MISSOURI WORKERS' COMPENSATION

CASE LAW UPDATE

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Commission Can Determine Fund Responsible for PTD Benefits Despite the Fact that None of the Experts Specifically Stated Claimant was PTD as Result of Work Injury In Combination With Pre-existing Condition

Patterson v. Central Freight Lines, Case No. ED101451 (Mo. App. Ct. 2015)

FACTS: In November 2008, the claimant slipped and fell, injuring his lumbar spine. He underwent surgery in August 2009, and alleged that thereafter he developed depression and anxiety which rendered him physically unable to do much. Prior to the work injury, the claimant never had any formal psychiatric diagnosis, but had an absent alcoholic father, academic and behavioral problems, years in foster care and juvenile detention, a felony conviction, seven years in prison, and strained familial relationships.

The claimant's treating psychiatrist, Dr. Bassett, diagnosed the claimant with depression with psychotic features, but stated that as his psychiatrist and fiduciary, the doctor declined to provide a formal opinion as to the cause of the claimant's psychiatric condition. However, Dr. Bassett opined that the claimant's symptoms were severe enough to hinder employment. Dr. Stillings, the employer/insurer's expert, diagnosed several pre-existing psychiatric conditions, and assessed pre-existing psychiatric PPD of 32.5% of the body, as well as 5% PPD referable to the work injury. The claimant also underwent an IME with Dr. Liss at the request of his attorney, who found him PTD as a result of the work injury.

At a hearing, an ALJ found Dr. Stillings' opinion most persuasive and awarded 10% pre-existing psychiatric PPD, as well as 5% psychiatric PPD due to the work injury. He also awarded the claimant 40% PPD of the body referable to his lumbar injury, as well as 5% pre-existing PPD of the body referable to his pre-existing lumbar injury. The ALJ found the claimant's pre-existing injury insufficient to reach PTD and thus, insufficient to trigger Fund liability. On appeal, the Commission agreed with the ALJ's finding that the claimant suffered a total of 45% PPD from his work injury, but found that he had even greater pre-existing psychiatric PPD which they assessed at 30% of the body. As a combination of his pre-existing psychiatric disability and his work injury, the Commission found the claimant PTD and imposed liability against the Fund. The Fund appealed.

HOLDING: On appeal, the Fund argued that no expert opined that the claimant was PTD as a result of a combination of his work injury and pre-existing psychiatric problems. Rather, the Fund argued that the Commission picked and chose from the opinions of several experts to reach its own conclusion that the claimant was PTD as a result of the work injury and pre-existing psychiatric problems. The Court did not find the Fund's argument persuasive. The Court stated

that the Commission may consider the opinions of multiple experts of differing specialties to arrive at its factual determination as to the parts and sum of the claimant's conditions and disability.

ALJ Did Not Find Doctor's Opinion Persuasive Because Doctor Relied on Scientific Study

In **Pogue v. Plaza Tire & Auto Service, Injury No. 13-034224**, the claimant alleged that he developed bilateral carpal tunnel syndrome as a result of his repetitive job duties. The employer/insurer obtained a report from Dr. Beyer, who stated that cumulative trauma disorder is not validated in any literature. Additionally, the doctor stated that with very few exceptions, there is no identifiable relationship between work activities and the development of carpal tunnel syndrome. Therefore, Dr. Beyer stated that the claimant's conditions were not work-related. Conversely, the claimant obtained a report of Dr. Schlafly, who did believe that the claimant's job duties were work-related. At a hearing, the ALJ found Dr. Beyer's reasoning very unpersuasive, and stated that he doubted the doctor's ability to objectively evaluate the claimant. Additionally, the ALJ believed that the doctor had a bias in favor of the employer/insurer given his stance on causation. Therefore, the ALJ did find that the claimant's conditions were work-related and found the matter compensable. On appeal, the Commission summarily affirmed.

Claimant's Expert More Credible Because Better Understanding of Claimant's Job Duties

In **Sproaps v. Allied Barton Security Service, Inc., Injury No. 11-049158**, the claimant alleged that her bilateral carpal tunnel syndrome developed as a result of her repetitive job duties. She alleged an injury date of June 22, 2011. The claimant began working for the employer/insurer in July 2008, as a district recruiter. Her job duties consisted of receiving and reviewing applications, inputting paper applications into the system, performing employment verifications and background checks, scheduling interviews and interviewing applicants, making and answering phone calls, performing drug tests and taking measurements for uniforms. She testified that 85% of her work day involved working on the computer. A video of her job duties was submitted but the claimant testified that the video showed only a small portion of what she does, and does not accurately reflect the job. The employer/insurer provided a report from Dr. Crandall who believed that several non-work risk factors, namely her female gender and hormone use (*i.e*, birth control use for 10-11 years) were more likely the cause of the claimant's carpal tunnel syndrome. The claimant obtained a report from Dr. Volarich who believed her condition was work-related. At a hearing, an ALJ found Dr. Volarich's opinion more persuasive because he appeared to have a better understanding of the claimant's job duties, specifically her non-computer work, and found the claimant's condition compensable. On appeal, the Commission summarily affirmed.

Liability Triggered After "Evidence of Disability" Not Simply After Diagnosis

In **Sharp v. Tarlton Corporation & C. Rallo Contracting Company, Inc., Injury No. 13-072248**, the claimant worked for the Union for various employers over 26 years. He alleged

bilateral carpal tunnel syndrome as a result of his repetitive job duties. He worked for C. Rallo on and off from January of 2012 through May of 2013. He worked for Tarlton for two weeks and then returned to C. Rallo for two months. He then returned to Tarlton from August 5, 2013 through October 31, 2013. At both C. Rallo and Tarlton the claimant worked as a laborer but during his last stint working for Tarlton, he jackhammered approximately nine hours a day, which he did not do while employed with C. Rallo. On October 23, 2013, Dr. Baak stated that the claimant had carpal tunnel syndrome which was clearly related to work with compression hammers. The doctor recommended surgery but the claimant did not undergo the same and continued to work. The claimant returned to Dr. Baak on September 20, 2013 who noted a severe flare-up of carpal tunnel symptoms related to jackhammering for the past few months. The claimant testified that his hands began to hurt while working with Tarlton as he was performing jackhammering.

Dr. Schlafly, the claimant's expert, testified that the claimant did have carpal tunnel syndrome prior to August 2013 but believed that the claimant's jackhammering duties at Tarlton aggravated and worsened the claimant's condition. Dr. Rotman, Tarlton's expert, stated that the claimant's job duties prior to working at Tarlton were the prevailing factor in developing and causing his carpal tunnel syndrome and that his work with Tarlton simply re-triggered his symptoms.

At a hearing, the ALJ found the claimant sustained work related carpal tunnel and assessed liability against Tarlton. The ALJ found that although the claimant was diagnosed with carpal tunnel syndrome prior to working for Tarlton, that did not decide whether the claimant had "evidence of disability." The ALJ found that "evidence of disability" arose when the claimant's condition impaired his earning capacity and/or caused him to miss time from work. The ALJ stated that "evidence of disability" is the controlling issue in determining which employer is liable. Therefore, the Judge rendered a temporary Award in favor of the claimant and against Tarlton. On appeal, the Commission summarily affirmed.

University of Missouri Found to be Responsible Employer Despite Claimant Working There Through a Temporary Agency

In **Marshall v. Job Finders Employment Service & Curators of the University of Missouri, Injury No. 09-054072**, the claimant worked at University of Missouri as a temporary employee through Job Finders. On July 1, 2009 the claimant injured his right shoulder while using a heavy mop at the hospital. He notified Job Finders of his injury who sent him to Dr. Herting at the University of Missouri for treatment. The claimant filed a Claim for Compensation and the sole alleged employer was Job Finders, and they did not timely answer the Claim.

Subsequently, the claimant amended his claim to include the University of Missouri as an employer along with Job Finders. Job Finders again did not timely answer the claimant's Claim for Compensation but the University of Missouri did. Job Finders did not file an Answer until more than two years after the amended Claim for Compensation was filed and more than three years after the original Claim for Compensation was filed. Job Finders did not have workers' compensation insurance on the date of injury.

At a hearing, an ALJ found that Job Finders was the claimant's employer in light of the fact that they did not timely answer the Claim for Compensation. In other words, the ALJ found that whether an entity is an employer is a fact deemed admitted if the Answer is untimely. Additionally, the ALJ found that the University of Missouri was a statutory employer because the University entered into a contract to obtain the claimant's temporary employment, the University directed what he would do each day, supplied his uniform and had the right to terminate his employment. Thus, the ALJ found that the University of Missouri and Job Finders were co-employers but in light of the fact that Job Finders did not have workers' compensation coverage, imposed liability against the University of Missouri. However, the ALJ did find that the University of Missouri was entitled to one-half of the total Award for permanent partial disability and unpaid medical expenses in contribution from Job Finders. On appeal, the Commission affirmed.

Fund Not Responsible For PTD Because Claimant's Subsequent Injury Was Not Related to Work Accident

In **Chambers v. Missouri Department of Highways & Transportation**, **Injury No. 07-124759,** the claimant injured his neck and subsequently developed right arm, upper and lower back symptoms at work. He also had several pre-existing injuries. As a result of the work injury, he developed a small disc protrusion at C6-7 and a tiny herniation at C5-6. He received authorized treatment with Dr. Coyle who treated him conservatively with injections and physical therapy and placed him at MMI on February 27, 2008, with respect to his low back. In August 2008, for reasons not explained in the Award, the claimant returned to Dr. Coyle who recommended an MRI of the lumbar spine, which showed a tethered cord at L3 and a protrusion at L5-S1, which the doctor stated were not causally related to the work injury. Dr. Musich, the claimant's expert, stated in his report that the claimant's condition at L3-4 "could" have been caused by his work injury. Ms. Gonzalez provided a vocational evaluation at the claimant's request on December 27, 2011 stating that the claimant was currently unable to compete on the open labor market, but did not specify as to when the claimant became unemployable.

At a hearing, an ALJ found that the claimant sustained a work injury to his neck, right arm and back. Dr. Musich merely found that the claimant's subsequent L3-4 condition "could" be work related whereas Dr. Coyle explicitly stated that the condition was not work related. Therefore, the ALJ found Dr. Coyle more credible and did not find the employer/insurer liable for the claimant's L3-4 condition. The ALJ imposed permanent partial disability liability on the Fund for the claimant's pre-existing conditions but did not award permanent total disability benefits.

Employer Responsible for Disc Bulge While Claimant Was Working For Them But Not Responsible For Herniation Two Years After Claimant Left Work

In **Harris v. Penske Truck Leasing Co., Injury No. 11-110474**, the claimant alleged an occupational disease to his neck as a result of his repetitive job duties with operating a fork truck which required him to look over his right shoulder 75 to 85% of each work day. An MRI in 2012

showed a disc bulge at C4-5. The claimant stopped working for the employer in 2012. Two years later, an MRI in 2014 showed a disc herniation at C4-5. The claimant obtained a report which connected a disc bulge at C4-5 to his work but did not connect the herniation. Specifically, his expert found the disc bulge was work related because the claimant put mechanical pressure on his neck by repeatedly rotating it to the right, which narrowed the foramina on the right side of his neck and developed the disc bulge.

Conversely, the employer/insurer obtained a report which stated that the claimant's neck conditions were not work related. The employer/insurer's expert stated that looking backwards is a normal movement and therefore, cannot be the cause of the claimant's neck condition. The employer/insurer's expert specifically addressed the herniation and stated that given that the claimant stopped working in August of 2012, it was not work-related. At a hearing, an ALJ found in favor of the claimant and imposed liability for a disc bulge at C4-5 but not for a herniation. Therefore, the ALJ found the employer/insurer responsible to provide treatment to cure and relieve the disc bulge, but not the herniation. On appeal, the Commission summarily affirmed.

Employer Responsible for PTD After Claimant Worked 38 Years As Electrician and Unable to Return to Electrical Work Due To Lifting Restrictions

In **Maloney v. Alpha Energy & Electric, Inc., Injury No. 10-048928**, the claimant was injured at work when he was working on a receptacle box and was shocked by hot wires. The claimant had a high school education and completed vocational training as an electrician. His entire 38 year career had been spent working as an electrician. Following the work injury, Dr. Hess performed a cervical discectomy and fusion from C5-6 to C6-7. Thereafter, the doctor placed the claimant in the medium category for physical restrictions. The claimant then obtained a report from Dr. Stuckmeyer who gave lifting restrictions of 20 pounds, no working overhead with either arm, and no extending his neck beyond the neutral position. Mr. Cordray provided a vocational evaluation stating that the claimant could not return to work as an electrician, that his electrical skills did not transfer to other occupations, and that he was too old to be retrained. At a hearing, an ALJ found that the claimant was PTD as a result of the work injury. On appeal, the Commission summarily affirmed.

Video Surveillance Not Admissible at Hearing Since Employer Did Not Comply With Continuing Request For Production

In **Burlison v. Department of Public Safety, Injury No. 09-065236,** the claimant sustained a work-related injury to her shoulder when a patient grabbed and twisted her arm. At a hearing, the claimant was found to be PTD as a result of the RSD in her arm. At the hearing, the employer/insurer did attempt to submit into evidence video surveillance which was taken of the claimant but the ALJ refused to consider that evidence in light of the fact that the video surveillance footage was never provided to the claimant's attorney. The claimant's attorney had previously sent a Notice of Deposition to the employer's superintendent and the notice included a request for statements and any video taken of the claimant. The employer/insurer did not have any video at the time of the request and argued it did not have to produce the video since the

video was not received until after the request had been made. The ALJ disagreed and stated the claimant's attorney can request surveillance pursuant to a civil rule despite the fact that the workers' compensation statute does not apply to videos. In this case, the claimant's attorney did not forward a Subpoena Duces Tecum to the superintendent which is required by the civil rule, but the superintendent voluntarily appeared for the deposition and therefore, had a duty to produce any videos. While the superintendent may not have had the video at the time of the deposition, there is a continuing duty to produce video, so once the employer obtained the video, they were required to provide the claimant's attorney the same.

Employer Responsible For PTD Benefits Because Claimant Was PTD Before Second Work Injury

In **McDonald v. Midland Radio Corporation, Injury No. 07-106174**, the claimant sustained injuries on May 22, 2007 and June 23, 2007. On May 22, 2007 the claimant fell over a cart containing boxes, and tore her left rotator cuff. The claimant requested medical treatment but it was not provided and she continued to work without accommodations until her June 2007 injury. On June 23, 2007 the claimant was lifting a radio when she sustained a partial rotator cuff tear of the left shoulder. Authorized treatment was then provided and the claimant eventually underwent surgery. She also sought psychiatric treatment and Dr. Hill diagnosed her with depressive disorder and generalized anxiety disorder, for which her May 22, 2007 accident was the prevailing factor. Conversely, Dr. Hughes, the employer/insurer's expert, believed that the claimant's depression disorder and generalized anxiety disorder were caused by a genetic component and not related to either of the work accidents. Specifically, Dr. Hughes diagnosed a pain disorder but believed that condition was caused by the claimant's inner drive to remain disabled rather than to any actual physical injury. The claimant had an eighth grade education, low academic skills and had flunked the GED on several occasions. She worked the majority of her career in unskilled positions. At a hearing, the ALJ found that the claimant's left shoulder condition and her psychological conditions were a result of her May 22, 2007 accident, and rendered her PTD. In light of the fact that the ALJ found that the claimant was rendered PTD as a result of the May 2007 accident alone, PTD liability was imposed solely against the employer/insurer and no liability was imposed on the Fund. On appeal, the Commission affirmed.

Unexplained (Idiopathic) Fall Compensable When Nature of Employment Causes Risk to Claimant

Gleason v. Treasurer of Missouri, Case No. WD77607 (Mo. App. Ct. 2015)

FACTS: The claimant fell from the top of a railcar he was inspecting sustaining injury to his head, neck, right shoulder, clavicle and ribs. The claimant had no memory of the circumstances leading up to the fall, the fall itself or the three days after the fall when he was hospitalized. In other words, the claimant could not explain why he fell.

The claimant settled his claim against the employer/insurer and the Stipulation stated that he

sustained a compensable injury in the course and scope of his employment. The claimant then proceeded to a hearing and sought benefits from the Second Injury Fund. At a hearing, the ALJ stated that because the claimant could not explain why he fell, the matter was not compensable as he could not prove that his injuries came from a risk or hazard which was related to his employment and which he was not equally exposed to normal non-employment life. On appeal, the Commission affirmed. The claimant appealed pro se.

HOLDING: On appeal, the Appellate Court reversed and remanded the decision. Specifically, the Court noted that although the claimant could not explain why he fell, it was a known fact that his work exposed him to the risk of falling from a railcar, which is the activity that caused his injuries. The Court further noted that such a risk is not one that he would have been exposed to in normal non-employment life. Specifically, the Court stated that the focus is not on what the claimant was doing when he suffered his injuries, but rather should be what was the "risk source" of his injury. While the claimant could not explain what activity he was engaged in when he fell, the Court found that he did satisfy his burden of showing that his "risk source," falling from a railcar, was what caused his injuries and was a risk he was not equally exposed to in his normal non-employment life. The Court also looked to prior case law and distinguished this case from *Miller* and *Johme*. In *Miller*, the claimant's knee popped while crossing the street to his truck and in *Johme* the claimant fell off of her shoe. The Court stated that in those two cases, the claimants' injuries stemmed from activities to which they would be equally exposed in non-employment life whereas in this case, the claimant was exposed to falling off a railcar, which is a risk he would not be equally exposed to in non-employment life. Therefore, *Miller* and *Johme* were correctly decided as non-compensable cases whereas this instance involved a compensable injury.

Of note, the Second Injury Fund argued that unless claimants are required to prove why they fell, then recovery for idiopathic injuries will be available. The Court disagreed with that argument and stated that idiopathic injuries can be raised as an affirmative defense to bar compensability. In other words, once the claimant has met his burden of proving that he sustained an injury in the course and scope of his employment, the employer/insurer or Fund can then raise the affirmative defense that the claimant's injury was idiopathic.

Editor's Note: The Court appears to be stating that if the claimant was injured by a risk to which he was not equally exposed to in normal non-employment life (*e.g*, falling off of a train car) then he does not need to explain why or how the injury occurred but if there is a question as to whether the claimant's injury stemmed from a risk to which he was equally exposed in non-employment life (*e.g,* walking down the street) then he does need to explain why or how the injury occurred.

Claimant's Fall Down Steps Not Compensable

In **Cotter v. Nitelines USA, Inc., Injury No. 12-046083**, the claimant worked on occasion at the VA Hospital. The claimant testified that on April 29, 2012, his date of injury, he worked from 4:00 P.M. to midnight. He testified his shift had ended and he was leaving the VA Hospital and walking to the parking lot area (which was not owned by the employer) to return home. While

descending the staircase of the parking lot, the claimant testified that he missed a step because it was dark. He fell and fractured his left ankle.

At a hearing, the claimant was confronted with evidence that it was 4:00 P.M. when he left the VA Hospital on his date of injury and he conceded it would not have been dark at that time. The ALJ denied compensability on several grounds. First, the ALJ held that because the claimant injured himself after he had completed his shift, that his injury did not occur "during a single work shift" as required by Statute. Additionally, the ALJ found that the extension of premises doctrine did not apply in this case, because the claimant fell in a parking lot which was not owned or controlled by the employer. Finally, the ALJ found that the claimant's fall on the steps was a risk to which he was equally exposed in his normal non-employment life.

On appeal, the Commission affirmed but largely disagreed with the ALJ's reasoning. First, the Commission stated that the claimant does not necessarily have to be on the clock to sustain a compensable accident. Second, the Commission stated that the extension of premises doctrine may be available to employees, such as the claimant in this case, who are working on a temporary or loaned basis at a premises other than that of their immediate employer. The Commission stated that an employee whose work entails travel away from the employer's primary premises is considered to be in the course of employment during the trip except when on a distinct personal errand. The Commission did state that when employees are working on a temporary or loaned basis at a premises other than that of their immediate employer, the application of the extension of premises doctrine would be more complicated, but the Commission did not definitively state whether the extension of premises doctrine would in fact apply to such instances. However, the Commission affirmed on the basis that the claimant was confronted with time sheets he filled out and he agreed on cross-examination that it would not have been dark at 4:00 P.M. when he was descending the steps. Additionally, the Commission noted that there is no mention of a workplace injury or any fall on a stairway in the claimant's earliest medical treatment records. Therefore, the Commission affirmed and compensability was denied

Claim Denied Because Claimant Could Not Identify Specific Activity that Caused His Injury

In **Barrientos v. Ben Hur Construction, Injury No. 10-108268**, the claimant was an iron worker in charge of a project to build a mezzanine. In order to accomplish the job, he was required to manually move all construction materials into the building. He stated that he had some pain in his low back for at least one week leading up to December 28, 2010 but had no leg pain. On December 28, 2010, the alleged date of injury, he was cutting screens all day, which required lifting and twisting. He completed the task without feeling anything out of the ordinary in his back or legs. However, he then went home, went to bed and woke up in the middle of the night with excruciating pain in his back and left leg. He was seen at St. John's Mercy Medical Center on December 29, 2010 and it was noted that his "pain was associated with no known injury (iron worker so does lots of heavy lifting at work but no specific event)." In his deposition, the claimant testified that he could have injured his back by erecting the steel, doing

everything by hand, unloading the truck, or moving the steel into the building by hand. At a hearing, he testified that he was injured due to eight hours of cutting and stacking security screens. The ALJ denied compensability finding that the claimant alleged an accident, and in order for him to have a compensable accident, he must identify by time and place of occurrence the event or strain which gave rise to his complaints. In light of the claimant's inability to point out when or what activity caused his low back complaints, the ALJ denied compensability.

On appeal, the Commission affirmed but stated that they believed it was possible for repetitive lifting throughout a single work shift to constitute a singular event or strain for purposes of proving an accident. However, they believed that in this case, the claimant failed to show any identifiable injury as a result of his work duties on December 28, 2010.

Claimant Slip/Fall While Walking in Public Street on Lunch Break Denied

In **Obic v. St. Louis Antique Lightning Company, Injury No. 11-044808**, the claimant was at work when he left for his 30 minute lunch break and walked across the street to eat at a restaurant. Upon returning from the restaurant, while walking in the middle of a public street, a strong gust of wind hit the claimant and he fell over, sustaining injury to his right arm. At a hearing, an ALJ denied compensability finding that the injury did not arise out of and in the course of the claimant's employment. Specifically, the ALJ found that the claimant chose to leave for lunch and was not directed by his employer to leave the premises for lunch. Therefore, the ALJ found that the claimant was not injured by any condition of his employment.

On appeal, the Commission agreed with the ALJ and stated that nothing about the claimant's employment required him to leave the workplace to eat lunch. Also, there was no indication that his employment was located in an area more prone to wind gusts than elsewhere. Therefore, the Commission held that the claimant's injury arose from a risk unrelated to the employment and to which he was equally exposed in normal non-employment life.

Claimant, a Traveling Surveillance Employee, Sustained Compensable Fall in Public Bathroom

In **Eberhard v. G4S, Injury No. 11-090670**, the claimant, a traveling surveillance employee, was traveling for work when she stopped to use the restroom in a McDonald's. While in the restroom, a heavy toilet dispenser fell on her right shoulder and face, injuring her. At a hearing, an ALJ found the matter compensable.

On appeal, the Commission found that the claimant's injuries arose from a risk related to her employment activities because she was required to use public restrooms due to the unique nature of her work, in that she had to travel far distances. Additionally, the Commission stated that use of public restrooms exposes people to risks greater than using private restrooms. While the Commission did state that people generally use public restrooms in their normal non-employment life, the Commission stated that the nature of the claimant's work exposed her to a greater frequency of using public restrooms and therefore, she was unequally exposed to this

risk. Finally, the Commission stated that simply because the claimant was not on the employer's premises did not mean that her claim did not arise out of and out of the course of her employment. Specifically, the Commission stated that the claimant sustained injuries while she was on the job, and therefore, the injuries arose out of the course of her employment.

Returning to Work Does Not Mean Claimant is Employable on Open Labor Market

Archer v. City of Cameron, Case Nos. WD77320 & 77321 (Mo. App. Ct. 2015)

FACTS: The claimant sustained a herniated disc and radicular symptoms in the course and scope of his employment in 2008. He worked light duty from 2008 through 2010, during which time he worked within his restrictions laying concrete but did not do repetitive heavy lifting as he had done prior to his work injury. During his time on light duty, he was accommodated by his employer, as he was allowed to take breaks whenever he wanted, many of his co-workers helped him perform his duties, he no longer performed any heavy lifting, and he frequently took breaks in his truck to alleviate pain. In 2010 he sustained a sprain/strain to his back while in the course and scope of his employment.

At a hearing, an ALJ found the claimant was PTD and assessed 35% disability from the 2008 injury and 7.5% disability from the 2010 injury. PTD benefits were imposed on the Fund. The Fund appealed to the Commission arguing that the claimant was already PTD as a result of the 2008 injury. The Commission agreed with the Fund, finding that while the claimant continued to work after his 2008 injury, he was heavily accommodated and did not perform work at the level "customarily performed by the average person engaged in such work." Therefore, the Commission shifted all liability to the employer/insurer. The employer/insurer appealed.

HOLDING: The Court of Appeals affirmed and agreed with the Commission's finding that although the claimant returned to work following his 2008 injury, he could still be found PTD as a result of that injury, especially in light of the multiple accommodations he was provided when he returned to work.

Commission Awards TTD Benefits While Claimant Recovers From Injury and is Working For Friend But Not the Employer

In **Gamble v. Chester Bros. Construction Company, Inc., Injury No. 08-087820**, the claimant tore his rotator cuff and underwent surgery. It is not explicitly stated in the Award but it appears the claimant worked for the employer/insurer as a laborer. The claimant was unable to return to work for his employer following the work injury but worked five months for a friend doing "odd jobs." The claimant testified that 90% of the work he did for his friend was simply supervising other employees. The ALJ awarded TTD benefits for the period that the claimant worked those "odd jobs."

On appeal, the employer/insurer argued that the claimant should not be entitled to TTD benefits for the periods that he worked between the time that he was injured and the time he was released

from care in September 2011. The Commission disagreed with this argument, and stated that the question is the claimant's earning capacity, not his actual earnings when determining whether he is entitled to TTD. The Commission stated that all of the claimant's jobs during the period which he was awarded TTD were obtained through his acquaintance, and therefore, were not obtained through competition in the open labor market. Therefore, they agreed with the ALJ and found that the claimant was not disqualified from receiving TTD benefits for those time periods.

Contract Waiving Workers' Compensation Benefits Signed by Claimant Did Not Establish Claimant Refused a Drug Test Because the Contract Did Not Contain Language to That Effect

In **King v. American Employer Group 3, Injury No. 13-063318**, the claimant had sustained a pre-existing injury in 1994 for his back. In 2011, he was diagnosed with fibromyalgia. The claimant began using marijuana, which he testified was to cope with his fibromyalgia and ongoing symptoms from the 1994 injury. On August 10, 2013, while walking at work, the claimant slipped and fell, injuring his tailbone. The employer requested the claimant submit to a drug test that day and told him that if he tested positive for drugs, his workers' compensation claim "may not be handled." The employer testified that the claimant refused to be tested. The employer testified that therefore, they provided the claimant with a document which stated that the claimant gives up his right to file a workers' compensation claim and will be responsible for all medical expenses. Additionally, the document stated that the claimant waives all rights to future claims against the employer that may arise from the work accident. However, the contract did not state that the claimant's signature was proof that he refused to take a drug test. The employer testified that they offered the claimant this contract as an alternative to taking the drug test, the claimant opted to sign the contract, and that was proof that the claimant refused to take the test. The claimant testified that he told the employer he may test positive because of marijuana he used prior to the injury but denied refusing to take a drug test.

At a hearing, an ALJ found that the claimant's injury was compensable. With respect to the drug issue, the ALJ found the claimant's testimony more credible than the employer's testimony, because the release which the claimant signed on his date of injury contained no reference to a drug refusal and the employer could not explain why such a clause was not included in the release. The employer/insurer appealed and the claimant also appealed, asking for the costs of the proceedings on the basis that his claim was defended without reasonable grounds.

The Commission affirmed the decision, and stated that they would not yet determine the issue of imposing costs of the proceedings.

Non-Forensic Drug Tests Are Not Persuasive Enough

In **Hertzing v. Beck Motors, Inc., Injury No. 09-025872**, the claimant was injured on April 14, 2009, when he slipped and fell. The claimant received treatment at St. Mary's Health Center on April 16, 2009, at which time a urine drug screen was positive for cocaine metabolites. Documentation of St. Mary's Health Center stated that "testing for above analytes was performed

only for medical purposes on urine using screening methodology. Occasional false positives and negatives due to interfering substances can occur. Confirmation testing is available by request." The claimant testified that he did not use cocaine of his date of injury and provided testimony from an expert toxicologist, Dr. Vasiliades, who testified that the claimant did have an inactive metabolite in his system which was produced by the body breaking down cocaine, but it had no pharmacological effect. The doctor further testified that the window for detecting benzoylecgonine in the urine is around three days and is not an illegal drug. The ALJ did not award a reduction in benefits pursuant to the St. Mary's drug test.

On appeal, the Commission affirmed. Regarding the drug penalty, the Commission was not persuaded by the non-forensic drug test results from St. Mary's Health Center, and instead credited the claimant's testimony that he did not use cocaine at work or in the few days prior to his work injury.

Claim Filed Against Fund Not Time Barred Because Claim Filed Within One Year of Settlement With Employer/Insurer

In **Couch v. Treasurer of Missouri, Injury No. 11-047929**, the claimant sustained injuries on June 22, 2011, to her head and neck. She filed a Claim for Compensation against the employer/insurer and the Fund on July 12, 2011. Subsequently, she settled with the employer/insurer on March 28, 2013. When the claimant settled her June 22, 2011 claim against the employer/insurer, the Second Injury Fund was dismissed by the claimant. The claimant then filed a new claim against the Fund on December 5, 2013, nine months later. At a hearing, an ALJ noted that a claim against the Second Injury Fund must be filed within two years after the date of injury or within one year after the claim is filed against the employer/insurer, whichever is later. The ALJ stated that her claim against the Fund was not time barred because her claim against the Fund was filed within one year after her settlement of the claim against the employer/insurer. The ALJ found that filing a settlement involving the claimant and the employer/insurer constitutes a "claim" and therefore, she filed her claim against the Fund within one year of settling her claim against the employer/insurer, so her claim against the Fund was not time-barred. On appeal, the Commission affirmed.

Employer/Insurer Responsible for Additional Treatment to Cure and Relieve Effects of Work Injury Only if Claimant Requests it

In **Aufdenberg v. Drury Inn, Inc., Injury No. 08-115098**, the claimant sustained an injury to his left shoulder on December 16, 2008. He received authorized treatment with Dr. Taylor and physical therapy was recommended. The claimant reported at physical therapy that he was 90% - 95% improved but still had some range of motion problems. On February 13, 2009 the claimant requested that Dr. Taylor return him to full duty, which the doctor did. After returning him to work, the claimant's shoulder immediately began to bother him. The claimant then went to Dr. Miller on November 30, 2009 for treatment on his own. In May 2010 the claimant contacted the adjuster and demanded additional treatment, which was provided with Dr. Nogalski. Eventually, the claimant submitted for an IME with Dr. Lehman, who did not recommend any further

treatment to address the work injury, but did refer the claimant back to Dr. Miller for treatment under his private insurance for arthritis. Thereafter, Dr. Miller performed surgery to repair a torn labrum. At a hearing, the ALJ sided with the claimant and found that his work injury was the prevailing factor in his torn labrum. The ALJ also found that the employer/insurer was liable for the costs of the surgery performed by Dr. Miller in 2012. However, the ALJ did not impose liability on the Employer/Insurer for the medical expenses accrued when he treated with Dr. Miller on his own in 2009. On appeal, the Commission summarily affirmed.