

**MISSOURI WORKERS' COMPENSATION
CASE LAW UPDATE
April 2011-June 2011**

SIMON & HUDSON, PC

Permanent Total Disability - SIF

Treasurer of the State of Missouri, as Custodian of the Second Injury Fund v. Donald Steck, Case No. WD73110 (Mo. App. W.D. 2011)

FACTS: The claimant injured his back at work and underwent surgery. The claimant settled with the employer, and then proceeded with a claim for permanent total disability against the Second Injury Fund. The Commission determined that the claimant was permanently and totally disabled due to a combination of the claimant's pre-existing conditions and the last work injury. The claimant's prior conditions included arthritis, tinnitus following service in the Navy, foot problems which lead to the insertion of screws in each big toe, chronic pancreatitis, cardiac disease, coronary artery disease, lung disease, deep vein thrombosis and pulmonary embolisms. The Second Injury Fund appealed, arguing that the claimant was permanently and totally disabled because of the last injury alone.

HOLDING: The Court of Appeals affirmed the Commission's decision because there was substantial and competent evidence in the record to support the finding. This evidence included uncontradicted testimony of Dr. Carr and the vocational expert, Phillip Eldred, who both testified that the claimant was permanently and totally disabled as a result of a combination of injuries. The claimant also testified that his prior injuries had hindered his job performance.

Permanent Total Disability - Last Injury Alone

Byron Proffer v. Federal Mogul Corporation and St. Paul Travelers Insurance, and Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. SD30871 (Mo. App. S.D. 2011)

FACTS: The claimant injured his neck and underwent an authorized fusion surgery. Following the fusion, the claimant experienced dizziness but further treatment was denied. He treated on his own and underwent a second surgery for a fusion augmentation. The claimant had a prior back surgery and three prior knee surgeries, but had previously returned to his heavy labor job with no accommodations. The Commission held that the claimant was permanently and totally disabled as a result of the last injury alone and also awarded the claimant back TTD and past medical expenses.

The employer appealed, arguing that the Commission erred in finding the claimant was permanently and totally disabled from the last injury alone because the claimant's expert opinions

were speculative. The employer also argued that the past medical expenses should be reduced because of write offs.

HOLDING: The Court of Appeals held that it was the Commission's role to weigh the evidence and the employer made no objections to the experts' testimony. The Court also held that there was sufficient evidence in the record for the Commission to find that the claimant was permanently and totally disabled as a result of the last injury alone. Finally, the Court noted that no evidence of a reduction in the medical bills had been presented, so the claimant was entitled to the amount of medical bills that he had proved were owed.

Permanent Total Disability - Claimant Working Sporadically

Stancie Molder v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, Case No. WD72977 (Mo. App. W.D. 2011)

FACTS: The claimant worked at Bank of America as a data entry processor from 1991 until 2007. She was diagnosed with work-related bilateral carpal tunnel syndrome and underwent bilateral releases. The claimant settled her claim against the employer, and then went to a hearing against the Second Injury Fund, alleging that she was permanently and totally disabled. The claimant had a prior back surgery, two right foot surgeries and a right shoulder surgery. The claimant had two medical experts and a vocational expert opine that she was permanently and totally disabled.

The Second Injury Fund argued that the claimant was employable on the open labor market because she was working part-time at Burch Automotive at the time of the hearing. The Commission determined that the claimant's work at Burch Automotive was highly accommodated. The claimant usually only worked four hours a day, one day a week, on an as needed basis. The claimant took telephone messages and performed other light work, but did not have to come in if she was not feeling well. The claimant's vocational expert testified that the part-time work with Burch Automotive was not representative of employment in the open labor market. The Second Injury Fund appealed, arguing that the claimant's employment at the time of the hearing indicated that she was not permanently and totally disabled.

HOLDING: The Court of Appeals noted that there was competent and substantial evidence in the record to support the Commission's finding that the claimant was permanently and totally disabled. The Court held that the Commission was not prevented from finding the claimant to be permanently and totally disabled simply because she holds limited, sporadic and/or highly accommodated employment. While the ability to perform some work is relevant to the total disability determination, it is not dispositive. Therefore, the Court upheld the Commission's decision and awarded permanent and total disability benefits to the claimant.

Medical Treatment Related to Work Injury

Phyllis Tillotson v. St. Joseph's Medical Center, Case No. WD72948 (Mo. App. W.D. 2011)

FACTS: All parties agreed that the claimant suffered an acute tear to the lateral meniscus at work. The employer's doctor opined that, due to the pre-existing degenerative condition in the claimant's knee, the only surgery that would benefit the claimant was a total knee replacement. A second doctor agreed, but opined that the claimant's pre-existing arthritis was the prevailing factor in the need for the knee replacement. The Commission determined that the work injury was not the prevailing factor in the need for the total knee replacement, so the employer was not liable for the cost of the knee replacement, temporary total disability or future medical. The Commission also determined that since the total knee replacement required the total removal of the meniscus, the claimant did not suffer any permanent partial disability for the torn lateral meniscus.

HOLDING: The Court of Appeals for the Western District held that the prevailing factor standard applied to the determination of whether a compensable injury occurred, but did not apply when determining what medical treatment was appropriate. The Court noted that the employer must provide medical treatment "as may reasonably be required after the injury or disability, to cure and relieve the effects of the injury". Once an accident is determined to be the prevailing factor in the cause of the claimant's injury, the reasonable factor standard is used to determine what medical treatment the claimant should receive. Therefore, the employer was responsible for the claimant's total knee replacement as it was reasonably required to cure and relieve the effects of the claimant's medical condition after the work injury. The Court also held that the employer was responsible for temporary total disability following the total knee replacement and for future medical expenses. The Court also sent the case back to the Commission, so they could determine an appropriate amount for permanent partial disability.

NOTE: The employer and insurer have filed an Application for Transfer to the Supreme Court. The Supreme Court has not yet made a decision with respect to whether they will hear the case.

Surveillance- Discoverable Through Subpoena

State ex rel. David Feltz v. Bob Sight Ford, Inc., Case No. WD72969 (Mo. App. W.D. 2011)

FACTS: The claimant filed a workers' compensation claim alleging that he was injured when he tripped over carpeting on a stairway while working at the employer. The claimant presented the employer with a Subpoena Duces Tecum requiring the production of video surveillance. The employer argued that video surveillance is not a statement which needs to be produced.

HOLDING: The Court of Appeals held that the exclusion of videos from the term "statements" was only applicable to one section of the Workers' Compensation Statute. Another section, which states that that subpoenas are to be used in the same manner as Circuit Court, allows videos to be discoverable with the use of a Subpoena Duces Tecum.

Exclusivity of Workers' Compensation and Affirmative Defense

Ivey Heirien, Katrina Williams, Salina Nelson and Frederick Nunley v. Junior Flowers and

Josh Flowers, Case No. SD30730 (Mo. App. S.D. 2011)

FACTS: The claimant was killed in an injury at work. Her dependants filed a civil suit against the claimant's supervisors alleging that they had performed affirmative acts of negligence which allowed a civil claim under the "something more" doctrine. The defendants argued that they were protected by the exclusivity provision of the workers' compensation statute and filed a Motion to Dismiss arguing the Circuit Court lacked subject matter jurisdiction over the case.

The Supreme Court then issued its opinion in *McCracken v. Walmart Stores East, LP*, which held that the Court always has subject matter jurisdiction to determine whether the employer-employee relationship exists. The Court held that the exclusivity provision of the Workers' Compensation Statute was an affirmative defense that could be waived.

Following the *McCracken* decision, the Motion to dismiss was heard and the defendants argued that the rules established in *McCracken* only applied to cases that were filed after that decision. The Circuit Court agreed and dismissed the claim because it did not have subject matter jurisdiction.

HOLDING: The Court of Appeals reversed the decision and sent the case back to the Circuit Court for further proceedings. The Court of Appeals held that the Supreme Court had indicated that the *McCracken* decision did apply to lawsuits filed before the decision, but that the Courts should proceed as though the affirmative defenses had not been waived and allow defendants to amend their pleadings. Therefore, the Circuit Court did have subject matter jurisdiction and the claim should not have been dismissed.

Commission Trends

Old Law (Pre August 28, 2005)

Over the last three months, the Commission has ruled on seventeen (17) old law cases. They have reversed or modified three (3) of those cases.

When does a claimant reach MMI?

In **Marion Lamberson v. BASF Corporation, Injury No. 05-069283**, the Commission agreed with the ALJ that the claimant was permanently and totally disabled as a result of her primary injury combined with her pre-existing disabilities, however, it disagreed with various aspects of the ALJ's analysis. The Commission found it was illogical to conclude that the claimant reached MMI on the same date as his fusion surgery. The Commission also determined the claimant had 35% PPD of the body, rather than 25%, from the primary work injury.

There is a Maximum PPD Rate

In **Michael Deveraux v. Omni Cart Services, Inc., Injury No. 04-119237**, the Commission agreed with the parties that the claimant's disfigurement and permanent partial disability benefits

should be calculated using a maximum weekly permanent partial disability rate of \$354.05 and not the \$408.00 weekly compensation rate the ALJ used in calculating the Award. The Award was simply modified using the correct maximum weekly permanent partial disability rate.

Credibility of Expert Testimony

In **Robert Dwyer v. Federal Express Corporation, Injury No. 01-014444**, the Commission disagreed with the ALJ's finding that Dr. Tate and Dr. Kennedy were more credible than Dr. Yingling on the question of whether the work injury was a substantial factor in the claimant's medical condition and disability after the claimant reached MMI on July 27, 2001. Dr. Yingling was the claimant's treating doctor, performed surgery and evaluated the claimant during the course of treatment. He was of the opinion that the work injury was a substantial factor in causing the claimant's worsening low back symptoms in May 2002 and the need for subsequent treatment, including surgery. Because the Commission was convinced that Dr. Yingling provided more convincing expert medical testimony, it concluded the work injury was the substantial factor in the claimant's medical condition and disability after the July 27, 2001 date of MMI and the need for future medical treatment after that date. The Commission therefore found the employer was liable for the disputed past medical expenses the claimant incurred seeking relief from the effects of the work injury of February 5, 2001.

New Law

The Commission heard appeals on twenty seven (27) new law cases over the last three months. Of those cases, the Commission modified, reversed or supplemented opinions in eleven (11) cases.

Nature and Extent of PPD

In **Michael Wood v. The Doe Run Company, Injury No. 09-012651**, the Commission modified the finding of the ALJ as to the amount of PPD sustained by the claimant. The Commission can consider all of the evidence, including the testimony of the claimant, and draw all reasonable inferences in arriving at the percentage of disability. The Commission concluded the ALJ's Award of 30% PPD was excessive and therefore modified the amount of PPD to 20%.

In **Michael Webb v. Pepsi Mid America Company, Injury No. 05-144189**, the Commission disagreed with the ALJ with regard to credibility. The ALJ found that Dr. Volarich's opinions that there was time for post-traumatic arthritis to set in during the eighteen (18) months the claimant went without treatment following his work injury and that there was a medical causal relationship between the work injury and the claimant's arthritis was credible. In this case, Dr. Haupt was the claimant's treating doctor, performed surgery and was of the opinion that the acute injury suffered by the claimant on December 1, 2005 was a hyperflexion injury that resulted in a meniscus tear and his arthritis was a condition pre-existing and unrelated to the work injury. He also was of the opinion that the claimant was at MMI on December 1, 2005 with regard to the work injury and was in no need of further medical treatment due to the work injury. Dr. Milne concurred with Dr. Haupt's opinion. The Commission found that Dr. Volarich's testimony was less persuasive than

that of Dr. Haupt and Dr. Milne. Therefore, the Commission found that the work injury of December 1, 2005 was not the prevailing factor in causing the claimant's chondromalacia and degenerative conditions of the right knee, he was at MMI and needed no further future medical treatment with regard to the work injury. The Commission also adjusted the PPD award, from 35% of the knee to 15% of the knee.

Can an ALJ Suspend Benefits?

In **Richard Williams v. R & M Pressure Washing**, Injury No. 08-112842, the Commission agreed with the ALJ that the claimant was permanently and totally disabled due to a combination of his primary and pre-existing injuries, however, it disagreed with the ALJ's decision to suspend the claimant's benefits. The ALJ found the claimant reached MMI on October 5, 2009, but determined that "the claimant's right to receive workers' compensation benefits shall be suspended during the time in which the claimant was able to earn a viable income from the employer after his accident" or late October 2010. Therefore, the Second Injury Fund's obligation to pay benefits would not commence until the date of the Award or October 26, 2010. The Commission found that the ALJ did not cite any authority or provision of law to support these findings. The Commission determined that the plain meaning of the Statute contemplates a suspension of PTD benefits only in specific circumstances which are not present in this case and found that suspending the claimant's PTD benefits was unauthorized under the law.

Does the Need for Future Medical Treatment Flow from the Work Injury?

In **Larry Shelton v. Levy Restaurants**, Injury No. 06-080998, the Commission modified the Award of the ALJ, stating that the employer was not responsible for providing the claimant with a total knee replacement, however it was liable for pain management since the injury did increase his knee pain. The ALJ found that the employer should provide a total knee replacement on the basis that the work accident accelerated the time when the claimant would need the knee replacement. The Commission noted that the claimant must prove more than that the work injury changed the timing of the need for medical treatment; he must prove that the work injury caused the need for the medical treatment.

A Psychologist's Opinion is a Medical Opinion

In **Pamela Simpson v. The Board of Education of the City of St. Louis**, Injury No. 07-095109, the employer argued that the ALJ's opinion was an error because the claimant was awarded disability and medical expenses based on the opinion of a psychologist who testified within a reasonable degree of psychiatric certainty. During the deposition, the claimant's counsel asked the doctor if her opinion was given "within a reasonable degree of psychiatric testimony" to which the doctor answered affirmatively. The Commission declined the employer's invitation to transform the doctor's persuasive psychological opinion into an impermissible medical opinion based solely on that brief exchange, particularly since the employer's counsel did not raise an objection during the deposition. The Commission went on to state that if it was to accept the employer's premise that every claim for permanent disability must be supported by a medical opinion, it would render the Statute nearly meaningless because the determination of whether an injured worker is

permanently and totally disabled is not solely a medical question. The Commission further noted it is common for physicians to offer their opinion on the disability resultant from a workers' physical condition while deferring to a vocational expert as to whether the worker is totally disabled. Furthermore, the Commission found it highly unlikely that the legislature intended to summarily exclude from consideration the expert opinion of every non-physician, mental health or vocational professional. Therefore, the Award and Decision of the ALJ was affirmed.

Notice

In **Sharon Beckton v. AT&T**, Injury No. 08-042592, the Commission affirmed the Award of the ALJ and provided a supplemental opinion with regard to notice. The Commission noted that the Statute imposes six requirements on the method and manner of notice claimants must provide the employer in occupational disease and repetitive trauma cases: (1) written notice; (2) of the time; (3) place; and (4) nature of the injury; and (5) the name and address of the person injured; (6) given to the employer no later than thirty (30) days after the diagnosis of the condition.

Here the ALJ found that the thirty (30) day notice period began to run from Dr. Schlafly's diagnosis of work-related carpal tunnel syndrome on October 24, 2008, however, the employer argued the deadline should instead have run from May 5, 2008 since the claimant "knew in her own mind that she had CTS" on that date and "knew that the only cause in her own mind was her keystroking at work starting in 2005 and increasing for a year before May 2008."

Applying the holding of *Allcorn*, the Commission found that the ALJ correctly determined the thirty (30) day notice period to run from October 24, 2008, the date that Dr. Schlafly rendered his opinion because this was the first time a diagnostician made a requisite causal connection between the claimant's carpal tunnel syndrome and her work activities. The Commission also found that the claimant is not a diagnostician, and her own thoughts or opinions as to whether her carpal tunnel syndrome was work-related did not trigger the thirty (30) day notice requirement. The commission noted that if it did, it would place the burden on the employee to determine the cause of her occupational disease.