

Simon Law Group, P.C.

720 Olive Street, Suite 1720, St. Louis, MO 63101

314-621-2828

MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

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Claimant's Accident Compensable as Risk Source was Driving/Conditions of Road, Not Choking on Breakfast Sandwich, but Employer Entitled to Reduction in Benefits for Safety Violation

Boothe v. Dish Network, Inc. Case No. SD36408 (Mo. App. 2020)

FACTS: The claimant, an installer for Dish Network, was injured in a single car accident in the Dish van he was driving on the way to his first job of the day. He choked on a breakfast sandwich, blacked out and crashed into a short pillar on the side of the highway. The Claim was denied by the employer. The case went to a hearing and the ALJ awarded benefits, concluding that the risk source was having to travel on a rural highway on a strict timeline in a Dish van. The employer did receive a 30% reduction for a safety violation as eating while driving was against company policy. The employer appealed and the Commission reversed the decision of the ALJ, finding that the risk source was actually the claimant's decision to eat breakfast while driving. The Commission found there was no aspect of the claimant's work that required him to eat breakfast while driving and the employer prohibited him from doing so. The claimant then appealed.

HOLDING: The claimant argued that the risk source was the inherent road and driving conditions of his employment not his decision to eat breakfast while driving and the Court agreed. The Court noted that the claimant had to identify the risk source as the immediate cause of injury and that he was not equally exposed to driving risks in nonemployment life. The Court agreed with the claimant that the activity that caused the claimant's injury was driving and crashing the van. It noted that while choking caused the accident, the accident caused the claimant's injuries. The Court went further to note that there was no dispute that the claimant drives extensively as a part of his employment and there was undisputed evidence that on the claimant's day off, he does not maintain a travel schedule he has on his job. Therefore, the claimant's injury occurred within the course and scope of his employment.

The employer also argued that violation of a company rule, such as doing prohibited work or engaging in an activity personal to the employee, may be such conduct as to take the employee outside of the course of employment. The Court found that the argument lacked merit. It noted that the claimant's general argument that the claimant's violation of a safety rule takes him outside the course of employment would render the section of safety violations meaningless. For

the Commission's final award, denying compensation was reversed and the cause was remanded to the Commission for further proceedings consistent with the opinion.

Claimant's Condition Not Compensable as Workplace Stress Not Extraordinary and Unusual

Shiple v. State of Missouri Office of Administration and Treasurer of Missouri as Custodian of The Second Injury Fund, Case No. SD36643 (Mo. App. 2020)

FACTS: The claimant was hired on by the employer in 2001 as a maintenance engineer at a prison power plant. He had various issues with other employees and supervisors. In March 2010 the claimant refused to timely turn off a boiler scheduled for repairs, got into shouting matches with his supervisor and subordinates, and then left in his truck. He returned briefly the next day, but after calling the peer-action review team, he was taken to a nearby ER and then transported by ambulance to another hospital for psychiatric care. The claimant resigned in May 2010 and filed a Claim for Compensation shortly thereafter. The claimant suffered a stroke six months later and filed a second Claim for that event.

After a hearing, an ALJ concluded that the claimant did not meet his burden of proof on the mental health claim that the actual events he described, alone or collectively, objectively rose to the level of extraordinary and unusual stress. The ALJ also concluded that the claimant did not meet his burden of proof that his work-related stress was the prevailing factor in causing his stroke six months after he resigned from his employment. The Commission affirmed with a supplemental opinion. The claimant appealed.

HOLDING: The claimant argued that that the Commission's acceptance of one expert's opinion over another was so unreasonable that it must be overturned. The Court pointed out that the weighing of conflicting medical testimony lies within the Commission's sole discretion and cannot be reviewed by the Court. The claimant also argued that there was a lack of evidentiary support for the finding that the claimant did not meet his burden of proof that his mental injury arose out of and in the course of his employment and that he did not meet the objective standard for proof that he was exposed to extraordinary and unusual work stress compared to other power plant managers or other similarly situated employees. The Court was not persuaded, noting that evidentiary support is only needed when factual findings are made to make an Award for the claimant. The Commission's decision was affirmed.

Claimant's Shoulder Condition Denied as Employer's Expert More Credible than Claimant's Expert

Comparato v. Lyn Flex West, et al., Case No. ED108870 (Mo. App. 2020)

FACTS: The claimant worked for the insured beginning in 1998 and in 2013 alleged an occupational disease to her shoulder. The employer sent her to Dr. Strege who did not believe that her job duties contributed to her condition. The claimant then treated on her own and underwent surgery. The claimant's attorney sent her to Dr. Poetz who connected her condition to her job duties. The parties went to a hearing and the ALJ denied benefits. The Commission

affirmed the ALJ's decision and modified the Award specifically finding that Dr. Strege's opinion was more credible than Dr. Poetz's opinion. The claimant again appealed.

HOLDING: The claimant argued the Commission exceeded its authority by substituting its own opinion of causation for the opinion of the doctor. The Court noted that the Commission specifically found Dr. Strege's opinion more credible than Dr. Poetz's opinion and therefore her first argument was denied.

The claimant also argued that the Commission's findings were not supported by substantial and competent evidence. The Court disagreed and noted that there was sufficient and competent evidence as Dr. Strege considered more information than Dr. Poetz including the claimant's medical history, photographs of her surgery, personal review of radiographic testing, two examinations of the claimant, deposition testimony, and the PDA. Therefore, the Commission's final award was affirmed.

Claimant's Unauthorized Surgery Not Compensable due to Pre-existing Condition, Gap in Treatment and Subsequent Exacerbation of Symptoms

Beavers v. St. Johns Mercy Medical Center et al., Injury No. 07-123519

On December 24, 2007 the claimant sustained an injury to his back and treated with Dr. Coyle who diagnosed a lumbar sprain with left leg radiculopathy. He was also seen by Dr. Cantrell who recommended work conditioning and work restrictions. He was released at MMI. He returned to work and thereafter he was subsequently terminated because of an encounter with a co-worker which ended with an argument and the claimant telling the co-worker to "get the f*** out of my face". This occurred in front of a patient which was grounds for termination.

The claimant then treated on his own and eventually underwent an L5-S1 lumbar microdiscectomy with Dr. Levy. He continued to treat and subsequently filed for Social Security disability and was awarded benefits on September 21, 2011. Dr. Poetz testified on behalf of the claimant and believed that the need for the claimant's surgery and subsequent treatment was a result of the work injury.

At a hearing the ALJ noted that despite the claimant denying any radicular complaints prior to the work accident there was evidence in the medical records that he did experience the same. The ALJ also noted the gap in treatment from when he was last seen by Dr. Cantrell on August 13, 2008 until he saw his own physician on December 7, 2009 at which time, he reported low back pain, noting, "pain began couple of weeks ago progressively worse-last episode - 07." The ALJ also noted that in or around December 2009 the claimant sustained another acute exacerbation of his low back and leg complaints while working for a subsequent employer. In light of this he did not believe that the claimant's surgery and subsequent treatment was related back to the work injury. Therefore, the employer/insurer was not responsible for the claimant's unauthorized medical treatment or future medical treatment.

The ALJ also noted that the claimant was not entitled to TTD benefits since causation was not found. However, he did note that even if causation was made the claimant would not be entitled

to TTD based on the fact that he was terminated and his actions did arise to the level of post injury misconduct. The claimant was awarded 12.5% of the body referable to the lumbar spine as a result of the work injury as well as permanent partial disability benefits from the Fund due to the claimant's preexisting conditions. The claimant appealed and the Commission affirmed the award of the ALJ.

Claim Filed Against Fund Denied Because Not Timely Filed

Hunsaker v. Treasurer of the State of Missouri Custodian of the Second Injury Fund, Case No. SD36450 (Mo. App. 2020)

FACTS: On June 28, 2011 the claimant filed a Claim for Compensation against the employer or an injury on January 24, 2011. The SIF was not included as a party to the Claim. On December 28, 2015 the claimant settled his claim against the employer. On December 14, 2016 the claimant filed an Amended Claim adding the SIF. In its Answer, the SIF asserted that the Claim was barred by the statute of limitations. At a Hearing, the ALJ agreed and denied benefits. The Commission affirmed the ALJ's decision. The claimant appealed.

HOLDING: The claimant argued that his December 28, 2015 settlement with the employer constituted a claim, and his Amended Claim against the SIF on December 14, 2016 was therefore timely filed because it occurred within one year of the settlement. The Court found that the settlement could not constitute a "Claim" for statute of limitations purposes since the claimant filed an earlier Claim for Compensation.

The Court also noted that because the Amended Claim did not supplement or amend the Claim against the employer, the Amended Claim could not be used to calculate the statute of limitations date. Therefore, the Amended Claim against the SIF was filed more than one year after the claimant filed his initial Claim against the employer on June 28, 2011.

The claimant also argued that the barring of his SIF claim violated his constitutional rights of due process and equal protection of the law. The Court was not persuaded. The Commission's decision was affirmed.

Claimant's Claims Against the Fund Denied Based on The Statute of Limitations

Scott v. Treasurer of the State of Missouri Custodian of the Second Injury Fund, Case Nos. SD36596 and SD36597 (Mo. App. 2020)

FACTS: The claimant sustained an injury while working for the employer in July 2009. The claimant sustained another injury in March 2010. The claimant filed two separate Claims for Compensation against the employer on March 24, 2010. On April 18, 2016, 6 years later the claimant filed Amended Claims for each injury now naming both the employer and the Fund. Each of the Amended Claims named the same body parts as the original Claims. In response to each Claim, the Fund asserted a statute of limitations defense. After a Hearing, the ALJ entered Awards finding the claimant's Claims against the Fund were not timely filed. The Commission affirmed. The claimant appealed.

Per the statute, a claim against the Second Injury Fund shall be filed within two years after the date of injury or within one year after a claim is filed against an employer or insurer, whichever is later.

HOLDING: The claimant made various arguments, one being that she filed sufficient Amended claims making subsequent changes before settling her cases and therefore her claims against the Fund were not untimely. The Court did not agree as she did not add any additional body parts that she injured and therefore neither of the Claims added to the original Claims by adding some cause, effect, or injury relating back to the original Claims.

The claimant also argued that other filings in the case such as the pre-hearing requests, mediation requests and hearing requests counted as Claims since they listed the Fund as a party to the proceedings. The Court was not persuaded.

Therefore, the Court affirmed the Commission's decision that the Claims were barred by the statute of limitations.

Court Upheld Commission's Dismissal of Claimant's Fund Claim for Failure to Prosecute

Hager v. Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. ED108950 (Mo. App. 2020)

FACTS: The claimant was injured at work and filed a Claim. He settled the case with his employer but his Claim against the Fund remained pending. Over the next several years the case was set, continued and re-set numerous times. An ALJ issued an Order of Dismissal with prejudice for failure to prosecute. The claimant filed an Application for Review and the Commission set aside the Order of Dismissal. The case was again repeatedly reset and continued for multiple years.

The Division then sent the claimant and his attorney a Notice of a Pre-hearing which was mailed to the claimant's address on file but was returned by the postal service with the notation "Attempted-not known" and "unable to forward." The Division informed the claimant's attorney and advised it was imperative the Division have the claimant's updated contact information. The Division also set the case on a Dismissal Docket. The attorney for the Fund appeared but the claimant and his attorney did not. The ALJ later issued an Order of Dismissal with prejudice for failure to prosecute.

The claimant's attorney filed an Application for Review with the Commission on the claimant's behalf asserting (1) he had faxed a letter to the ALJ seeking a continuance because he had been unable to reach the employee (2) the ALJ erred in finding no good cause was shown because the Judge did not hear evidence and did not review any of the claimant's medical records (3) he did not believe the claimant received the Notice to Show Cause because the address used did not appear to be a good one and (4) he had retained a professional investigator to make an effort to locate the claimant.

The Commission affirmed the ALJ's Order of Dismissal noting it was still not convinced the Application sufficiently alleged the claimant had prosecuted his claim or had good cause for failing to do so. The Commission also found that counsel being unable to reach his client showed that the claimant failed to prosecute his claim by failing to keep in contact with his attorney. The claimant again appealed.

HOLDING: The claimant made various arguments including that the Commission's decision was not supported by sufficient evidence because the Application for Review established evidence of good cause for failure to participate in the show cause setting and also that the Commission relied on several cases predicated on a Regulation that had been repealed. The Court was not persuaded and affirmed the decision of the Commission.

Employer Responsible for PTD Benefits Due to Left Knee Surgery and Pulmonary Emboli

Joyner v. Monsanto & American Zurich Insurance Company & Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 17-035903

The claimant was a journeyman plumber and on January 18, 2017 he sustained an injury to his left knee. He underwent an MRI which showed a tear. He had a week-long vacation to Costa Rica planned and asked the doctor if it would be okay to go and the doctor advised it would not be a problem as it would take a while to get into an orthopedist. A day after his return he was taken to St. Anthony's Medical Center and hospitalized for deep vein thrombosis which caused pulmonary embolism in both lungs and respiratory failure with hypoxia

Subsequently Dr. Fissel performed surgery. Dr. Fissel did assess 5% disability to the left knee and did connect the claimant's deep vein thrombosis and pulmonary emboli back to the work injury. He provided the claimant restrictions of no ladders, no squatting, no climbing and no kneeling.

The claimant's attorney obtained a report of Dr. Volarich who assessed 25% disability to the left knee and 25% disability to the body due to the deep vein thrombosis. He also assessed 35% of the body which was preexisting due to a prior low back surgery and 15% of the left foot due to a prior injury.

Mr. Hughes testified on behalf of the employer and concluded that if the claimant was permanently and totally disabled it would be due to his preexisting condition in combination with the work injury. Ms. Gonzalez provided a report on behalf of the claimant and she concluded that the claimant was permanently and totally disabled as a result of the last injury in combination with the claimant's preexisting condition. However, at her deposition she testified that the claimant would not be able to perform even sedentary work because of the limitations he has from shortness of breath, easy fatigability and lack of endurance which were a direct result of the last injury alone. Therefore, the ALJ found the employer/insurer was responsible for benefits. The employer appealed and the Commission affirmed.

Employer Responsible for PTD Benefits Despite Claimant's Pre-existing Conditions Including Bilateral Shoulder, Back and Carpal Tunnel Surgeries

Franklin v. Mitchell Mill Systems USA, Inc. & Accident Fund Insurance Company of America & Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 14-025678

The claimant filed a Claim for occupational disease with an April 12, 2014 date of injury involving the claimant's low back. Dr. Cunningham performed a L4-5 decompression and microdiscectomy. Thereafter, he treated with Dr. Woodward who released him to full duty and assessed 10% disability to the body referable to the work injury and 10% preexisting. After he was released from authorized care he never returned to work.

The claimant does have various preexisting injuries/conditions including a prior right knee surgery, work-related right shoulder surgery, work-related left shoulder surgery, low back surgery, and work-related bilateral carpal tunnel syndrome.

The claimant's attorney obtained a report of Dr. Koprivica who noted that it was possible that the claimant was PTD was based on the last injury alone. However, if it was found that he was not then he would be PTD due to the work injury and his preexisting conditions. Mr. Eldred opined that the claimant was PTD as a result of the primary injury and his preexisting disability. The ALJ agreed and found that the claimant was PTD and the Fund had liability. The Fund appealed arguing that all of the claimant's preexisting conditions did not meet the threshold pursuant to section 287.220.3 as they did not fall into one of the four categories needed to be considered for Fund liability.

The Commission did not specifically address that argument by the Fund as they first looked to the last injury alone and found that the claimant was PTD as a result of the same. Therefore, the employer was liable for benefits regardless of whether 287.220.2 or 287.220.3 applied.

Fund Not Responsible for PTD Benefits as No Evidence That All Claimant's Pre-existing Disabilities Met Threshold for Fund Liability

Clinkenbeard v. Department of Corrections & Central Accident Reporting Office & Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 14-089634

On October 28, 2014 the claimant, a correctional officer sustained an injury to his elbow and shoulder. He received authorized care and Dr. Hicks performed a left shoulder arthroscopy. Ultimately Dr. Hicks provided the claimant a permanent lifting restriction of 20 pounds.

The claimant did have a variety of preexisting conditions including a right shoulder fracture, bilateral work-related knee surgeries, bilateral hip pain, back pain, sleep apnea, a left wrist surgery, GERD/acid reflux, diabetes, restless leg syndrome, cataracts and deafness. Dr. Volarich and Mr. Eldred testified that the claimant was PTD as a result of the last injury along with his preexisting conditions. The ALJ agreed and found the employer responsible for 27.5% of the shoulder and 10% of the elbow and the Fund was responsible for PTD benefits. The Fund appealed arguing that all the claimant's preexisting conditions did not meet Fund liability pursuant to §287.220.3.

After looking at the claimant's preexisting conditions the Commission determined that no qualifying preexisting disability had been established. The Commission noted that Dr. Volarich and Mr. Eldred both concluded that the claimant was PTD based on all the claimant's preexisting conditions and his primary injury.

The Commission noted that there was evidence to show a preexisting fracture of the right shoulder from 2009 which would qualify under §287.220.3 as it was a pre-existing condition to the opposing extremity as the work injury. However, there was no medical opinion to support the conclusion that the combination of the right shoulder preexisting condition and any resulting disability combined with the left shoulder and elbow primary injuries resulted in permanent total disability. Rather Dr. Volarich and Mr. Eldred opined that it was all the preexisting conditions together that combined to result in permanent total disability. Therefore, the Commission concluded that the claimant's disability from the last injury did not combine with any preexisting qualifying disability to result in total and permanent disability pursuant to §287.220.3 and therefore the Fund was not liable for benefits.

Civil Claim Barred Against Distributer as It was Found to Be Claimant's Statutory Employer

Sebacher v. Midland Paper Company, Case No. ED108615 (Mo. App. 2020)

FACTS: Midland is a distributor of paper and packaging supplies. They contract out to independent contractors who deliver the products instead of Midland's own employees delivering them. The products are delivered by CHR Transportation and the claimant was employed by this entity as a truck driver working full-time delivering Midland's products pursuant to its contract with CHR. The claimant was allegedly assaulted by one of Midland's employees and filed a petition against that employee and Midland asserting claims of assault and battery and alleging that Midland was negligent in failing to supervise and train the co-employee and in retaining him as an employee. Midland asserted an affirmative defense advising that it was immune from the suit as workers' compensation was the claimant's exclusive remedy since Midland was his statutory employer. Midland filed a Motion for Summary Judgment which was granted. The claimant appealed arguing that Midland was not its statutory employer.

HOLDING: The Court noted that one is a statutory employer if 1) the work is performed pursuant to a contract 2) the injury occurs on or about the premises of the alleged statutory employer and 3) the work is in the usual course of the alleged statutory employer's business. The issue here was whether the claimant was performing work within the usual course of the employer's business.

The Supreme Court of Missouri has defined usual business as those activities that 1) are routinely done 2) on a regular and frequent schedule 3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time and 4) the performance of which would require the statutory employer to hire permanent employees absent the agreement.

In this case, the claimant was on the employer's premises to pick up products for delivery. This work was to be routinely performed on a daily basis and delivery services would be repeated over a relatively short period of time. Finally, the employer established through Affidavit that if the third party's drivers were not performing transportation services for the employer, the employer's employees would have to provide the transportation.

Therefore, the Court found that the employer's usual business was to distribute and deliver its products to its customers. Therefore, the employer was the claimant's statutory employer and the claimant's claim was barred because the claimant's exclusive remedy was workers' compensation.