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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Work Accident Prevailing Factor in Causing Ankle Injury and Resulting Disability, Including Death Due to Pulmonary Embolism

Knutter vs. American National Insurance, Case No. SD35644 (Mo. App. 2019)

FACTS: On March 25, 2013, the employee sustained a non-displaced right ankle malleolus fracture, which was treated conservatively, and the claimant was advised to use a wheelchair. Less than two months later, she died as the result of a pulmonary embolism. The claimant filed a Claim for Compensation for death benefits on behalf of the employee.

Doctors disagreed as to whether the claimant's ankle injury was the prevailing factor in causing the PE and death. Dr. Wright provided a report at the claimant's attorney's request and opined that the employee had underlying risk factors, but the employee's immobility following her ankle injury was the tipping point that caused the PE. Dr. J. Mullins provided a report at the employer/insurer's request and opined there was a lack of evidence directly tying the ankle fracture to DVT or a blood clot, and he noted that the employee had other contributing factors such as obesity, a sedentary lifestyle, obstructive sleep apnea, and chronic kidney disease, all of which raised her risk of DVT. Dr. Cross reviewed the medical records at the employer/insurer's request and opined that without an autopsy, it was impossible to conclude that the claimant had DVT in the lower extremity that may have caused a PE to the lungs.

After a Hearing, the ALJ denied death benefits and opined it would be pure speculation to causally relate the PE back to the work injury since there was no autopsy or evidence in the medical records directly tying a blood clot or DVT to the claimant's injury or the use of a wheelchair. On appeal, the Commission reversed the ALJ's decision and Award. The Commission found the expert opinion of Dr. Wright credible and concluded that it was not coincidence that the claimant developed a PE just forty-five days after being confined to a wheelchair due to her injury.

HOLDING: The employer/insurer appealed the Commission's decision, which was affirmed by the Court, who specifically found that the Commission's decision was supported by sufficient competent evidence on the record and deferred to the Commission's credibility determinations.

Claimant's Work as Firefighter Prevailing Factor in Development of Non-Hodgkin's Lymphoma and Claimant's Death

<u>Cheney (Deceased), Cheney spouse vs. City of Gladstone,</u> Case No. WD81939 (Mo. App. 2019)

FACTS: 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 and opined that statistical correlation does not equal causation. On Appeal, the Commission reversed the ALJ's decision and Award and 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 there was an increased risk of contracting NHL as a result of occupational exposure as a firefighter, and the employer was ordered to pay death benefits to the claimant's dependent widow.

HOLDING: The employer appealed, and the Court of Appeals affirmed the Commission's decision and Award. The Court noted that the Commission had expressly found the expert opinions of Dr. Lockey and Dr. Koprivica the most credible and persuasive with respect to causation and the prevailing factor in the development of the claimant's NHL, and it declined to disturb the Commission's credibility findings.

Court Reversed Circuit Court Decision Granting Summary Judgment Finding a Genuine Issue of Material Fact as to Whether Defendant Engaged in Affirmative Negligent Act That Purposefully and Dangerously Caused or Increased Risk of Injury to Employee

<u>Mems vs. Labruyere</u>, Case No. ED106319 (Mo. App. 2019)

FACTS: On June 27, 2013, the defendant was removing a heavy overhead roller door from a mechanical assembly and caused the door to suddenly detach and fall onto the claimant, causing injury. The Circuit Court granted summary judgment at the defendant's request, holding that the employee failed to establish a genuinely disputed fact that the defendant engaged in "purposeful, inherently dangerous conduct." The employee appealed.

HOLDING: The Court of Appeals first looked to whether the defendant breeched a duty owed to the employee by engaging in "an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." The Court first found that the defendant performed an *affirmative* act by loosening the bolts and prying the roller door loose from its wall anchors. It also held that the defendant's actions were *purposeful* because he meant to do the physical acts of
detaching the bolts and prying the roller door. He did not need to intend to cause harm for his actions to be purposeful. The Court then found that there was sufficient evidence for a jury to find that the defendant's actions were *negligent* and *dangerously caused or increased the risk of injury* to the employee. The Court also found that the defendant's actions created a transitory risk to the employee that was not reasonably foreseeable by the employer, and therefore, he breached a duty that was separate and distinct from the employer's non-delegable duty to provide a safe workplace. Therefore, the Circuit Court's award of summary judgment was reversed, and this matter was remanded for trial.

Compensable Injury Because No Evidence Claimant was Equally Exposed to Hazard or Risk of Injury of Pulling 2-Wheeled Cart Through Congested Doorway Outside of Work in Non-Employment Life

McDowell vs. St. Luke's Hospital of Kansas City, Case No. WD82076 (Mo. App. 2019)

FACTS: The claimant had a pre-existing hip condition which caused her to use a support cane and transport her belongings between her vehicle and work using a 2-wheeled rolling cart. She parked in a parking garage at work, where she frequently encountered other people. On her date of injury, the claimant went through a door in the garage and attempted to maneuver to the right to avoid another employee, at which time the wheel of her rolling cart pulled and caught on the door frame, causing her to fall to the ground and fracture her left wrist.

At a hearing, the claimant testified that she only used the cart when arriving to and departing from work, and she exclusively used the north parking garage because it was the door closest to her destination. The ALJ found the claim compensable because the risk source was pulling a cart of work-related supplies through a congested entryway, which was related to the workplace and not a risk source the claimant would be likely to encounter in her non-work life. The Commission affirmed the ALJ's decision and Award, and the employer appealed the Commission's decision.

HOLDING: On appeal, the Court held that the Commission did not err when it held that the claimant's injury arose out of and in the course and scope of employment. The employer first argued there was no causal nexus between the claimant's use of the rolling cart and her work because the cart was not necessary for her to complete her work. However, the Court found that the risk source of the claimant's injury was the door frame of a congested exit, and there was no evidence to suggest that the claimant was equally exposed to the cause of this injury outside of work. The employer also argued that the risk of injury was unrelated to the claimant's work because she only used the cart due to her prior hip replacement. However, the Court held that an using an assistive device due to a pre-existing condition does not render an injury involving the

use of that assistive device non-compensable.

Claimant Not Injured in Course and Scope of Employment Because Equally Exposed to Risk Source of Descending Stairs Outside of Work in His Normal Non-Employment Life

Marks vs. Missouri Department of Corrections, Injury No. 17-086644

The claimant was required to perform security checks and cell searches, which required him to go up and down stairs at work. On his date of injury, he was descending the stairs when he mis-stepped off a stair, felt his right knee twist, and injured the same. He reported the injury, but no treatment was authorized by the employer. He completed a questionnaire four days after the accident wherein he denied that he was responding to a code or other emergency-type situation, that he was distracted for any reason while on the stairs, that he was carrying anything at the time, that there were any offenders in the area, or that there was anything on the floor or physically wrong with the steps. When asked specifically to state what caused his injury, the claimant answered that he "stepped off the step wrong."

At a hearing, the claimant testified that he also uses stairs outside of work to access his apartment. He did not testify that there was anything physically defective about the stairs. The claimant did testify that he was performing security training and was looking back for another officer to ensure her safety when he missed the step. However, the ALJ did not find his testimony credible in light of the fact that it was inconsistent with his prior statements just four days after the date of injury.

The ALJ held that the accident and injury did not arise out of and in the course and scope of employment because the hazard or risk of injury was descending stairs and stepping wrong, which was unrelated to the claimant's employment, and the claimant was equally exposed to that risk outside of work in his normal non-employment life. The ALJ found that the claimant was simply walking down the stairs and was not carrying anything, responding to a code, hurrying to complete a task, distracted, or looking for a co-worker. The ALJ also found there was nothing on the stairs, and the stairs were not physically defective. The ALJ further opined that even had the claimant been looking at his co-worker and attempting to complete a task in a timely manner, the only risk source in this case was walking down stairs. Therefore, the ALJ found that the claimant failed to meet his burden of proof that he sustained a compensable injury. On Appeal, the Commission affirmed the ALJ's Decision and Award.

Windsor Not Liable for Benefits as Statutory Employer, Because ALJ Found No Joint and Several Liability with Primary Employer, A Staffing Agency

Chilton vs. Productive Staffing Ajinomoto Windsor Inc., Injury No. 15-098442

The claimant was hired by staffing agency Productive Staffing (PS) to work at Windsor Foods (WF), where he performed maintenance work. He received paychecks through PS, but daily instructions were given by his supervisors at WF. PS had a contract with WF noting that PS would provide all workers' compensation insurance for employees. The claimant had an

employment contract with PS but not with WF. On December 22, 2015, claimant sustained an injury to his right hand. PS authorized treatment and paid TTD. The claimant filed a Claim for Compensation against both PS and WF. PS filed a timely Answer, but WF did not. The claimant reached a settlement agreement with PS and then pursued additional benefits against WF.

At a hearing, the claimant argued that WF was a statutory employer. The ALJ noted that a 3-part test determines statutory employment, including whether: the work at the time of the injury was being performed pursuant to a contract; the injury occurred on or about the premises of the alleged statutory employer; and the work was performed in the usual course of the alleged statutory employer's business. The ALJ found that all three parts of the statutory employment test had been met, and WF was a statutory employer of claimant. However, the ALJ also held that WF was not liable for benefits because PS was the immediately employer, and pursuant to statute, no other employer shall be liable if the employee was insured by his immediate employer, which was the case here.

The claimant argued that PS and WF were joint employers and were jointly and severally liable for benefits. However, the ALJ rejected this argument and held that PS and WF were not joint employers. The ALJ noted that joint employment occurs when a single employee is under contract with two employers, under simultaneous control of both, and performs services for both employers, and the services are the same or closely related to that of the other. The ALJ noted that the claimant had an employment contract with PS but not with WF, and there was no persuasive evidence of simultaneous control or that the claimant provided services for both employers that were the same or closely related. Therefore, the ALJ denied the claim against WF. On appeal, the Commission affirmed the ALJ's decision and Award.

Court of Appeals Reversed Commission Decision and Found That Employer That Went Out of Business Before 2014 Could Still Be Liable for Enhanced Benefits by Fully Insuring Its Liability for Occupational Disease at Time of Last Exposure

<u>Hegger vs. Valley Farm Dairy Company</u>, Case No. ED106278 (Mo. App. 2019)

FACTS: The employee was last exposed to asbestos through the employer in 1984. The employer went out of business in 1998. The employee then died in 2015 from mesothelioma caused by exposure to asbestos while working for the employer. He initially filed a Claim for Compensation, and his children subsequently sought benefits after his death.

At a Hearing, the ALJ addressed the sole issue of enhanced benefits under Section 287.200.4(3). The ALJ found that the claimant was last exposed to asbestos while working for the employer, and his exposure was the prevailing factor for his diagnosis of mesothelioma which resulted in his death. However, neither of the insurers who insured the employer during the claimant's dates of employment were liable for paying enhanced benefits because the enhanced benefits provision did not go into effect until January 1, 2014. The ALJ reasoned that the employer could not possibly have elected to be liable for enhanced benefits, because it went out of business in 1998. The ALJ also held that insuring its liability for occupational diseases in 1984 did not qualify as

electing to be liable for enhanced benefits, which are separate from and additional to benefits otherwise payable for an occupational disease. Therefore, the claimant was not entitled to enhanced benefits. On Appeal, the Commission affirmed and adopted the ALJ's decision and Award.

HOLDING: On appeal, the claimants argued that the Commission erred because the employer did elect to accept liability for benefits under strict construction when it insured its liability at the time of last exposure and the employer was not required to provide the Division with notice of an election to accept liability. The Court of Appeals first noted that the employer was fully insured on the date of last exposure and held that this meant the employer had elected to accept liability for any occupational diseases that manifested from that exposure "regardless of the length of time" it took for the occupational disease to manifest and be compensable. The Court held that it did not matter that the statute regarding enhanced benefits did not exist at the time of last exposure. With respect to the claimants' second point on appeal, the Court noted that employers could accept liability for enhanced benefits by "insuring their liability, by qualifying as a self-insurer, or by becoming a member of a group insurance pool." The Court concluded that under strict construction of the statute, only employers who chose to become a member of a group insurance pool were required to provide notice to the Division of an election to accept liability for enhanced benefits. Therefore, the Court reversed the Commission's decision and Award and remanded this matter to the Commission to determine which insurer is liable for paying enhanced benefits.

Employer/Insurer Liable for PTD After Rotator Cuff Tear Due to Permanent Lifting Restrictions, Age, Education, and Other Life Factors

Duarte (Deceased), Dobrauc vs. Butterball, LLC and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 09-111523

The 76-year-old claimant obtained degrees in political science and law in Peru and also worked as an accountant, secretary, and owned two businesses while in Peru. When he immigrated to the United States in 2003, he was 63-years-old, spoke very little English, and did not have a U.S. driver's license. He briefly worked for a florist and then on the line at a cereal plant before he started working for the employer, where his job duties involved pulling skin and cutting meat off of hanging turkey carcasses on the line using his right arm. The claimant developed right shoulder pain, and he was diagnosed with a chronic rotator cuff tear and underwent two unauthorized shoulder surgeries in 2009 and 2010. He has not worked since March 31, 2009. He did collect unemployment benefits for a time in 2010 and 2011. Although the claimant had prior medical conditions including cataracts, DDD in the lumbar and cervical spine, and tenosynovitis in the left wrist, he denied that those conditions hindered or impaired his ability to work prior to 2009.

Dr. Volarich examined the claimant at his attorney's request, causally related the claimant's right shoulder condition and need for surgery back to his job duties, placed the claimant at MMI, and recommended permanent lifting restrictions for the right arm. Dr. Parmet examined the claimant at the employer/insurer's request and opined that the prevailing cause of his need for treatment

was age and preexisting arthritis, although his job duties could have aggravated his condition. Mr. Eldred provided a vocational report at the request of claimant's counsel and opined that the claimant did not have a preexisting disability that constituted a hindrance or obstacle to employment and was PTD as a result of the primary injury alone. Mr. Dreiling provided a vocational report at the employer/insurer's request and opined that the claimant was unemployable due to a combination of his primary injury and preexisting conditions.

At a hearing, the ALJ found the opinions of Dr. Volarich and Mr. Eldred more credible than the opinions of Dr. Parmet and Mr. Dreiling and held that the claimant sustained a compensable injury by occupational disease to his right shoulder. The ALJ also noted the claimant's 5-pound lifting restriction, noted that he did not have any permanent restrictions before 2009, and found the claimant PTD as a result of the primary work injury alone. The ALJ opined that although the claimant was previously limited to manual labor by his age, education, and other life factors, these were not pre-existing disabilities that triggered Fund liability. The ALJ ordered the employer/insurer to pay TTD benefits from April 1, 2009 until his last office visit with Dr. Lieurance on April 29, 2010 as well as PTD and future medical. On appeal, the Commission affirmed the ALJ's decision and Award with a supplemental opinion, wherein it held that the claimant's MMI date was the date of Dr. Volarich's examination on June 12, 2013, because it was the first medical record to expressly address MMI. However, the Commission also held that the claimant was not entitled to TTD during the periods in 2010 and 2011 where he was receiving unemployment.

Claim Barred by Statute of Limitations Because Medical Payments Made in Kansas Did Not Toll Statute of Limitations in Missouri Under Strict Construction

Austin vs. AM Mechanical Services and Missouri State Treasurer as Custodian of the Second Injury Fund, Injury No. 11-112011

On March 10, 2011, the claimant sustained a neck injury and also had complaints in his wrists and shoulder. He underwent a multi-level cervical fusion as well as surgeries on the bilateral wrists/hands and right elbow. The claimant's injury occurred in Kansas, but he entered a contract for employment in Missouri. He previously settled a workers' compensation case referable to this accident in Kansas. The claimant testified that he was under duress at the time of the settlement, which closed out all claims in all jurisdictions for injuries related to the date of injury. This was approved at a conference before an ALJ in Kansas.

At a Hearing in Missouri, the ALJ held that he did not have jurisdiction to rule on the validity of the Kansas settlement, and there was no evidence showing that the employer pressured, forced or coerced the claimant into the settlement agreement. The ALJ noted that he must give full faith and credit to the Kansas settlement agreement and denied the claimant's claim for benefits in Missouri against the employer.

The ALJ also noted that the claim against the Fund was denied because the statute of limitations had run. The claimant argued that the treatment provided by the employer in Kansas pursuant to the Kansas claim tolled the statute of limitations, but the ALJ noted that the statute had to be

strictly construed in Missouri. Therefore, only payments made pursuant to Chapter 287 in Missouri, and not payments made pursuant to the Kansas Workers' Compensation Act, would toll the Missouri statute of limitations. The ALJ also held that there is no authority stating that payment for an examination for rating purposes tolls the limitation period, only payment for a doctor's bill for treatment. Therefore, the claimant's claim in Missouri was denied in full. The employee appealed the ALJ's decision, which was affirmed by the Commission.

Claimant Not Owed Past TTD After Terminated for Post-Injury Misconduct When He Failed To Work For Several Months After Being Released From Care Without Restrictions and Failed to Follow Employer Policies

Hicks vs. Missouri Department of Corrections and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 14-004926

The claimant was working as a corrections officer and was undergoing training when he sustained an injury to his left arm and shoulder. He underwent authorized treatment, including a surgery performed by Dr. Emanuel, who placed the claimant at MMI without restrictions on August 26, 2014. However, the claimant did not feel he could return to work full duty, and light duty was not available. He demanded a second opinion and additional treatment, which was denied, and he advised that he would not come back to work until his shoulder was fixed. The claimant was then a no call, no show for work during most or all of September 2014. He was aware of the employer's attendance policies due to his recent training. Attendance policies required the claimant to notify his supervisor at least 60 minutes prior to the beginning of the work shift each day he was unable to work. The claimant was also instructed by the employer via letter to return to work no later than October 27, 2014, and if he was unable to do so, to submit a voluntary resignation in writing effective on that date. The claimant did not do so, did not request additional leave without pay, and was ineligible for FMLA benefits. A pre-disciplinary meeting was scheduled for October 22, 2014, but the claimant did not attend, and his employment was subsequently terminated.

At his attorney's request, the claimant was evaluated by Dr. Snyder, who opined that the claimant required additional surgery and was unable to work from the date of injury until January 2015. The employer then sent the claimant back to Dr. Emanuel, who performed a second surgery on April 1, 2015. The claimant subsequently underwent a third authorized shoulder surgery, which was performed on December 17, 2015 by Dr. Lenarz, who subsequently placed the claimant at MMI again on February 10, 2016.

At a Hearing, the claimant demanded TTD to cover the period from his date of injury until he reached MMI on February 10, 2016. The employer argued that he forfeited his right to additional TTD when he was terminated for post-injury misconduct. However, the ALJ held that the claimant was unable to return to any employment during that period and failure to comply with the employer's attendance policies did not rise to the level of post-injury misconduct. The ALJ also held that pursuant to statute, post-injury misconduct does not include absence from the workplace due to a workplace injury. Therefore, the ALJ awarded full TTD benefits in the amount of $26,999.12 as well as PPD.

The employer appealed, and the Commission modified the ALJ's decision and Award with respect to TTD. The Commission found that the claimant only called in sporadically to report absences between September and November 2014, despite the fact that he did not return to work in violation of attendance policies, and he failed to make arrangements with his supervisor, request additional leave without pay to cover his absences, respond to the employer's letters, or attend the pre-disciplinary hearing. The Commission found that the employer did not terminate the claimant merely because of his absences but because he failed to follow proper procedures to report his absences, which was post-injury misconduct. Therefore, the claimant was not entitled to TTD benefits after his termination.

When Primary Work Injury Occurs After January 1, 2014, Claimant Not Entitled to PPD Benefits From SIF

Douglas Cosby vs. Treasurer of the State of Missouri as Custodian of Second Injury Fund, Case No. SC97317 (S. Ct. 2019)

FACTS: On January 22, 2014, Douglas Cosby injured his left knee at work. He filed a workers' compensation claim against the employer and Second Injury Fund alleging he was totally or, alternatively, partially disabled as a result of his knee injury combined with his pre-existing disabilities, which included bilateral inguinal hernias in 2002, a left shoulder rotator cuff tear in 2004, and a right shoulder rotator cuff tear in 2008.

At a hearing, the ALJ determined the claimant was not permanently and totally disabled. Also, the ALJ found that the claimant was not entitled to PPD benefits due to the fact that §287.220.3(2) which was added to the Statue in 2013 applied to the case at hand, which states that PPD claims against the Fund shall not be filed for injuries occurring after January 1, 2014. The Commission affirmed the ALJ's award.

HOLDING: The claimant's attorney made various arguments, including that §287.220.3(2) did not apply because the claimant's pre-existing disabilities and/or injuries occurred prior to January 1, 2014. The Court did not agree, as it noted that "injury" is defined in the statute as "an injury which has arisen out of and in the course of the employment." Therefore, "injury" pertained to the primary work-related injury, and since that injury occurred and a Claim was filed after January 1, 2014, §287.220.3(2) does apply, and therefore the claimant is not entitled to PPD benefits from the Fund. The claimant's attorney also made other arguments, including that §287.220.3(2) violates the open courts provision, due process and equal protection, but the Court was not persuaded. Therefore, the Court upheld the Commission's decision and concluded that the claimant was not entitled to any PPD benefits from the Fund.