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MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

April 2017 – June 2017

Parties Could Not Commute Award Under 287.530 Because Statute Requires Unusual Circumstances and Commission Lacked Authority Under 287.390

Dickemann vs. Costco Wholesale Corporation, Case No. ED105266 (Mo. App. 2017)

FACTS: The claimant was injured at work in July 2010, and an Award of PTD benefits became final in April 2014. In November 2016, the claimant and employer filed a joint motion with the Commission to commute the Award to a lump sum, which the Commission denied because it found that 287.530 only allows commutation under unusual circumstances, and no unusual circumstances were alleged in the parties' motion. Also, the Commission found it did not have authority to commute the Award under 287.390 because there was no longer an open Claim in light of the fact that the Award was already finalized.

On appeal by both parties, the claimant argued the Commission was required to approve the motion to commute because it met the requirements of 287.390.1 and the Western District previously held that 287.530's requirements only apply to *contested commutations*.

HOLDING: The Missouri Court of Appeals Eastern District affirmed the Commission's decision to deny the motion and held that the Western District failed to correctly interpret Sections 287.390 and 287.530 using strict construction and 287.530 should actually be applied even where both parties voluntarily agreed to commute an Award.

Claimant Awarded PPD For Hearing Loss Due to Industrial Noise Exposure Despite Wearing Hearing Protection at Work and Exposure to Firearms Outside of Work

Abt vs. Mississippi Lime Company, Injury No. 13-074707

The claimant worked for 40 years in the plant, which was extremely noisy. He testified that he religiously wore hearing protection while working until the late 1980's, at which time they started using radios while operating cranes. He subsequently stopped wearing hearing protection all the

time in order to hear the radio, and he always kept the left side of the crane door open due to the extreme heat. The employer performed annual hearing tests, which showed the claimant had mild to moderate hearing loss. He retired on January 7, 2013 and testified he has been in a quiet environment ever since. He testified he began having problems with his hearing 12 years prior to retiring and experienced humming/ringing in his ears and had difficulty understanding people when they talked to him. The claimant also testified he goes deer hunting once a year, previously went turkey hunting with a 12-gage shotgun until four years earlier, and also participates in 20 shooting matches per year using a 12-gage shotgun. He testified he has worn noise canceling headphones while shooting since the 1970's and has always worn some type of hearing protection since he was in high school.

The claimant treated on his own with Dr. Mason, who diagnosed mild to moderate hearing loss in the left ear and bilateral Tinnitus, which he opined were both work related. Dr. Mason found it unsurprising that he had hearing loss only in the left ear in light of the fact that the right side of his head was in the interior of a crane away from the noise.

The employer sent the claimant to Dr. Mikulec, who noted that his hearing loss in his left ear did not significantly change until after he retired in 2013 and opined that his left-sided hearing loss was age-related or due to an underlying medical condition, and his Tinnitus was causally related to his non-occupational hearing loss.

At a Hearing, the ALJ held that the claimant's left-sided hearing loss was work related, although his bilateral Tinnitus was not work related, and found that he sustained 3% PPD of the left ear due to exposure to occupational noise. On appeal, the Commission affirmed the ALJ's decision and Award.

Injury Compensable When Claimant Re-Tore Rotator Cuff While Performing Mandatory Physical Capability Evaluation Prior to Returning to Work

<u>Duncan vs. Allied Aviation, LLC</u>, Injury No. 15-072795

After undergoing surgery to repair a non-work related right rotator cuff tear, the claimant presented to work for a physical capability evaluation (PCE) prior to returning to work. The PCE was mandatory before a worker could return to work, and it was scheduled and paid for by the employer. The claimant performed PCE on May 12, 2015, at which time he felt a pop in his right shoulder followed by immediate pain. An MRI of the right shoulder showed a large full thickness rotator cuff tear, which the claimant's prior treating doctor, Dr. Lingenfelter, opined was a new injury.

At a Hearing, the claimant testified that he was ready to return to work prior to the PCE and had no limitations with respect to his right shoulder, was pain free, and was not taking any medications. He testified that following the PCE, he experiences significant pain and limited range of motion in his right shoulder.

Dr. Gilliam, who works for the company that performs the PCE, testified on behalf of the employer/insurer that the PCE testing machines are not capable of producing an injury. Also, the employer/insurer argued that the claimant=s injury did not arise out of and in the course and scope of his employment because he had not yet returned to work.

The ALJ found that the claimant=s injury arose out of and in the course of his employment because the test was mandatory under company policy, and declining to undergo the same could be grounds for termination. Also, the employer scheduled the PCE, instructed where and when to attend, and paid for the test. Also, the risk of injury sustained by the claimant during the PCE was not one to which he would have been equally exposed outside of employment in his normal nonemployment life. Therefore, the employer/insurer was ordered to provide medical care, including surgery. On appeal, the commission affirmed the ALJ=s decision and award.

Right Shoulder Injury Sustained While Wrestling Co-Worker Not-Compensable

Grayson vs. Thorne & Son Asphalt Paving Co., Injury No. 15-089660

The claimant sustained a right rotator cuff tear while wrestling a coworker at work, which required surgical repair. According to written statements from witnesses, the two employees voluntarily agreed to wrestle, and although workers would occasionally play around by knocking off hard hats or throwing water or pebbles at each other, such behavior was not permitted at work, and no one had wrestled at work prior to the date of injury.

At a Hearing, the ALJ noted that injuries that occur as a result of horseplay are generally not compensable unless the horseplay is so pervasive in the workplace that it becomes an incident of employment. Factors considered by the courts include the frequency of horseplay, the employer's awareness of the activity, and whether or not the employer took affirmative steps to discourage the activity. The ALJ found that horseplay was clearly in violation of company policy in light of the fact that all employees were aware it was not allowed. Also, wrestling was substantially different than the types of horseplay usually engaged in by employees. Therefore, the claimant's right shoulder injury was not compensable.

On appeal, the Commission affirmed the ALJs decision and Award with a supplemental opinion. The Commission found the claimant's injury was not compensable because the risk source of the claimant's injury was his own voluntary consent to horseplay, which was unrelated to his employment and to which he would have been equally exposed outside of work in his normal life.

Claimant's Testimony Credible and Injury Compensable Despite Inconsistent Statements Regarding How Injury Occurred

Brown vs. Christian County, Missouri, Injury No. 14-063533

The claimant sustained injuries to the right wrist/hand and right shoulder when she fell. She was standing next to a rolling file cabinet immediately prior to her injury. At the hospital, the claimant advised that she thought she fell after she lost her footing and also that it felt like her ankle gave out. In a subsequent recorded statement, she stated that she lost her footing, did not believe she caught her foot on anything, and did not really know what happened. At the Hearing, the claimant testified that her foot became caught underneath the rolling filing cabinet in the gap between the cabinet and the floor, against the wheel, which caused her to fall when she turned.

The employer pointed out the claimant's inconsistent statements regarding how she was injured. However, the ALJ found the claimant's testimony credible and found that she fell after her foot became caught under the filing cabinet. The ALJ also found that the injury was in the course and scope of employment because the risk source of injury was not merely standing, walking, or turning, but was instead placing her left foot underneath the filing cabinet. Therefore, the injury was compensable. The ALJ also opined it was understandable that the claimant's initial account of her accident was inaccurate or incomplete in light of the fact that she was in distress, taking pain medications, and was not sleeping well. The employer was responsible for PPD benefits with respect to the claimant's right hand/wrist and right shoulder.

On appeal, the Commission affirmed the ALJ's decision and Award and noted that the claimant's Hearing testimony need not be discredited simply because she previously gave different, less detailed, or incomplete accounts of her accident.

Court Cannot Dismiss Wrongful Death Petition Based On Exclusivity Doctrine Until the Commission Determines the Injury is Compensable

<u>Channel vs. Cintas Corporation No. 2, et al.</u>, Case No. WD79673 (Mo. App. 2017)

FACTS: The claimant was employed as a delivery driver when he died of heat stroke. His spouse filed a Claim for Compensation on his behalf and also filed a wrongful death petition against the claimant's supervisor and the employer (Defendants). The Defendants filed a Motion for Summary Judgment, arguing that under the exclusivity doctrine, Workers' Compensation is the exclusive remedy for a work-related death or injury. The Circuit Court agreed and granted summary judgment, finding the claimant's death was the result of an accidental injury that could only be addressed by the Commission.

The claimant's spouse appealed and argued that the Circuit Court did not have authority to determine whether his death was due to an accident under Workers' Compensation law while the Workers' Compensation Claim was still pending.

HOLDING: The Appeals Court held that the Commission has exclusive jurisdiction to determine whether an employee's injury resulted from an accident under Workers' Compensation law and reversed the Circuit Court's Decision and remanded the case with an Order to Stay Proceedings until

the Claim was resolved. The Commission held that it would be inappropriate for a court to enter summary judgment based on the exclusivity doctrine before the Commission decides the question of accidental injury, because granting summary judgment would prevent the claimant's spouse from refiling her civil law suit if the Commission subsequently found that it was not an accidental injury.

Flu Vaccine Not Prevailing Cause of Claimant's Congestive Heart Failure

Johnson vs. Barnes-Jewish West County Hospital, Injury No. 09-112063

The claimant's doctor gave her a permanent exemption from receiving the flu vaccine. However, the claimant was subsequently advised that the H1N1 vaccination was mandatory and underwent the same on December 7, 2009. She testified that she developed immediate numbness, tingling, and burning in her hands, and she developed flulike symptoms within one week after her shot. She testified that she had flare-ups of those symptoms, and in June 2010, a flare-up caused her to go to the emergency room, where she was diagnosed with cardiomegaly. Her condition progressively worsened, and she was ultimately diagnosed with congestive heart failure. She treated on her own and continues to take medications for her heart condition. She alleged that she developed her heart condition as a result of the mandatory H1N1 flu vaccination she received from the employer.

Both medical experts diagnosed the claimant with congestive heart failure. The claimant's expert, Dr. Wolfson, testified that the H1N1 vaccine caused her cardiomyopathy and permanent disability. The employer's expert, Dr. Schuman, testified that the claimant did not sustain a work injury and there is no known correlation between the vaccination and myocarditis. He also noted that the claimant did not seek medical treatment until six months after her vaccination.

At a Hearing, the ALJ found the claimant's condition was not compensable because she failed to prove that the flu vaccine was the prevailing factor in causing her congestive heart failure. The ALJ found Dr. Schuman's opinion more persuasive with respect to causation and noted the extensive gap between when the claimant received the vaccination and when she first sought treatment. On appeal, the commission affirmed the ALJs decision and Award.

Driving School Bus Was Prevailing Factor Causing Bilateral Carpal Tunnel Syndrome

Lammert vs. Festus R-VI School District, Injury No. 16-006646

The claimant worked as a school bus driver for 11 years. Before 2015, she drove older buses, which required flipping a switch with her left hand, engaging an emergency break, and operating a manual door with her right hand at each stop. The steering wheels on the older buses vibrated continuously. In May 2015, the claimant began driving newer buses, which did not require her to manually engage an emergency break or open the door, were much easier to steer, and had much less vibration. She first developed symptoms in her hands/wrists in August or September 2015, months after she switched to the newer buses and after she was off work for approximately three months for summer

break.

The claimant's expert, Dr. Schlafly, testified that driving a school bus was the prevailing factor causing her bilateral carpal tunnel syndrome, which he believed developed over years of driving the older buses, although it did not manifest until after the change to newer buses in 2015. Dr. Crandall testified for the employer and opined her job duties were not hand intensive enough to cause carpal tunnel syndrome and noted there were no studies to suggest that carpal tunnel syndrome could be caused by driving a bus. Both doctors agreed that the claimant required bilateral carpal tunnel releases.

At a Hearing, the ALJ found Dr. Crandall's testimony more persuasive and noted that although operating the old buses was hand intensive, her complaints did not begin until months after she started operating newer buses, and she developed carpal tunnel syndrome in her left hand, although she only operated the manual door on the older buses using her right hand. The ALJ also noted that Dr. Schlafly could not identify any scientific studies relating bilateral carpal tunnel syndrome to driving a bus. Instead, the ALJ opined that the claimant's age, gender, obesity, hypertension, and menopause all predisposed her to carpal tunnel syndrome, and her condition was therefore not compensable.

On appeal, the Commission reversed the ALJs opinion and Award and found that Dr. Schlafly's medical opinion was more persuasive than Dr. Crandall's opinion. The Commission ordered the employer to pay past medical expenses and provide future medical care, including bilateral carpal tunnel releases.

Employer Responsible for PTD Benefits After Left Shoulder Injury

Maryville R-2 School District vs. Paydon and Treasurer of the State of Missouri Custodian of the Second Injury Fund, Case No. WD80070 (Mo. App. 2017)

On March 10, 2014, the claimant, a fifty-eight-year-old employee, helped a co-worker lift a soccer goal that weighed 200 pounds, at which time he injured his left shoulder. He treated on his own with Dr. Atteberry, who diagnosed a rotator cuff tear and performed left shoulder surgery on May 12, 2014. He subsequently filed a Claim against the employer for PTD benefits.

At a Hearing, the claimant testified that his left shoulder pain interrupts his sleep and he now has to lie down or recline multiple times during the day and sometimes has difficulty concentrating due to sleep deprivation. Dr. Koprivica evaluated the claimant and issued permanent work restrictions as a result of the work injury alone, including the need to recline and take naps on an unpredictable basis during the work day. Both parties' vocational experts agreed that, assuming Dr. Koprivica's restrictions, the claimant would be unemployable in the open labor market.

The ALJ found the claimant's testimony and Dr. Koprivica's opinion credible, held that the claimant was PTD due to the 2014 work injury alone, and ordered the employer to pay PTD benefits and provide future medical treatment. The Commission affirmed the ALJ's decision. On appeal, the Court of Appeals affirmed the Commission's decision and Award.

Claimant PTD from Last Injury Alone Due to Combination of Left Upper Extremity Injury and Psychiatric Condition.

Bass vs. Board of Police Commissioners of Kansas City, Missouri, Injury No. 08-006183

On January 23, 2008, the claimant was exiting a police vehicle when she slipped and fell on ice and sustained an injury to her left elbow and shoulder. She underwent left shoulder surgery with Dr. Hood in 2008 followed by two more left shoulder surgeries performed by Dr. Satterlee in 2009 and 2011. Dr. Satterlee released her from care on December 22, 2011 with permanent restrictions.

The claimant also treated on her own with Dr. Logan for depression, which the doctor opined she developed as a result of her left upper extremity injury and was exacerbated by a significant degree of preexisting panic disorder. Mr. Cordray, a vocational expert, testified that the combination of her physical pain and psychological issues would prevent her from presenting to work on a consistent basis, which made her unemployable in the open labor market.

Dr. Hughes examined the claimant on the employer's behalf and opined 80% of her psychological condition was unrelated to her work injury. Vocational expert Ms. Sprecker opined she was able to perform low stress jobs with minimal repetitive use of the left upper extremity and was not PTD.

At a Hearing, the ALJ found that the claimant was not PTD and assessed 45% PPD of the left shoulder, 10% of the left elbow, and 10% of the body referable to her psychiatric condition. The employer was not responsible for future medical care.

On appeal, the Commission found Dr. Logan and Mr. Cordray's opinions most credible and held that the claimant was PTD due to a combination of her left upper extremity injury and psychiatric condition, which was associated with the left upper extremity condition. The employer was ordered to provide future medical care as well as PTD benefits.

Employer Responsible for PTD Benefits for Combination of Back Injury and Psychological Condition, Both Caused by Primary Injury

Pulliam vs. RPCS, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 11-056403

The claimant sustained a back injury when lifting a 70-pound box and ultimately underwent a spinal fusion from T7 – T9 and was given permanent work restrictions. He alleged that he could not sit,

walk, or stand longer than 15 minutes after his work injury and had difficulty sleeping and concentrating due to pain. A surveillance video showed him driving, shopping, going up and down steps, walking without a cane, carrying bags, reaching, and bending.
Dr. Koprivica evaluated the claimant, recommended permanent restrictions including the ability to frequently change positions and use of a cane, and opined he was PTD as a result of his last injury alone. Mr. Eldred performed a vocational evaluation, noted he had to alternate between sitting and standing, lie down during the day, and use a cane, and he opined the claimant was unemployable in the open labor market as a result of his last injury alone.

Dr. Halfaker performed a psychological evaluation at the claimant's attorney's request and noted symptom magnification, which he opined was the result of somatoform disorder associated with chronic pain syndrome rather than malingering.

The treating physician, Dr. Corsolini, opined the claimant was not PTD.

At a Hearing, the ALJ found that the claimant sustained a herniated disc of the thoracic spine and a psychological injury as a result of his work accident. The ALJ reviewed the surveillance video and agreed that he was likely magnifying his symptoms, but the ALJ agreed with Dr. Halfaker that it was likely due to a psychological condition that resulted from his work injury. Therefore, the ALJ found the claimant was PTD as a result of his last injury alone and ordered the employer to pay PTD benefits. On appeal, the Commission affirmed the ALJs decision and Award.

Employer Responsible for PTD Benefits After Shoulder, Hip, and Back Injury

Gwin vs. Southeast Missouri Mental Health Center, Injury No. 10-011144

On February 17, 2010, the claimant was working for the employer as a Psych Aide and was helping to carry a resident on a litter/stretcher when the resident kicked her, causing her to fall to the floor, at which time she sustained injuries to her right shoulder, left hip, and lumbar spine. She treated through the employer with Dr. Wayne and Dr. Collard, who performed a right rotator cuff repair. She also received lumbar and hip injections. After she was released from care, the claimant had continued shoulder, lumbar spine, and left hip pain and sought treatment on her own. She continued to miss significant time from work and felt she could no longer work as a Psych Aide. She applied for a sedentary position with the employer as a receptionist, but her application was denied and she was fired.

Dr. Wayne and Dr. Collard believed the claimant was not PTD, as did her treating doctor, Dr. Krause, and medical expert, Dr. Robson. Dr. Musich evaluated the claimant at her attorney's request and opined she was PTD as a result of her work injury. Mr. Weimholt performed a vocational evaluation and also opined she was unemployeable due to her level of education and lack of transferable skills. Mr. England performed a vocational evaluation and noted she did not exhibit

observable pain behaviors and would make a good impression at an interview. He believed she was employable given the permanent restrictions from Dr. Wayne, Dr. Collard, and Dr. Krause.

At a Hearing, the ALJ noted that the claimant attended some college and completed a program at Metro Business College, her employment history included supervisory duties, and she did not appear to have any problems with reading or math. The ALJ also noted she did not appear to be in a lot of pain during the Hearing, found the opinions of Dr. Wayne, Dr. Collard, Dr. Krause, and Dr. Robson more persuasive, and held that she was not PTD. The employer was responsible for PPD at the level of the body and right shoulder as well as future medical treatment.

On appeal, the Commission found the opinions of Dr. Musich and Mr. Weimholt more persuasive and noted that she missed a significant amount of work due to her injuries after being released from care and the employer terminated her employment rather than hiring her for a light-duty position as a receptionist. The Commission modified the ALJs decision and Award to include PTD benefits to be paid by the employer.

Fund Responsible for PTD Benefits After Primary Low Back Injury Combined With Pre-Existing Low Back Condition

Davis vs. Ozarks Coca-Cola/Dr. Pepper Bottling Company and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 07-050555

The claimant worked for the employer for 27 years delivering vending machines, which required a lot of heavy lifting, pushing, and pulling. He sustained an injury to his low back on June 6, 2007 when a 600-pound vending machine tipped backward onto him. He treated conservatively with multiple doctors both through the employer and on his own. He was diagnosed with lumbar pain with radiculopathy and aggravation of pre-existing lumbar DDD. Dr. Woodward, the authorized treating physician, placed him at MMI on May 26, 2009 with permanent restrictions. He did not undergo surgery. The employer subsequently fired the claimant because they could not accommodate his permanent restrictions, and he did not work thereafter.

With respect to the claimant's pre-existing conditions, he had a prior back injury in June 2001, for which he underwent physical therapy. He also had a low back injury in June 2006 and testified he had ongoing low back pain but was able to continue working. The claimant also had a prior right shoulder injury and experienced ongoing shoulder pain and popping prior to his primary injury, and he had a prior left shoulder injury as a result of a motor vehicle accident.

The claimant's experts, Dr. Bennoch and Dr. Mullins, opined he was PTD as a result of a combination of his primary injury and pre-existing degeneration in his lumbar spine. The claimant's vocational expert, Mr. Swearingin, noted his 11th grade education and age and opined he was not a candidate for vocational rehabilitation. He also noted the claimant's extensive history working

manual labor positions and opined he was unemployable as a result of pre-existing degeneration and the primary work injury.

The employer's medical and vocational experts opined the claimant was not PTD.

At a Hearing, the ALJ found the claimant was PTD as a result of the combination of his pre-existing injuries, low back degeneration, and the primary injury. The ALJ found Dr. Bennoch's opinion most persuasive with respect to permanency and assessed 20% PPD of the body referable to the primary injury. The Fund was liable for PTD benefits, and the employer was ordered to provide future medical care referable to the primary injury. On appeal, the Commission affirmed the ALJ's decision and Award.

2017 Changes to the Workers' Compensation Statute

Please note this Bill has been signed by Gov. Greitens and goes into effect on August 28, 2017

Below is a description of the additions/changes to the Statute:

MMI

MMI is the point at which the claimant's medical condition has stabilized and can no longer reasonably improve with additional medical care.

TTD/PTD

TTD/PTD benefits shall be paid throughout the rehabilitative process until the claimant reaches MMI unless benefits are terminated by the claimant's return to work or as otherwise specified in the statute.

If a claimant voluntarily separates from employment with an employer and the employer had work available for the claimant that was within his or her medical restrictions imposed by the treating physician, neither TTD nor TPD benefits shall be payable

Drug Testing

If a claimant tests positive for a nonprescribed controlled drug or the metabolites of such drug there is a rebuttable presumption which may be rebutted by a preponderance of the evidence, that the tested drug was in the claimant's system at the time of the accident or injury and that the injury was sustained in conjunction with the use of the drug if:

- the initial testing was administered within 24 hours of the accident or injury;

- notice was given to the claimant of the test results within 14 calendar days of the insurer receiving actual notice of the positive test results;
- the claimant was given an opportunity to perform a second test upon the original sample; ***AND***
- the positive test was confirmed by mass spectrometry using generally accepted medical
  or forensic testing procedures

Settlements/Rating Reports

With respect to compromised settlements, after a claimant has reached MMI and the employer/insurer has received a rating from the authorized treating physician, a claimant shall have a period of 12 months from such date to obtain a rating from a physician of his or her own choosing.

Absent a finding of extenuating circumstances by an ALJ or the Commission, if after 12 months the claimant has not obtained a rating from a second physician, any compromise settlement entered into under this section shall be based upon the initial rating.

A finding of extenuating circumstances by an ALJ or the Commission shall require more than failure of the claimant to timely obtain a rating from a second physician.

The provisions of this subsection may be waived by the employer with or without stating a cause.

PTD

With respect to injuries resulting in the death of a claimant, the statute has been changed with respect to dependents. The statute previously stated that the employer shall pay to the "total" dependents of the claimant a death benefit. However, "total" has been removed from the statute.

The definition of dependent now also includes a stepchild claimable by the deceased on his or her federal tax return at the time of the injury.

Termination

No employer or agent shall discharge or discriminate against a claimant for exercising any of his or her rights under this chapter when the exercising of such rights is the motivating factor in the discharge or discrimination.

For the purposes of this section "motivating factor" shall mean that the claimant's exercise of his or her rights under this chapter actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination.

Hardship Hearings

With respect to a claimant's request for a Hardship Hearing the statute previously allowed the Division 60 days to set a case for Hearing but the statute has now been changed to allow only 30 days.

Coverage for Shareholders of an S Corporation

Beginning on January 1, 2018 a shareholder of an S corporation with at least 40% or greater interest in it may individually elect to reject coverage by providing written notice of such rejection to the corporation and its insurer.