. The claimant did have various preexisting conditions, including a right shoulder surgery, two low back strains, a left shoulder surgery, a hernia which was repaired and a prior right elbow injury, all of which were worked related. Dr. Koprivica opined that the claimant was permanently and totally disabled as a result of the 2015 date of injury, as did Mr. Eldred. Ms. Sprecker testified on behalf of the employer and found that the claimant was employable. Dr. Woodward, the claimant's authorized treating physician, did not recommend any continued pain medications or treatment.

At the hearing, the 2015-2016 injuries were tried simultaneously and therefore, the employer argued that the true last injury was the 2016 neck injury. However, the judge disagreed and noted that the 2015 injury caused significant disability and the subsequent neck injury was quite minor. The judge did note that the claimant admitted to having pains and limitation accumulating through the years but after the 2015 date of injury, he needed more than a modification or slight accommodation to continue working. It was noted that after he returned to work after the 2015 date of injury, he never performed his job in the manner any employer would have expected on the open labor market, which included frequent days off and taking multiple breaks to lay down during the day due to his back pain. The judge noted that it was abundantly clear from the record that due to the 2015 lumbar injury, the claimant was not capable of returning to work on the open labor market. In light of this, the employer was found responsible for perm-total benefits. The employer was also responsible for future medical that was reasonably required to cure and relieve the claimant from the effects of the work injury. The employer appealed and the Commission affirmed.

Employer/Insurer Responsible for PTD Due to Conservatively Treated Low Back Injury, Despite Claimant's History of a C3-C7 Cervical Fusion

Harper v. Springfield Rehab and Health Care Center/NHC Health and Treasurer of Missouri as Custodian of the Second Injury Fund, Injury No. 18-057914

The claimant, a 69-year-old registered nurse, sustained an injury to her hip/low back on June 22, 2018. She did have a prior neck injury, which required a fusion from C3 to C7 in 2013. She noted that due to this, she had limited strength in her arms so she used her hip to push the cart. She felt a pull in her back but continued to work her 12-hour shift. She testified that within a few

hours, she had difficulty walking, which became increasingly worse throughout the shift. After her shift, she went home, took Tylenol and went to bed due to her discomfort. During her deposition, she did admit that she did not feel immediate pain but rather the pain began as she was walking later in her shift. She was not asked if she felt a strain or a pull during her deposition but at the time of the hearing, she testified that she felt a pull or a strain in her back at the time of the incident. She received conservative treatment and underwent an MRI, which showed chronic degenerative spondylosis of the lumbar spine. Therefore, she was referred to her primary care physician. She did undergo epidural injections and attended a psychological consultation. Dr. Koprivica opined that she was totally disabled as a result of the work injury in isolation.

Dr. Cantrell testified on the employer's behalf and concluded that there was no accident or injury. He testified that a pulling sensation in the muscle was not evidence of an injury. However, he noted that the claimant's treatment with Dr. Gil could be considered reasonable for a temporary aggravation of a preexisting condition but her subsequent treatment was not work related. Mr. Eldred testified on the claimant's behalf and found that him PTD based on the back injury alone. Mr. Hosutt testified on the employer's behalf and found that the claimant was employable. However, the ALJ noted that he had not reviewed the depositions of the IME physicians and was not aware of Dr. Koprivica's testimony that the claimant was not capable of full sedentary work and that it was medically appropriate for the claimant to lie down during the day to relieve pain.

At a hearing, the ALJ found that the claimant was credible and found that she sustained unusual strain in her lower back when she pushed the heavy medicine cart on June 22, 2018. The ALJ also found Dr. Koprivica credible and did not believe that Dr. Cantrell was credible, based on the fact that the doctor noted that she did not sustain an injury due to not feeling immediate pain. However, the claimant described a pull in her back and experienced pain thereafter and therefore, pursuant to the statute, this would be an unusual strain.

The ALJ noted that the employer/insurer argued that if there was a work accident, then the claimant sustained nothing more than a soft tissue injury and that the claimant merely took a well-deserved retirement when she quit work on November 14, 2018. The ALJ did note that this was a close case but she found the claimant and Dr. Koprivica credible and also noted that the claimant was rehabilitated from severe cervical disability to return to work full time as a nurse and she also attempted to continue working after her release after the 2018 date of injury and therefore, this would hardly suggest that she simply was desirous of retirement. The judge found that the claimant was PTD from the work injury in isolation and believed that the employer was responsible for future medical treatment. The employer appealed and the Commission affirmed.

Claimant PTD Due to Hearing Loss and Preexisting Disability so Fund Responsible for Benefits

Fields v. Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. WD 109251 (Mo. App. 2021)

FACTS: The claimant, a ramp agent, had various low back injuries, the first on August 17, 2011 and the second on May 17, 2012 which he testified worsened his low back symptoms from his initial injury. He also reported that he hurt his back at work on June 29, 2012 and then again on November 9, 2012. He also testified he began noticing problems with his hearing loss in the last few years of his employment and testified to other injuries including one to his right shoulder and his right thigh. He also reported a fracture to his C7 vertebrae after an auto accident and that same year was diagnosed with depression and anxiety.

The claimant brought multiple claims against the Fund and an ALJ denied compensation for the claimant's August 2011, May 2012, June 2012 and November 2012 PPD claims for his back injuries and also denied compensation for his November 2012 PTD claim for his back and his PTD claim for his hearing loss. The claimant appealed to the Commission who reversed the ALJ's Award as to the claimant's May 2012 back injury and awarded PPD benefits but denied PPD for his August 2011, June 2012, and November 2012 back injuries and his alternative PTD claim for his November 2012 back injury and his PTD hearing loss claim. The Commission was not persuaded by the claimant's physician who acknowledged that his disability ratings regarding the claimant's back injuries were a "guess" and noted that nothing in the record suggested his hearing loss prevented him from performing his job duties. The claimant appealed.

HOLDING: The claimant argued that there was not sufficient evidence to support the Commission's denial of the claimant's PPD and PTD back claims because he was not required to establish an exact percentage of disability for each primary injury and he established the nature and extent of each primary injury by overwhelming evidence. The Court disagreed, noting that the Commission was presented with opposing expert opinions and noted that the claimant's expert could not apportion the injuries individually and instead equally divided his disability rating among the back injuries which he conceded was a guess while the employer's expert concluded that the claimant did not suffer permanent disability of any kind except from the May 2012 back injury. The Court noted the Commission was free to rely on the opinion deemed the most credible and persuasive.

The claimant argued that the Commission's decision denying his PTD for his hearing loss was erroneous. The Court agreed. The Commission concluded that if the claimant was PTD it was based on prior physical injuries without consideration of his hearing loss but the Court noted that this was inconsistent with its own Award finding the claimant was not permanently and totally disabled based on his last back injury and his preexisting disabilities. The Commission's decision finding the claimant was not PTD based on a combination of his hearing loss and preexisting disabilities was reversed while the Commission's decision denying PPD for his back injuries and PTD for his last back injury were affirmed.

When Challenging Award All Evidence Favorable to Factual Proposition Necessary to Sustain Award Must be Presented

Patrick v. Mulvaney and City of Monett, Case No. SD36956 (Mo. App. 2021)

FACTS: In 2015, the City of Monett began a project to renovate City Hall. The City Council member, Jerry Dierker was assigned to coordinate the project. He hired contractors including

Derek Mulvaney, who did business as Mulvaney Construction. The claimant began working for Mulvaney sometime in 2015 and in March 2016 he suffered a serious injury to his left hand resulting in tendon damage to several fingers, requiring surgery. The employer reported the injury to Mulvaney, who informed the claimant that he did not have workers' compensation insurance. The claimant filed a claim and the City and Dierker both filed Answers, denying they were an employer while Mulvaney did not file an Answer. After a hearing, the ALJ entered an Award finding Mulvaney liable for the claimant's injury and the City secondarily liable, while Dierker was not found liable. The City appealed.

HOLDING: The City argued that the Commission's finding that the City was a statutory employer of claimant was not supported because the evidence established that the claimant did not perform work for the City as an operation of the usual business which the City carries on and the claimant was an independent contractor. The Court noted that the City purported to utilize the three step analytical formula set forth in *Nichols v. Belleview* that requires an appellant challenging an Award to 1) identify a factual proposition necessary to sustain the Commission's result 2) marshal all evidence in the record supporting the factual proposition and 3) demonstrate why the evidence from the second step lacks sufficient probative force on the issues. The Court pointed out that the City's arguments failed to meet the second criterion as evidence in the records supporting the proposition was cited inconsistently. Therefore, the Award of the Commission was affirmed.

Claimant Able to Move Forward with Appeal as Application for Review Complied with Statute Despite Cover Sheet Not Being Detailed

Miller v. Henniges Automotive Sealing Systems North America, Inc., Travelers Indemnity Company of America and Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. ED109432 (Mo. App. 2021)

FACTS: The claimant filed two claims one for a 2015 date of injury and the second for a 2016 date of injury. The ALJ found the 2015 injury was not compensable but awarded PPD benefits against the employer for the 2016 injury. The Fund was not liable for benefits on either claim. The claimant filed an Application for Review (AFR) and appealed to the Commission arguing that the ALJ misapplied the restrictions placed on her by Dr. Cohen. The employer filed an Answer in response and the Fund asked the Commission to dismiss as the claimant's pleading did not satisfy the requirements laid out in 8 CSR 20-3.030. The Commission issued an Order granting the Fund's Motion to Dismiss finding the claimant's AFR failed to satisfy the minimum requirements. The claimant appealed.

HOLDING: The claimant argued that the Commission acted without or in excess of its power in granting the Fund's Motion to Dismiss because the AFR sufficiently specified the reasons the claimant believed the findings and conclusion of the ALJ were not properly supported. The Court agreed noting the Commission seemingly based its dismissal on the cover sheet of the claimant's AFR while the AFR itself clearly specifies why the decision of the ALJ was not supported and therefore the pleading complied with 8 CSR 20-3.030. Therefore, the Commission erred in granting the Fund's Motion to Dismiss. The decision of the Commission was reversed.

