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MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

April 2018 – June 2018

Claimant's Injury Not Compensable Because There Was Nothing About that Particular Step that Caused Her Injury

MacFedries vs. General Cable Corporation, Injury No. 15-034728

On May 21, 2015, the claimant injured her right knee while stepping up onto a concrete step when she felt a popping in her right knee accompanied by pain. She reported to her doctors that she was not really doing anything, did not fall, and was simply going up the stairs when she sustained her injury. It was also noted that she had significant right knee arthritis and had sustained a prior right knee injury in 2014.

At a hearing, the ALJ found that the claimant's 2015 knee injury was not compensable in light of the fact that she failed to prove she was injured in an accident that arose out of and in the course and scope of her employment. The ALJ noted that the claimant did not present any evidence regarding the height or rise of the step or show there was anything particular about the step itself that caused her to injure her right knee. In fact, the claimant testified that she simply stepped onto the step and felt a pop and knee pain. The ALJ likened these facts to those in Miller vs. Missouri Highway and Transportation Commission, wherein the Court held that an injury was not compensable when the employee's knee popped while walking on an even road surface, and just because an injury occurs *during* work does not mean that it *arises out of* work. On appeal, the Commission affirmed the ALJ's decision and Award with a supplemental opinion, wherein it noted that the claimant failed to show that the risk source of her injury, stepping up on a step, was work-related.

Knee Injury from Hurdle on Obstacle Course Compensable Because Claimant was Encouraged by Employer to Complete Course in Exchange for PTO, and Claimant Not Equally Exposed to Risk of Landing Awkwardly on Obstacle Course Outside of Employment

Reiter vs. Kansas City Police Department, Injury No. 15-103652

The employer owned and maintained an obstacle course on its premises to train cadets, and the employer also allowed officers to earn two days of PTO by completing the course within a specified time limit. Officers had to complete the course while off-duty and sign a form indicating that any injuries sustained while undertaking the course would be treated as "non-duty related injuries." On December 10, 2015, the claimant sustained an injury to his right knee while off-duty after leaping a hurdle on the course and landing awkwardly. The employer denied the claim, and the claimant underwent an unauthorized ACL repair with Dr. Snyder.

At a hearing, the employer argued that the injury was not compensable, because it occurred during a recreational activity and while the claimant was off-duty. The claimant testified that the only reason he participated in the activity was to earn PTO, not for recreational purposes. The ALJ held that the obstacle course was not a recreational activity, because the employer provided incentives to encourage officers to complete the course, and the injury was found compensable. The employer was ordered to pay medical, TTD, and PPD.

The employer appealed to the Commission, which affirmed the ALJ's decision and Award with a supplemental opinion, wherein it noted that the ALJ came to the correct conclusion but incorrectly cited numerous pre-2005 amendment decisions in her opinion. The Commission held that the correct analysis was whether the risk source of the injury was one to which the claimant was equally exposed outside of work. It held that the risk of injury in this case was landing awkwardly while attempting to clear hurdles, and the risk source was the obstacle course. The Commission held that this risk was related to the claimant's employment because he was encouraged to complete the course in exchange for PTO. Also, the Commission found that the claimant was not equally exposed to the hazard or risk of landing awkwardly after attempting to clear a hurdle on the employer's obstacle course in his normal non-employment life. Therefore, the injury arose out of and in the course and scope of employment and was compensable. The Commission also found that the waiver the claimant signed prior to undertaking the obstacle course was invalid because an employee cannot agree to waive his/her rights under workers' compensation.

Summary Judgment Not Proper Due to Genuine Dispute Regarding Material Facts Needed to Establish Claimant Was a Statutory Employee

Barger vs. Kansas City Power & Light Company, Case No. WD80778 (Mo. App. 2018)

FACTS: The employer (KCPL) was an energy company that used condenser tubes, which were occasionally cleaned in a process that took approximately four days. KCPL originally used its own employees to clean the tubes, but in 2010, it contracted with a company (Projectile) to perform that task. The claimant was an employee of Projectile and cleaned the tubes at the plant on five occasions over the course of several years. On March 21, 2013, he was at the plant to

clean the tubes when he sustained an injury to his right wrist. He filed a workers' compensation claim against Projectile and subsequently filed a civil suit against KCPL, which argued that the claimant could not file a civil suit because he was a statutory employee of KCPL under workers' compensation law. KCPL moved for summary judgment, which the Circuit Court granted.

The claimant appealed and argued that the circuit court should have tried the case rather than granting summary judgement. On appeal, the Court noted that summary judgement was only appropriate if there was no genuine issue of material fact as to whether the claimant was a statutory employee of KCPL. Under Missouri Workers' Compensation Law, a person is a statutory employee if the work is performed pursuant to a contract; the injury occurs on or about the premise of the alleged statutory employer; and *the work is in the usual course of the alleged statutory employer's business*. "Usual business" is defined as activities routinely done; on a regular and frequent schedule; contemplated in a contract or agreement between the contractor and the alleged statutory employer which will be repeated over a short span of time; and performance of which without the contract would require the statutory employer to hire permanent employees.

HELD: The Court found there was a genuine dispute as to whether the claimant was, in fact, a statutory employee of KCPL, including questions regarding whether the tubes needed to be cleaned routinely and on a regular and frequent schedule, whether KCPL owned the necessary tools required to complete the work, and whether KCPL would have to hire permanent employees to clean the tubes if they did not contract that work out to Projectile. Therefore, summary judgment was not proper, and the Circuit Court's decision was reversed.

Claimant Was Statutory Employee, and Ms. Carter, the Company's Owner, Found Personally Liable for Benefits

<u>Rodas vs. The Carter Group, Villa Bella LLC, and Aandrea Carter</u>, Injury No. 15-078084

The claimant worked at Villa Bella Apartment Complex when he sustained an injury to his right knee on May 18, 2015. He was hired as a contractor by The Carter Group to do carpentry, roofing, and anything having to do with remodeling on Ms. Carter's properties. Ms. Carter was the sole owner of Carter Group and Villa Bella, neither of which carried workers' compensation insurance.

At a hearing before an ALJ, Ms. Carter argued that the claimant was an independent contractor, not an employee. The ALJ found that the claimant was a statutory employee, because Villa Bella routinely engaged in the erection, demolition, alteration, and repair of its properties, and the claimant performed work pursuant to a contract, on or about the premises of the employer, and that work was in the usual course of the employer's business. The ALJ ordered Villa Bella and Ms. Carter to pay PPD, TTD, and medical.

Bella Villa and Ms. Carter appealed to the Commission, which affirmed the ALJ's decision and Award with a supplemental opinion. The Commission agreed that the claimant was a statutory employee of Bella Villa, which would otherwise have to hire a permanent employee to perform similar work. However, the Commission also found that Ms. Carter exclusively owned and controlled 100% of both the Carter Group and Villa Bella, which were not legitimate separate corporate entities, and she used these corporations as an "alter ego" in order to avoid her responsibilities under workers' compensation law. By not carrying insurance, Ms. Carter caused the claimant to incur substantial uncompensated medical expenses and lost wages. Therefore, the Commission held that Ms. Carter was personally liable for PPD, TTD, and medical benefits.

Fund Not Liable for PPD Because No Permanent Disability Resulted from Last Work Injury

Collins vs. Kone, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 13-023689

The claimant worked as an elevator repairman, and on April 2, 2013, he bent over in an awkward position on his knees to release an emergency hook on an elevator and had a sudden worsening of low back pain. He was already treating for a prior work-related low back injury that he sustained in April 2012. Prior to the 2013 incident, he noted improvement in his complaints, which were then temporarily reaggravated by the 2013 incident. On May 28, 2013, the claimant reported to the treating doctor that his complaints had returned to the level they were prior to the 2013 incident. The doctor opined there was not a new injury in 2013, because the claimant's complaints were identical to those he had prior to that incident, and he declined to change Dr. Lennard's prior work restrictions or disability rating from the 2012 injury. The claimant and employer entered a settlement agreement for 15% PPD of the body referable to the 2013 claim.

Dr. Paul and Dr. Mullins each issued an IME report. Dr. Paul assessed permanency in the 2012 injury alone and did not mention the 2013 injury. Dr. Mullins reviewed the same treatment records and assessed PPD due to the 2013 incident as a separate injury.

The claimant filed a claim against the Fund and testified at his deposition that he had an increase in complaints after the 2013 incident and was not able to return to his job performing elevator repairs. However, the ALJ did not find his testimony credible because it was inconsistent with his medical records, wherein he also reported an increase in pain after he drove to Fort Leonard Wood to work on an elevator on April 19, 2013, seventeen days after the 2013 incident. The ALJ held that the claimant did not sustain any additional permanent disability as a result of the 2013 incident, and therefore, the Fund was not liable for any permanency in that matter. On Appeal, the Commission affirmed the ALJ's decision and Award.

Employer Liable for Future Medical for Retained Hardware Under Statute Requiring Employers to Provide Prosthetic Devices to Cure and Relieve Effects of Work Injury

Penning vs. Harley Davidson, Injury No. 13-046307

The claimant felt a pop and developed right wrist pain at work on May 13, 2013 while pushing down on a drive train. He was directed to Dr. Toby, who diagnosed a chronic scaphoid fracture non-union that was pre-existing and not related to the work injury. Dr. Toby also diagnosed right carpal tunnel syndrome, which he opined was caused by swelling due to the chronic scaphoid non-union, and he performed a wrist fusion with hardware and carpal tunnel release. At the request of claimant's counsel, Dr. Guinn evaluated the claimant and related both the fracture and the carpal tunnel syndrome back to the work accident.

At a hearing, the ALJ found Dr. Guinn's opinion persuasive and awarded 35% PPD of the right hand/wrist. The ALJ also opined that because the claimant had retained hardware in the right wrist, the employer was liable for future medical referable to the same, pursuant to the statute that requires employers to provide prosthetic devices to cure and relieve the employee from the effects of the work injury.

On Appeal, the Commission affirmed the ALJ's decision and Award with a supplemental opinion, wherein it noted that the claimant's condition was causally related back to the work accident, because the accident caused a change in the pathology of the claimant's wrist that produced immediate, unprecedented pain and disability that necessitated treatment. The Commission also found that the claim for carpal tunnel syndrome was not prohibited, although the claimant did not specifically plead carpal tunnel syndrome in his Claim for Compensation.

Commission Could Not Commute PTD Award to Lump Sum Because Agreement Did Not Constitute a "Claim," Lump Sum Amount Was Not Present-Day Value of PTD Benefits, and Agreement Did Not Plead Unusual Circumstances

Dickemann vs. Costco Wholesale Corp., Case No. SC96513 (Mo. Sup. Ct. 2018)

FACTS: The claimant sustained a compensable work injury in July 2010. An ALJ ordered the employer/insurer to pay PTD benefits, and that Award became final in April 2014. In November 2016, the employer and claimant entered into an Agreement to commute the Award to a lump sum of $400,000.00. However, the Commission refused to approve the Agreement and held that it lacked statutory authority to do so.

The claimant appealed to the Missouri Supreme Court and argued that pursuant to a prior decision in Nance vs. Maxon Elec. Inc., a post-Award agreement to forego weekly benefits in exchange for a lump sum payment is a claim, and the Commission has to approve it if the employee fully understands his/her rights, has agreed to the settlement voluntarily, and the agreement was not procured as the result of undue influence or fraud.

HELD: On appeal, the Court affirmed the Commission's decision. It held that the Commission did not have authority to consider the Agreement, because it did not constitute a claim under workers' compensation law, because the claim had already been resolved in April 2014. In this opinion, the Court overturned the prior decision in *Nance*. The Court also held that the Commission did not have statutory authority to approve the Agreement because the lump sum to be paid ($400,000.00) was not the financial equivalent of the present-day value of the PTD benefits, which was at least $590,000.00 when taking account of the claimant's life contingency. The Court further held that the Commission could not approve the Agreement because commutation is only allowed under clearly unusual circumstances, but the Agreement did not allege any unusual circumstances.

Missouri Court of Appeals Does Not Have Authority to Review Award of Temporary or Partial Benefits in a Workers' Compensation Claim

Leech vs. Phoenix Home Care, Inc., Case No. SD35220 (Mo. App. 2018)

FACTS: The ALJ awarded the claimant TTD benefits in an amended Temporary Award, which was affirmed by the Commission. The employer filed an appeal with the Court. The claimant subsequently filed a Motion to Dismiss the employer's appeal on the grounds that the Court does not have statutory authority to review an Award of temporary or partial benefits.

The employer pointed to a Missouri regulation that states that, "Any party who feels aggrieved by the issuance of a temporary or partial award by any administrative law judge may petition the commission to review the evidence upon the ground that the applicant is not liable for the payment of any compensation…" 8 C.S.R., section 20-3.040. The employer argued that the Court should consider its appeal because it was denying liability for any compensation in this matter.

HELD: The Court was not persuaded by the employer's argument and granted the claimant's Motion to Dismiss. It held that it has statutory authority to review an appeal from a *final* Award of the Commission, not temporary or partial awards, and as an appellate court, its authority to consider an appeal is governed by statute, not by administrative regulations.

Employer Liable for Total Knee Replacement, Despite Significant Pre-Existing Arthritis, Because Injury Complicated the Arthritis and Caused Increased Pain and Need for Surgery

Pierce vs. Bedrock, Inc., d/b/a Tri-State Motor Transit Co., Injury No. 09-072827

The claimant sustained a compensable right knee injury on September 14, 2009. Dr. Parmar performed an ACL repair and found evidence of Grade III/IV chondromalacia. He placed the claimant at MMI and opined that he would need a total knee replacement (TKR) in the future due

to his pre-existing arthritis. Dr. Stuckmeyer evaluated the claimant at his attorney's request and opined that the need for a TKR flowed from the claimant's most recent injury. The claimant settled with the employer for 26% PPD of the right knee, and medical was to be left open for a period of one year after the date of settlement, which was approved on May 4, 2012. One month later, the claimant demanded that the employer authorize a TKR, which was denied in light of Dr. Parmar's opinion.

On November 3, 2014, the claimant filed a Motion to Reactivate his claim. The employer filed an objection, and the claimant requested a hearing. At a hearing, the ALJ denied the Motion because no new physical evidence or medical opinions were admitted at hearing that were not previously available at the time the claimant voluntarily entered the compromise settlement. The ALJ also found Dr. Parmar's opinion persuasive and held that the employer was not liable for the TKR.

On Appeal, the Commission reversed the ALJ's decision and Award. It found that regardless of reactivation, it had jurisdiction to determine liability for future medical treatment because the claimant requested surgery during the time period that future medical was to remain open under the settlement agreement. The Commission also held that although the claimant had a history of prior knee issues before the work injury, he did not require surgical intervention until *after* the work injury. Therefore, the work injury was the prevailing factor in causing a change in pathology in the claimant's right knee and a permanent increase in disabling symptoms, which necessitated a TKR. Therefore, it did not matter if the surgery was required because the work injury complicated a pre-existing condition, because once the accident and injury were found compensable, the claimant only needed to show that the need for treatment flowed from the work injury.

Compensable Occupational Disease Claim for Chronic Right Rotator Cuff Tear Due to Repetitively Slicing Meat and Cheese

<u>Dockery vs. Dierbergs Markets, Inc.</u>, Injury No. 14-049534

The claimant, a 64-year-old long-time deli worker, sliced 300-400 slices of various meats and cheeses each shift. On November 6, 2014, she had sudden onset of right shoulder pain while pulling on a ham. An MRI showed a full thickness rotator cuff tear. The employer sent her to Dr. Nogalski, who diagnosed a shoulder strain and chronic rotator cuff tear and recommended conservative treatment, including physical therapy. She was subsequently released from care and followed up with her own doctor, Dr. Sigmund, who opined that her rotator cuff tear probably *was* pre-existing, and the changes on the MRI looked chronic, but she may have done something at work to exacerbate the problem or extend the tear. Dr. Sigmund performed a right shoulder arthroscopy.

Dr. Schlafly evaluated the claimant at her attorney's request and opined that the years she worked

as a deli cutter was the prevailing cause of her chronic rotator cuff tear, because repetitive use of the shoulder could cause a gradual progressive tearing where symptoms do not develop until the tear reaches a certain point in size. Dr. Nogalski disagreed with Dr. Schlafly and opined that the MRI did not show any acute findings, and work was not the prevailing cause of the tear.

At a hearing, the ALJ found the opinion of Dr. Nogalski more persuasive and denied compensation. On Appeal, the Commission noted that the claimant made hundreds of slices of meat/cheese each day using her right hand/arm to operate the slicer, and she also routinely carried heavy boxes of meat weighing 40-50 pounds. The Commission reversed the ALJ's decision and Award and held the employer was responsible for past medical expenses, TTD, and 35% PPD of the right shoulder.

Firefighter's Claim for NHL Due to Exposure to Fumes/Smoke Found Compensable Because Claimant Established Increased Risk/Probability of Developing NHL Due to Occupational Exposure

Cheney (Deceased) and Surviving Spouse vs. City of Gladstone, Injury No. 08-066683

The claimant, a longtime firefighter, developed non-Hodgkin's lymphoma (NHL). He filed a workers' compensation claim, underwent treatment, and subsequently died as a result of the disease on May 22, 2014. He was exposed to smoke and other emissions during his work as a firefighter, including fumes from burning household objects that contained toxins and carcinogenic chemicals. He was also regularly exposed to diesel fumes in the fire station due to poor ventilation.

Dr. Lockey and Dr. Koprivica testified that the claimant's occupational exposure as a firefighter was the prevailing factor in causing his NHL. Dr. Lockey cited a statistical correlation between firefighting and NHL. Dr. Shah testified on behalf of the employer that NHL has no known cause and is a disease to the lymphatic system, not the respiratory tract or cardiovascular system, and age, race, and obesity are known risk factors for NHL. The claimant's treating oncologist also opined in a report that it is impossible to know the cause of NHL.

At a hearing, the ALJ found that the claimant failed to prove that his job duties as a firefighter were the prevailing factor in causing his NHL. The ALJ found the opinions of Dr. Shah and the oncologist persuasive and opined that statistical correlation does not equal causation. The claimant argued that the firefighter presumption should apply, which states that "diseases of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart or cardiovascular system, including carcinoma, may be recognized as occupational diseases for the purposes of this chapter and are defined to be disability due to exposure of paid firefighters of a paid fire department… if a direct causal relationship is established." The ALJ rejected this argument because medical causation had not been established, and NHL was not one of the diseases listed in that provision.

On Appeal, the Commission reversed the ALJ's decision and Award. The Commission held that with respect to occupational disease, the claimant does not need to establish causation to a medical certainty. The Commission found the claim compensable because it found that there was an increased risk of contracting NHL as a result of occupational exposure as a firefighter. The Commission did opine it was unclear whether NHL qualifies as one of the diseases in the firefighter provision, but it ultimately found that it did not matter, because the claim was compensable regardless. Therefore, the employer was ordered to pay death benefits to the claimant's dependent widow.

No Safety Penalty Because Telling Employees to Obey Any Safety Rules at a Customer's Plant Was Not Sufficient to Trigger a Penalty

Marquess (Deceased) and Estate of Jesse Marquess and Estate of Patricia Marquess vs. Fischer Concrete Services, Inc. and University of Missouri Healthcare, Injury No. 11-068578

The claimant was working as a pneumatic tanker truck driver for the employer and delivered material to customers' plants. It was customary for drivers to open the center hatch on the top of the tank to allow it to be filled. The trucks had ladders on the side, but some customers required drivers to use a "gantry," which was a platform with a permanent set of steps and railings. On August 27, 2011, the claimant was on site at a customer's plant (Plant) when he climbed the ladder on his truck to open the hatch and fell to the ground, and he was rendered a paraplegic. The Plant did require all drivers to use a gantry while on the property. There was a written safety rule posted on the wall at the Plant that announced this policy. The employer had a policy that while on site at a customer's plant, all drivers were to adhere to any safety rules at that facility. During treatment, the employer paid only 50% of the medical bills and TTD, because it argued it was entitled to a safety penalty because the claimant failed to comply with its policy when he violated the Plant's safety rule regarding the gantry.

At a hearing, the ALJ declined to award a safety penalty because the Plant's rule was not the employer's safety rule, and simply stating that drivers should adhere to a customer's rules is akin to suggesting that a worker should "be safe" or "not do anything stupid," which is not sufficient to trigger a safety penalty. The ALJ found the claimant PTD and ordered the employer to pay the rest of the TTD and medical owing and provide future medical. The claimant subsequently died, and his surviving spouse filed an Amended Claim for death benefits before she also died, at which time her estate was substituted as a claimant, along with the claimant's estate and the guardian of their dependent granddaughter.

On appeal, the Commission affirmed the ALJ's decision and Award with respect to the safety penalty, reasoning that telling drivers to obey the safety rules at other companies' facilities is akin to telling drivers to "obey all traffic laws," which has previously been found insufficient to assert

a safety penalty. The Commission also considered the issue of death benefits and held that the prevailing cause of the claimant's death was underlying coronary artery disease, not any conditions relating to his work injury. Therefore, the employer was not responsible for the same.

No Safety Penalty Because Employer Failed to Show It Made Reasonable Efforts to Ensure Employees Obeyed Reasonable Safety Rules

Elsworth vs. Wayne County Missouri, Case No. SD34919 (Mo. App. 2018)

FACTS: The claimant, an 18-year-old who was on the job less than a month, was driving a dump truck when he rounded a corner and rolled the truck, which placed him in a persistent vegetative state. He had a commercial drivers' instruction permit for two weeks prior to his first day of work, and he was directed to drive the dump truck by himself. The employer alleged the claimant was speeding and not wearing a seatbelt at the time of the accident, and it argued it was entitled to a safety penalty reduction in benefits.

Evidence at the hearing indicated that the claimant was accompanied by other drivers on a few occasions and was told on at least two occasions to wear his hard hat and seatbelt and observe all traffic laws while driving. No other evidence was presented at the hearing regarding what, if any, specific safety training the claimant underwent. The ALJ found that the employer failed to prove it was entitled to a safety penalty. On appeal, the Commission affirmed the ALJ's decision and Award.

HELD: On appeal, the Court noted that in the past, specific factors have been considered to determine whether an employer has taken reasonable efforts to cause compliance with safety rules, including: distribution of written safety materials; scheduling and presentation of regular training seminars educating employees concerning the rules; warning employees that disciplinary action will be taken if employees fail to follow necessary guidelines; completion by employees of a written test to confirm understanding of the rules; and whether known violations of the safety rules have previously gone unpunished. The Court held that the Commission could have found from the evidence that the employer did not provide specific training regarding dump truck safety and did not make reasonable efforts to enforce safety rules, especially considering that the claimant was directed to drive a commercial vehicle by himself with almost no experience. The Court affirmed the Commission's decision and Award.

Employer Liable for PTD After Right Rotator Cuff Tear/Repair and Conservative Left Shoulder Treatment, Despite Fact that Claimant Had Only Second Grade Education and Could Not Speak English, and Claimant Did Not Develop Left Shoulder Symptoms Until Two Years After Work Accident

Pineda vs. EFC Corporation, Injury No. 06-036310

The claimant, a 59-year-old employee from Mexico with a second-grade education and limited English skills, sustained a shoulder injury on April 28, 2006 while lifting heavy windows at work. The doctor diagnosed a partial rotator cuff tear and labral tear and performed an arthroscopic repair. The claimant continued to have significant difficulty with the right shoulder after surgery, despite undergoing injections. He returned to work and sustained a second injury on January 31, 2008, when he developed left shoulder pain, which he attributed to using only his left arm at work to compensate for his right shoulder. He treated conservatively for the left shoulder. The employer was not able to accommodate the claimant's restrictions beginning in February 2009, and he has not worked since.

Both parties submitted expert opinions. Dr. Volarich evaluated the claimant at his attorney's request, and Dr. Lennard evaluated him at the employer's request. Both doctors assessed PPD of the bilateral shoulders and recommended permanent restrictions. Dr. Volarich believed the conditions in both shoulders resulted from the 2006 work injury and opined that the claimant was PTD as a result of the 2006 injury alone. Dr. Lennard opined the left shoulder condition was the result of a separate work injury that occurred in 2008. With respect to vocational evaluations, Mr. Eldred opined the claimant was PTD as a result of the April 2006 injury alone. Mr. England opined that considering Dr. Lennard's restrictions in combination with the claimant's academic limitations and language barrier, he was likely unemployable.

At a hearing, the ALJ held that the claimant was PTD in light of the fact that he continued to take narcotic pain medication, needed to lie down during the course of the day, and is unable to speak, read, or write in English. The ALJ also held that the claimant's left shoulder condition followed as a natural and legitimate consequence of the original accident in 2006, and there was not a separate injury in 2008. Therefore, the employer was liable for PTD benefits instead of the Fund. On appeal, the Commission affirmed the ALJ's decision and Award with a supplemental opinion, wherein it agreed that the claimant's left shoulder complaints were the result of the 2006 work injury.

Employer Liable for PTD Benefits for Operated Rotator Cuff Tear, Despite Fact He was Already Limited by Age, Education, and Other Life Factors; Future Medical Left Open Due to Retained Hardware

Duarte vs. Butterball LLC and Treasurer of the State of Missouri as Custodian of Second Injury Fund, Injury No. 09-111523

The claimant was a 76-year-old from Peru who spoke very little English, and who reportedly earned a college degree in Peru. He developed right shoulder pain while working for the employer on the meat processing line, which involved repeated overhead cutting and pulling to remove the meat from 58 turkeys per minute. The claimant treated on his own with Dr. Ogden, who diagnosed AC joint osteoarthritis and a chronic rotator cuff tear due to arthritis. Dr.

Lieurance performed an unauthorized right shoulder arthroscopy on June 24, 2009 and a second surgery on April 21, 2010. The claimant was not able to return to work for the employer after March 31, 2009 due to his shoulder restrictions, and he testified that he was also rejected for a job with another employer for that reason. The claimant did have several pre-existing conditions, including cataracts and DDD of the lumbar and cervical spine, but he did not have any work restrictions referable to those conditions.

At his attorney's request, the claimant was evaluated by Dr. Volarich, who placed him at MMI, assessed 40% PPD of the right shoulder, and recommended permanent work restrictions of no overhead use of the right arm and lifting restrictions. Dr. Parmet evaluated the claimant on behalf of the employer and diagnosed degenerative arthritis with a secondary rotator cuff tear, and he opined that pre-existing arthritis was the prevailing factor in causing the claimant's condition, not his job duties. Vocational experts for both parties opined the claimant was PTD and unemployable. However, Mr. Eldred opined he was PTD due to the right shoulder injury alone, whereas Mr. Dreiling opined he was not PTD due to the right shoulder injury alone, because that injury would not impact the claimant's ability to perform prolonged standing/walking.

At a hearing, the ALJ found the injury compensable. With respect to PTD, the ALJ noted that although the court could weigh factors such as the employee's age, education, physical condition, work history, job skills, and pain when determining PTD, those are not ratable disabilities that are subject to liability from the Fund. Therefore, the ALJ held that the claimant was PTD as a result of the last injury alone, despite the fact that he was already very limited in the types of work he could perform when he moved to the United States due to his age, education, and other life factors. The ALJ also concluded that future medical should be left open in light of the fact that the claimant had retained hardware which may require further intervention in the future. Therefore, the employer was found liable for PTD benefits as well as TTD, past medical, and future medical. On Appeal, the Commission modified the ALJ's decision and Award with respect to TTD benefits but otherwise affirmed the Award with respect to PTD and future medical.

Disability Payments Not Credited Against TTD Award Because Employer/Insurer Failed to Clearly Raise the Issue or Provide Any Records at the Hearing to Prove Entitlement to a Credit for Same

<u>Barnett vs. Harley Davidson</u>, Injury No. 15-065149

The claimant worked as an engine assembler at Harley Davidson for 12 years, and he alleged complaints to multiple body parts due to his repetitive job duties. He treated in plant medical and was then directed to his PCP, who recommended injections and then performed a cervical fusion at C5-6. Both sides obtained medical opinions, and at a hearing, the ALJ awarded 25% PPD of the body referable to the cervical spine as well as PPD and TTD.

On Appeal, the employer argued it was entitled to a credit for short-term disability payments received by the claimant during the time TTD was owed.

The Commission affirmed the ALJ's decision and Award with a supplemental opinion. The Commission declined to award a credit because the employer failed to raise the issue at the hearing or present any records or documentation regarding the source of any short-term disability payments to the claimant. Pursuant to statute, no benefits derived from any source besides the employer and workers' compensation insurer shall be considered in determining the compensation due. Therefore, without documentation that short-term disability payments were made by the employer or the employer's workers' compensation carrier, the employer failed to meet its burden to prove that it was entitled to a credit.

Insurer Liable for Enhanced Mesothelioma Benefits Despite Fact that Insurer Did Not Insure Employer During Period of Last Exposure; Statute Providing Enhanced Benefits Constitutional When Applied to Claims Filed After January 1, 2014, Regardless of Date of Last Exposure

Accident Fund Insurance Co.; E.J. Cody Co., Inc. vs. Casey/Murphy, Case No. SE96899 (Mo. Sup. Ct. 2018)

FACTS: The claimant worked as a floor tile installer for several different companies, and he last worked as a tile installer for the Employer from 1984-1990. During that time, he was exposed to asbestos while removing old tile. He retired in 1990, was diagnosed with mesothelioma in 2014, and filed a Claim against the Employer in February 2015. At the time the Claim was filed, the Employer had an insurance policy purchased from the Insurer with a mesothelioma endorsement that provided coverage for all mesothelioma claims filed on or after January 1, 2014. The Insurer did not insure the Employer from 1984-1990, when the claimant was last exposed. The claimant subsequently died from mesothelioma, and his widow (Murphy) proceeded with the Claim following his death.

At a hearing, the ALJ found the Employer/Insurer liable for the enhanced benefits. On appeal, the Commission affirmed the ALJ's decision and Award and held that the last exposure rule did not apply to claims made under the toxic exposure provision. Therefore, the Insurer was liable for the enhanced benefits, despite the fact that it did not insure the Employer at the time of last exposure. The Commission also limited recovery to Murphy because the amended claim did not identify the claimant's eight adult children as dependents/claimants.

On appeal, the Insurer argued that it could not be liable for this Claim because it did not insure the Employer at the time the claimant was last exposed to asbestos, and it argued that the toxic exposure provision was unconstitutional if applied retrospectively. Murphy argued that the Commission erred by excluding Casey's eight children from the final Award.

HELD: The Missouri Supreme Court affirmed the Commission's decision and Award but modified it with a supplemental opinion, wherein it included Casey's eight children in the Award. The Court found that the Employer accepted liability under the statute when it purchased a policy from the Insurer to cover additional benefits for all mesothelioma claims filed on or after January 1, 2014, which would include the current Claim, which was filed in 2015. The insurance endorsement specifically stated that it applied to any claims filed after January 1, 2014. The Court reasoned that "the relevant inquiry in this matter is not under whose employment Mr. Casey was last exposed, but whether the terms of the employer's policy provide coverage." The Court also found that the provision was not unconstitutional as applied in this case, because the Claim was filed *after* January 1, 2014, and the Employer/Insurer affirmatively agreed to provide coverage for mesothelioma claims filed after January 1, 2014. It did not matter that the claimant's employment and exposure with the Employer occurred *prior to* January 1, 2014.

Notably, the Court found that the last exposure rule that is used to determine liability for occupational disease claims *does not* apply to toxic exposure claims. Therefore, it is unclear whether any/every employer who has employed a claimant that was exposed to asbestos during that employment will have potential liability for enhanced benefits under this provision.

Travelers Did Not Effectively Cancel Policy Prior to Date of Injury Because Did Not Provide Unequivocal, Advanced Notice of Cancellation That Strictly Complied with Policy's Terms

Chudnovtsev vs. BSI Constructors, Inc; St. Louis Brick & Stone, Injury No. 14-027901

St. Louis Brick (SLB) was a subcontractor of BSI. It purchased workers' compensation insurance from Travelers for the period November 2013 – November 2014. According to the terms of the policy, it could be cancelled unilaterally if Travelers *mailed or delivered advanced written notice* of the cancellation. SLB had an inconsistent payment history. On March 13, 2014, Travelers issued a Notice of Cancellation (March Notice) for non-payment with an effective date of April 2, 2014 and advised that the policy "is cancelled," although it also noted that cancellation could be rescinded if the minimum amount due was received before that date. One month later, on April 15, 2014, Travelers generated a lapse of insurance letter (April Letter) to advise SLB that coverage was terminated as of April 2, 2014. However, this again advised that coverage could be reinstated if SLB paid the outstanding premium. On April 17, 2014, SLB generated a check payable to Travelers. However, a stop payment order was issued sometime between April 22, 2014 and April 24, 2014, and Travelers returned the check.

On April 21, 2014, the claimant sustained a compensable injury while working for SLB and filed a workers' compensation claim against SLB and BSI, the general contractor. Travelers argued it did not have a valid policy for the alleged April 21, 2014 date of injury because the policy was cancelled on April 2, 2014. The parties entered into an agreement regarding permanency, and

the only remaining issue was whether Travelers was responsible for payment of benefits as opposed to BSI's insurer.

At a hearing, the ALJ noted that notice of cancellation in Missouri must be very specific, strictly comply with the terms of the policy, unequivocal and unmistakable, and it must be a present cancellation that is not dependent upon some future event. The ALJ concluded that the March Notice was not an effective cancellation because it advised that Travelers could rescind the cancellation upon receipt of the minimum due. The ALJ also found that the April Letter did not effectively cancel the policy because it did not provide advanced notice of the cancellation prior to the April 2, 2014 cancellation date, pursuant to the terms of the policy. The ALJ did conclude that the April Letter could have effectively cancelled after the April 15, 2014 date, except that Travelers could not prove that it "mailed or delivered" the notice as required by the policy. Simply showing a copy of the letter with SLB's address was not sufficient. Therefore, the ALJ held that Travelers did have an effective insurance policy on the claimant's date of injury and was responsible for paying workers' compensation benefits. On appeal, the Commission affirmed the ALJ's decision and Award.