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**MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE**

**January 2021 – March 2021**

**Claim Denied as Claimant Not in Course and Scope Because No Hazard Connected to Employment Caused Falls**

**Smith v. Lester E. Cox Medical Centers, Injury No. 17-011723**

**FACTS:** The claimant sustained separate injuries from two falls at work. The first occurred near quitting time on February 21, 2017 when she was walking in the hallway and she landed on her left elbow. She was referred to Dr. Hicks who performed an open reduction with internal fixation of hardware. The hardware was removed at a later date. While on modified duty, the claimant fell again on April 25, 2017 after she was standing at a board with the listed surgeries and turned and began walking down the hallway. She landed on her left shoulder, elbow and hip.

She testified that the floors where she fell on each date were slippery from buffing or polishing though she did not know when the maintenance crew buffed the floors. She could not remember whether the floors were more or less slippery between her two falls and did not know whether anyone else had fallen in the same hallways between February 21 and April 25, 2017. She heard that there were some people who had fallen in the surgical department but she did not know their names. She testified that a coworker told her that she too had slipped because of the floor, though the coworker had not fallen. Neither the coworker nor any other witness testified regarding the condition of the floors.

Immediately after she fell on February 21, 2017, she told emergency room personnel that she had been “walking down the hallway, tripped and fell on her left elbow, denies LOC, denies neck or back pain...” and two days later when she saw Dr. Hicks, he recorded in the medical record that she tripped. She disagreed with his recitation and believed she told him she had slipped. Following her second fall the emergency room staff recorded that “patient states: she tripped over something while working (in OR) and fell...C/o left hip pain.” The claimant disagreed with this statement. Upon her admission to the hospital that same day Dr. Smith recorded that the claimant was not sure why she fell. She did not remember what she told the admitting physician. In a recorded statement taken by the employer’s third-party administrator the claimant stated she tripped and blamed it partly on her shoes which she stated she threw away. The claimant agreed with the accuracy of the recorded statement but stated she was emotional at the time and had been blaming herself.

The claimant saw a psychologist on May 9, 2017 who reported that the claimant stated she purchased a new pair of shoes in February 2017 and the soles kept catching on the floor and she noted she fell while wearing the shoes in late February.

According to the ALJ the issue was whether there was a risk source associated with the job that caused the claimant to fall on each occasion. A claim will be denied when the claimant fails to prove that there was a work hazard risk or risk of injury to which the employee would not have been exposed outside of work. In the instant case, the claimant did not prove that, more likely than not, a condition at her work place posed a risk of injury greater than what she faced off the job. She did not notice any hazards including substances on the floor, defects or any problems immediately afterward, and she gave different accounts of why she fell and believed that her shoes were at least partly to blame. Therefore, the ALJ concluded that the claimant did not meet her burden of proof of persuasion that there was a risk connected to her employment greater than one faced in her normal non-employment life. Therefore, the claim was denied. The claimant appealed.

**HOLDING:** The Commission affirmed the Award and decision of the ALJ.

### **Post Injury Misconduct Proven Therefore TTD Benefits Not Owed**

#### **Paxton v. Little Sisters of the Poor & Old Republic Insurance Company, Injury No. 14-001314**

**FACTS:** On January 11, 2014 while walking in the parking lot at work the claimant slipped on ice and fell and injured her left ankle. Several days later while in crutches the claimant fell again and lacerated her right elbow. She underwent authorized treatment with Dr. McCormick who diagnosed a distal fibula fracture in the left ankle on January 16, 2014. After the fracture healed the claimant continued to experience pain and the doctor recommended an evaluation. He was then seen by Dr. Tung who performed surgery on March 31, 2015. She then treated with Dr. Keener who diagnosed olecranon bursitis of the right elbow.

The claimant's supervisors, Ms. Avery and Mr. Deering, who testified on behalf of the employer, terminated the claimant on May 5, 2014 after several policy violations including leaving a medicine cart unlocked twice and failing to supervise patients to make sure they took their medicine. The employer argued that the claimant engaged in post injury misconduct and was therefore not entitled to the TTD benefits she received. The ALJ concluded that the testimony of Ms. Avery and Mr. Deering was less than credible and that based on the exhibits and evidence, the employer did not meet its burden to prove the claimant engaged in post injury misconduct.

The claimant's attorney obtained a report of Dr. Volarich who connected the claimant's ankle condition back to the work injury and assessed 40% disability of the left ankle and 20% disability of the right elbow. The employer obtained a report of Dr. Krause who concluded that the claimant's left ankle fracture and need for non-operative treatment was related back to the work injury. However, he did not believe that the superficial peroneal nerve injury was related to the work injury. In any event, the ALJ believed Dr. Volarich was more credible and connected the claimant's peroneal nerve injury back to the work injury.

**HOLDING:** The Commission modified the Award finding that the claimant's actions constituted misconduct as she violated employer's known policy as well as state safety regulations when she left a cart with controlled medications unlocked and out of her sight which was irresponsible, unlawful and dangerous behavior, regardless of whether she intended harm or harm resulted. Therefore, she was not eligible for TTD after her May 5, 2014 discharge.

**Application for Payment of Additional Reimbursement of Medical Fees Dismissed Because Not Filed Within One Year of Notice of Dispute**

**Chesterfield Spine Center, LLC, d/b/a St. Louis Spine and Orthopedic Surgery Center v. Best Buy Company, Inc. and XL Insurance America, Inc., Case No. WD83757 (Mo. App. 2021)**

**FACTS:** On April 27, 2013 an employee of Best Buy was injured when a refrigerator fell on him. On December 22, 2015 Chesterfield Spine Center ("Chesterfield") provided authorized treatment to the claimant and billed the employer \$125,184.60. On May 23, 2016 Sedgwick Claims Management sent Chesterfield a check for \$50,629.23 along with an Explanation of Bill Review. On August 16, 2017 Chesterfield filed an Application for Payment of Additional Reimbursement Medical Fees asserting that Chesterfield is entitled to the additional \$74,555.37 for the authorized treatment. In response, the insurer filed a Request for Award on undisputed facts asking the Division to deny Chesterfield's Application as untimely under Section 287.140.4.

The insurer's request asserted that 1) the date of service was December 22, 2015 and the amount billed was \$125,184.60 2) a check in the amount of \$50,629.93 and the Explanation was mailed by or on behalf of Sedgwick to Chesterfield 3) the Explanation was in writing and had Reason Codes to explain the basis for disputing the charged amounts 4) Chesterfield cashed or deposited the check on or before June 1, 2016 5) Chesterfield's Application was filed on or about August 16, 2017.

Chesterfield denied that 1) the Explanation and check were mailed together 2) the Explanation constituted a notice of dispute and 3) Chesterfield received the Explanation on or before June 1, 2016.

On September 17, 2019 an ALJ denied Chesterfield's Application finding that there were no genuine issues of material fact as to the notice of dispute or the fact that Chesterfield's Application was time barred. The Commission adopted the ALJ's findings and Award and concluded that Employer/Insurer is not liable to Chesterfield for additional reimbursement of medical fees. Chesterfield appealed.

**HOLDING:** In its first three points, Chesterfield argued that the Commission erred in dismissing its Medical Fee Dispute because genuine issues of material fact existed as to whether Explanation is a "notice of dispute" sent by an agent of the Employer/Insurer and whether it was received by Chesterfield more than one year before the Application was filed. The Court noted

that the Explanation contained all the elements required by 8 C.S.R. Section 50-2.030(1)(A), and therefore the Explanation was a notice of dispute within the meaning of that rule.

For its remaining points, Chesterfield argued that the Commission erred in dismissing the dispute because Section 287.140 and 8 C.S.R. Section 50-2.030 violated Chesterfield's constitutional rights in various ways including the retroactive application of laws, interference with the right to contract and vagueness. The Court was not persuaded. The Commission's decision was affirmed.

### **Claimant Not Entitled to Past Medical Expenses Because No Demand Made or Notice Given to Employer**

#### **Justin Kent v. NHC Healthcare and Treasurer of the State of Missouri as Custodian of the Second Injury Fund, Case No. ED108667 (Mo. App. 2021)**

**FACTS:** The claimant sustained an injury to his back on December 4, 2008. The employer sent the claimant out for treatment and he treated conservatively until he was placed at MMI on March 2, 2009. In March of 2009 the claimant was terminated. He then began treating on his own.

The ALJ found that the employer was liable for \$140,030.65 in past medical expenses and that they would be responsible for future medical expenses. The ALJ also ruled that the claimant was entitled to TTD benefits beginning May 12, 2010. The ALJ granted the claimant PTD based on both medical records introduced at the hearing and the ALJ's observations of the claimant's pain cues during his testimony. The ALJ held that the Fund was not liable because the claimant's disability stemmed solely from the 2009 workplace injury.

The employer appealed. The Commission rejected the ALJ's finding that the claimant was PTD and instead found that the claimant sustained 35% PPD referable to the lower back. The Commission affirmed the ALJ's conclusion that the Fund was not liable for PTD. The Commission rejected the theory of constrictive notice adopted by the ALJ. Accordingly, the Commission reversed the ALJ's award of most medical expenses as well as the award of additional TTD benefits. The Commission ordered the employer to pay PPD benefits in the amount of \$44,123.80. The claimant appealed.

**HOLDING:** The claimant argued that the facts found by the Commission required a finding of PTD. The Court pointed out that the Commission found that while there is evidence that the claimant may be PTD, the evidence did not persuade them that it is the disability resulting from the work injury that caused the PTD. The claimant also argued that there was not sufficient evidence in the record to support an Award of anything less than PTD. The Court did not agree.

The claimant also argued that the Commission erred in not awarding past medical expenses. The Court noted that Section 287.140.1 states that when the employee picks his own doctor, the employer must pay only when the employer has notice that the employee needs treatment or a demand is made on the employer to furnish medical treatment. In this case, no demand was made by the claimant and there was no specific evidence in the record that would put the employer on notice that the claimant needed further medical care.

In his fourth point, the claimant argued the Commission erred in denying additional TTD benefits because the evidence showed the claimant was totally disabled during the time period at issue. The Court noted that an employee's self-assessment may be sufficient evidence to establish TTD but it is not necessarily conclusive, and the Commission expressed concern as to the claimant's credibility. The Court deferred to the credibility determination of the Commission and held that the denial of additional TTD benefits was supported by sufficient evidence.

### **Claimant Not Entitled to PTD From Fund Because No Documented Pre-existing Disability Qualified Per Statute**

#### **Phelps v. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 16-025639**

**FACTS:** On April 14, 2016 the claimant sustained an injury to his left shoulder. He was seen by Dr. Mall who performed an arthroscopic rotator cuff repair and released him at MMI on December 13, 2016. He settled his claim with the employer/insurer for 30% of the left shoulder. The claimant's prior injuries include asthma, several chemical exposures, two motor vehicle accidents causing injury to the spine, three injuries to the right knee, two injuries to the lumbar spine, and injury to the right index finger and three strokes.

Dr. Volarich, the claimant's expert, opined that the claimant was PTD due to a combination of the April 14, 2016 work injury and his pre-existing medical conditions. Ms. Shay provided a vocational evaluation and concluded that the claimant was unemployable in any work that is typically performed in the national labor market.

The ALJ concluded that the claimant was not entitled to PTD benefits from the Fund because the claimant has no medically documented disability that falls under categories 1, 3, or 4 of Section 287.020.3. Specifically, the Commission concluded that the claimant did not meet his burden of proof that his chemical exposures and right knee injuries were compensable since the evidence was insufficient to support a finding that they were a substantial factor in causing his medical condition. Also, certain injuries were non-work related while others equaled less than the 50 weeks of compensation required by the Section. The ALJ concluded that the claimant had no qualifying disabilities for Fund liability and therefore his claim against the Fund was denied. The claimant appealed.

**HOLDING:** The Commission affirmed the ALJ's decision noting that the claimant failed to demonstrate that a single qualifying disability combined with disability from his primary injury to result in PTD.

### **Fund Not Responsible for PTD Because Claimant PTD Prior to Last Injury**

#### **Barnes v. Karren Brock Construction, Inc. & and Bitco General Insurance Corporation & Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 16-104170**

**FACTS:** In 2015 the claimant, developed recurrent bilateral carpal tunnel syndrome. He did undergo releases with Dr. Brown and was released from care. He settled his Claim against the employer for 10% disability to each wrist.

With respect to the claimant's preexisting injuries, he sustained a work-related non-surgical compression disc fracture in his low back in 1997 and received a settlement of 30% disability referable to the low back. In 2002 he developed carpal tunnel syndrome and underwent releases and settled that Claim based on 20% of the left wrist and 18% of the right wrist, a 15% load and two weeks of disfigurement. The claimant also had multiple medical conditions involving his neck, shoulders and hands and sleep apnea, polyarthritis, hypertension, bilateral shoulder bursitis, cervical disc disease with cervicalgia and chronic post knee replacement pain.

Dr. Meyers, the claimant's expert, opined that the claimant was PTD due to a combination of his preexisting work injuries and his other non-work-related injuries. Mr. Kaver also opined he was PTD as a result of his work injury and his preexisting condition. Mr. Dolan testified on behalf of the Second Injury Fund and opined that the claimant was unemployable prior to the primary injury and he was employed only because of accommodations and an excessive use of opioids.

The claimant went to a Hearing against the Fund who first argued that the claimant's pre-existing work-related carpal tunnel syndrome did not qualify under Section 287.220.3 because the disability did not equal a minimum of 50 weeks of PPD compensation as required by the statute. The ALJ noted that the claimant settled his Workers' Compensation claim for 66.5 weeks of PPD benefits and therefore the argument was unsound.

The Fund then argued that the claimant's total disability was a result of not just his work-related injuries, but also multiple non-work-related medical conditions. The ALJ concluded that these non-work-related medical conditions did not constitute permanent partial disabilities as defined by the statute because no physician certified that they were such.

The Fund also argued that the claimant was PTD before the 2016 occurrence and the ALJ agreed and denied the claim. The claimant appealed.

**HOLDING:** The Commission affirmed the award and decision of the ALJ denying compensation.

### **Claimant PTD From Last Injury Alone Therefore Not Entitled to Fund Benefits**

#### **Southerland v. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 11-073978**

**FACTS:** On September 6, 2011 the claimant was preparing to remove the shifter of a tractor and when he pulled the final bolt, the full weight of the shifter came down and threw his left arm and shoulder backward, causing injury to his shoulder. He underwent surgery and physical therapy but was not able to return to the level of function needed to do his job and so he was eventually let go. He settled with the employer for 15% PPD of the left shoulder. He has not worked since September 6, 2011 and was approved for social security disability effective September 2011.

The claimant has multiple pre-existing injuries and conditions, including a low back injury from 1979, a right elbow injury from 2002, a left shoulder injury from 2003, a right-hand carpal tunnel release in 2008 and bilateral neuropathy in the feet, diagnosed in 2010. Dr. Volarich determined that the claimant was PTD due to a combination of his last injury and his pre-existing conditions and rated 25% PPD of the left shoulder from the last injury and 45% PPD of the left shoulder, 20% PPD of the left foot, 20% PPD of the right foot, 20% PPD of the body as a whole relatable to the lumbar spine, 15% PPD of the right elbow and 30% PPD of the right wrist from his preexisting conditions. Ms. Skahan found that the claimant had a total loss of access to the competitive labor market due to his pre-existing left shoulder injury, his last left shoulder injury and his age.

The ALJ found that the claimant was PTD from the last injury alone and therefore, the Fund was not liable for permanent total benefits. The ALJ found that credible evidence showed that the claimant was able to work a physically demanding job for about 5.5 years before the last injury. The ALJ also noted that claimant's preexisting injuries and disabilities were minor and did not result in significant disability. The ALJ rejected as excessive and not credible, Dr. Volarich's disability ratings for the claimant's pre-existing conditions. The ALJ also noted that Dr. Volarich's ratings for the left shoulder were inconsistent and not supported by the medical records. Lastly, the ALJ noted that claimant's testimony supported the conclusion that the last injury alone rendered him physically unable to work. The Claim against the Fund was therefore denied. The claimant appealed.

**HOLDING:** The Commission affirmed the Award and decision of the ALJ.

### **Claimant Failed to Meet Burden Entitling Him to Fund Benefits**

#### **Marberry v. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 15-083958**

**FACTS:** On September 24, 2015 the claimant sustained an injury when he fell backwards after reaching for a box and was diagnosed with a strain and pelvis contusion. He underwent physical therapy and was placed at MMI on June 28, 2018. He then proceeded to Hearing against the Fund. With respect to his preexisting conditions the claimant testified that he suffered three pre-existing disabilities, two to his neck and one to his right shoulder. In 1999, he sustained an injury to his neck for which he settled for 20% PPD of the body. In 2002, he was then involved in a car accident and sustained an injury to his neck that resulted in a fusion at C4-5 for which he was not given any permanent restrictions. On December 19, 2014 he was carrying a 50-pound bag up a ladder and he jerked his right shoulder. He underwent physical therapy but his pain persisted and so he underwent an MRI in 2016 and was diagnosed with a labral tear, tendinosis and bursitis of the rotator cuff. He underwent surgery and physical therapy and was then placed at MMI in May of 2017.

Dr. Volarich opined that the claimant was PTD as a result of the work-related injuries of December 19, 2014 and September 24, 2015, in combination with each other as well as in combination with his pre-existing medical conditions. Mr. Lalk opined that the claimant was

unable to compete at the unskilled sedentary level because of his inability to control his symptoms through the work day.

The ALJ concluded that the evidence did not support a finding that the claimant was entitled to Fund benefits. A claimant must establish 3 steps to be entitled to Fund benefits. Step 1 requires the claimant to establish he had a pre-existing disability that equals 50 weeks of PPD. The ALJ noted that the right shoulder injury did not reach MMI until nearly two years after the primary injury, and thus it does not qualify for step one. The 1999 neck injury meanwhile settled for 20% PPD and the evidence submitted by the claimant from Dr. Volarich provided only one rating for the neck, which considered both the 1999 and 2002 injuries at 20% PPD. The ALJ noted that this was insufficient to satisfy the requirements of Step 1. Step 2 required claimant's disability to fall into 1 of the 4 categories. The ALJ concluded that the claimant's 1999 neck injury fell within category 2 as an acute work injury and that therefore, the neck injury satisfied step 2. Step 3 required claimant to prove his single qualifying pre-existing disability combined with his primary injury to render him PTD. The ALJ concluded that the evidence submitted by the claimant failed to show this since the claimant's experts based their PTD opinions on consideration of the right shoulder, which did not yet reach the state of permanency. Based on the strict construction of language used in the statute, the right shoulder was disqualified from consideration for Fund benefits. The claimant therefore failed to meet his burden of proof that he was entitled to PTD benefits from the Fund. The claimant appealed.

**HOLDING:** The Commission affirmed the Award and decision of the ALJ.

### **Missouri Claim Denied as Claimant's Kansas Settlement Entitled to Full Faith and Credit**

#### **Austin v. AM Mechanical Services & AMCO Insurance Company & Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 11-112011**

**FACTS:** The claimant sustained an injury while at work on March 10, 2011 when a 107-pound box fell and struck him on his face and head causing pain in his neck and wrist and a pop in his shoulder blade area. The claimant underwent a neck fusion, a TFCC repair on his left wrist and a carpal tunnel release and several other procedures. The claimant sustained several injuries prior to March 2011 including to his left shoulder, back and right knee. He settled his workers' compensation case in Kansas which provided that he was closing out all injuries and claims arising out of his March 10, 2011 accident in all jurisdictions. He then filed a Claim in Missouri seeking workers' compensation benefits for the March 10, 2011 injury.

The claimant argued that he was not bound by the Kansas settlement agreement because it was invalid as he was under duress and did not understand what jurisdiction meant. The ALJ noted that the claimant was in essence asking the Division to rule that a Kansas settlement agreement or contract approved by a Kansas ALJ was invalid at its inception, though he cited no authority and the Court found no such authority. The employer argued that the Kansas Settlement Agreement was entitled to full faith and credit of the US Constitution. The ALJ noted that if the claimant's case had hinged on whether Missouri had to give full faith and credit to a Kansas decision based on a Kansas substantive law which differed from Missouri's substantive law, he would not have been bound by the Kansas decision. However, the claimant's case did not

involve any differences in the substantive laws of the two states, but he merely wanted the Kansas settlement declared invalid. The ALJ concluded that full faith and credit must therefore be given to the language in the Kansas settlement agreement and therefore the claimant's Claim in Missouri was denied. The claimant appealed.

**HOLDING:** The Commission agreed with the ALJ and found that the employer/insurer did not procure the Kansas Settlement by fraud or duress and that the full faith and credit clause barred the claimant from pursuing a Missouri Claim.