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MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

January 2019 – March 2019

Claimant Not Injured in Course and Scope of Employment Because Claimant Was Equally Exposed to Risk of Walking on Even Flat SurfaceOutside of Work

Annayeva vs. SAB of the TSD of the City of St. Louis and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 13-000909

On January 8, 2013, the claimant, a teacher, sustained an injury when she slipped and fell. She had just entered the school buildingusing a general entrance and was carrying student papers and lesson plans, although she was not "clocked in" at the time. She did not see any defects in the linoleum tile floor, and when filling out an investigation report, she did not mention any ice, salt, or dirt on the floor that caused her to slip and stated that she "could not determine the cause of the accident." The claimant alleged injuries to numerous body parts as well as a psychological injury. She underwent minimal authorized treatment, and when no additional treatment was authorized, she treated on her own.

At a Hearing, the ALJ found the claimant's testimony not credible and opined that her description of her disabilities verged on the point of malingering. The ALJ noted there was little or no objective medical findings to support any of the claimant's anomalies, and her claim was denied due to lack of causation.

On appeal, the Commission affirmed the ALJ's decision and Award with a supplemental opinion wherein the Commission found that this matter was not compensable because the claimant was not injured in the course and scope of her employment. The Commission found that nothing about the claimant's work caused her to fall, and the hallway was "normal" where she fell. When specifically asked by her attorney, the claimant testified that the floor was dirty and moist, but the Commission did not find her testimony credible and noted that none of the medical records noted any hazardous conditions on the hallway floor. The Commission found that without additional support in the record showing the alleged hazardous condition of the hallway floor, the only risk source was that of walking on an even flat surface, to which the claimant was equally exposed in her normal non-employment life. Therefore, the claimant failed to show that her injury arose out of and in the course and scope of employment.

Claimant Injured in Course and Scope of Employment in MVA While Traveling to Patient's Home; Employer Not Entitled to Safety Violation Penalty, Even Though Claimant Was Not Wearing Seatbelt, Because Employer Did Not Have a Separate Safety Policy Requiring Use of Seatbelt

Hayden vs. SW Center for Independent Living, Injury No. 16-104167

The claimant was injured on October 7, 2016 while working as a home health aide. She was required to secure all health forms and documents for the company regarding her patients in a secure place within her home, received assignments by phone call from the scheduler, and she frequently traveled directly from home to the first patient's residence to begin working. On the date of accident, the claimant dropped off her son at school, returned to her home, completed initial paperwork on her patients, and then began driving from her home to a patient's home. The route she was taking was a direct route to her patient's home, although in the opposite direction of the employer's principal place of business. She was in a motor vehicle accident and was ejected from the vehicle. She sustained multiple injuries to her back, ribs, and shoulders as well as to her left lower extremity, which was amputated below the knee.

The claimant gave conflicting statements regarding whether she was wearing a seatbelt at the time of the accident, but the accident report indicates that she was not using a seatbelt. The employer presented no evidence of a specific safety rule requiring the use of a seatbelt, and the claimant could not recall such a rule.

In a temporary and partial Award, the ALJ found that the claimant was traveling to her first assignment of the day at the time of the accident, not to the employer's principal place of business. The ALJ also found that the claimant was traveling to that location solely for the benefit of the employer, and traveling for work placed her at an increased risk of injury that to which she was exposed in her normal non-employment life. Therefore, the ALJ found that the claimant was injured within the course and scope of her employment. The ALJ also found that the employer was not entitled to a safety violation penalty simply because the claimant failed to wear a seatbelt while operating a motor vehicle, despite the fact that wearing a seatbelt was required by law. This was because there was no credible evidence that the employer had adopted a separate safety rule requiring that employees wear seatbelts while driving.On Appeal, the Commission affirmed the ALJ's Decision and Award.

Employer/Insurer Admitted Prevailing Factor When It Failed to Timely Answer the Claim for Compensation, and Commission Found Injury Occurred Within Course and Scope of Employment

Wright vs. Echota Systems, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 12-091385

In April 2012, the claimant, a 70-year-old electrician, was required to climb seven flights of stairs to reach his tools because the elevator was out of order. When he reached the seventh floor, he suffered a stroke followed by a series of subsequent strokes in 2014 and 2015. The claimant did have a prior cardio embolic stroke as well as a history of CAD, atrial fibrillation, and hypertension, and he was taking blood thinners on his date of injury. Evidence also established that he had done work of a similar nature at other high-rise buildings at other locations in the months leading up to his date of injury. The claimant's attorney filed a Claim alleging that the claimant was PTD and also that the claimant was injured "in the course and scope of his employment while climbing seven flights of stairs and exerting unusual and extraordinary physical exertion, which was the prevailing factor in causing his stroke and resulting in severe injury and permanent disability."

Dr. Farrar and Dr. Sand opined that the prevailing factor in causing the claimant's stroke was his preexisting medical conditions, not climbing seven flights of stairs. Dr. Koprivica examined the claimant at the claimant's attorney's request and opined that the claimant was at risk of having a stroke because of his medical conditions, but the prevailing factor in causing this particular stroke was the unusual stress of climbing seven flights of stairs.

At a Hearing, the ALJ noted that the employer/insurer had filed a late Answer to the Claim for Compensation, and therefore, all facts alleged in the claim were deemed as admitted. The ALJ found that this included the allegation that climbing seven flights of stairs was the prevailing factor in causing the stroke and resulting injury and disability. The ALJ found that the claimant was injured in the course and scope of employment and was PTD as a result of the primary injury alone, and the employer/insurer were responsible for paying PTD benefits as well as past and future medical.

On appeal, the Commission affirmed the ALJ's decision and Award with a supplemental opinion. The Commission found that the test for course and scope has two prongs. Whether the accident was the prevailing factor in causing the injury was the first prong, and this was admitted when the employer/insurer failed to file a timely Answer. The second prong was whether the hazard or risk was unrelated to the employment to which the claimant would have been equally exposed outside of work in his normal nonemployment life, and the Commission held that it was not. Therefore, because "exerting unusual and extraordinary physical exertion" resulting from climbing seven flights of stairs was the prevailing factor in causing the injury, and the stroke did not come from a risk unrelated to employment, the ALJ made the correct legal conclusion that the claimant's injury arose out of and in the course of his employment.

No Missouri Jurisdiction Because Accident Did Not Occur in Missouri, and Claimant Failed to Show That Contract of Employment was Made in Missouri or Employment was Principally Located in Missouri During 13 Calendar Weeks Prior to Diagnosis

Wilson vs. Liquid Environmental Solutions Corporation and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 11-109554

The claimant worked as a driver for the employer, and he testified that his routes required him to drive in Kansas, Nebraska, Missouri, and Arkansas. However, the employer's principal office was located in Kansas, and the claimant was required to begin and end each day by dropping off his truck there. At his deposition, he did not indicate how much driving he did in each state, and he did not present any evidence regarding where a contract of employment was entered into. In his Claim for Compensation, the claimant alleged that he developed bilateral carpal and cubital tunnel syndrome as a result of his repetitive job duties as a driver.

At a Hearing, the ALJ ultimately found this matter was not compensable because the claimant failed to establish Missouri jurisdiction. The ALJ found that the claimant failed to present any evidence regarding contract formation or that his employment was principally localized in Missouri within the 13 weeks preceding the work injury. The ALJ noted that the employer was located in Kansas, the claimant drove through Missouri but did not work from a Missouri location, and he received his job assignments at the Kansas office. The ALJ found that the claimant bears the burden of proving his employment was principally located in Missouri, and he failed to meet that burden.

On Appeal, the Commission affirmed the ALJ's decision and Award with a supplemental opinion, wherein it noted that some important factors to be considered in determining whether employment is localized in Missouri include: Where the workday starts and ends; whether the employer has an office in the state claimed; whether the duties performed in a state are merely incidental to the position; where the employee receives orders, pay, and supervision; if the employee's duties required travel, whether evidence establishes that most miles are within a certain state; and whether a base of operations is in the state. The Commission found that the claimant failed to establish that any of those were true of Missouri in this claim.

ALJ Finds Employer/Insurer Liable for PTD Due to Permanent Work Restrictions and Claimant's Need to Lie Down During Day

Hickmon vs. Propak Logistics, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 13-024814

On April 10, 2013, the claimant, a 39-year-old high school graduate, injured his right hip and low back. Dr. Krempec performed a right hip arthroplasty with arthroscopic labral repair and open femoral osteochondroplasty on October 31, 2013, placed the claimant at MMI without restrictions on March 25, 2014, and assessed 12% PPD of the hip. The claimant attempted to return to work with the insured, but he was unable to work a full day, and he did not return to work again after May 1, 2014. He proceeded to treat on his own for back complaints, and Dr. Ciccarelli performed a lumbar fusion and recommended permanent restrictions of no lifting over 35 pounds or repetitive bending or lifting. The claimant was subsequently terminated by the insured due to his permanent work restrictions.

The claimant had history of working physically demanding jobs after high school. He stopped working for three years following a motor vehicle accident in June 2007 wherein he sustained injuries to his right shoulder and low back. He subsequently returned to full time employment performing maintenance on semi-trailers, which required him to frequently lift over 35 pounds, bend, twist, and climb. He left that position for a higher paying job with the insured. He worked for the insured for 13 months full time in a position that required him to lift and turn pallets weighing up to 80 pounds throughout the day. The claimant testified that he was able to successfully perform all of his job duties despite ongoing back and shoulder complaints.

The claimant was evaluated by Dr. Stuckmeyer at his attorney's request, and he recommended permanent work restrictions and subsequently opined the claimant was PTD as a result of the last injury alone and recommended future medical treatment. Mr. Cordray opined the claimant had no transferable work skills and had below-average intelligence, was limited to sedentary work only given Dr. Stuckmeyer's restrictions, and was unemployable. Ms. Doering evaluated the claimant at the employer's request and opined the claimant was able to continue working in the open labor market.

At a Hearing, the claimant testified that he had trouble with prolonged standing and walking, lifting, and bending, and he has to lie down to relieve his symptoms. He also testified that he had difficulty sleeping due to his complaints. Despite video evidence showing the claimant adjusting straps under a refrigerator in the bed of a truck and playing with four toddlers while seated on the ground and wrestling with them, the ALJ found the claimant credible and the opinion of Mr. Cordray more persuasive than that of Ms. Doering. The ALJ held that the claimant was PTD as a result of the last injury alone and ordered the employer/insurer to provide PTD, future medical, and TTD. On Appeal, the Commission affirmed the ALJ's decision and Award.

Claimant Entitled to TTD Because Not Terminated for Cause and TPDBecause She Only Worked 40 Hours Per Week and Earned Less While on LightDuty

<u>Lana vs. Old Castle, Inc.</u>, Injury No. 17-022682

The claimant sustained an injury to her right elbow while working for the employer. Her job duties included lifting, manipulating, and sometimes breaking cinder blocks weighing up to 36 pounds. The claimant initially underwent authorized treatment with Dr. Towle and was placed on light duty. However, after reviewing a video of the claimant's job duties, Dr. Towle opined that the elbow injury was not work related. The claimant's doctor, Dr. Rosenthal, concluded that the claimant's condition was related to work and recommended surgery and work restrictions. The claimant was subsequently terminated for violating the employer's no-call/no-show policy for three consecutive workdays.

While on light duty, the claimant was limited to a 40-hour work week and was earning approximately $412.02 less per week than her pre-injury average weekly wage. She demanded TPD for the periods that she worked light duty as well as past and ongoing TTD after she was

terminated from employment on January 17, 2018.

At a Hearing, the ALJ found Dr. Rosenthal's opinion more credible than that of Dr. Towle and ordered the employer to provide additional medical treatment. The ALJ also noted that the employer's policy actually stated that a claimant could not miss three consecutive workdays without notifying her supervisor at least one hour prior to the start of the shift. The ALJ found the claimant's testimony credible regarding the fact that she provided timely notice to her supervisor for two of the three days that she missed from work. Therefore, the ALJ concluded that the claimant was not terminated for cause and was owed continuing TTD. The ALJ also awarded TPD for the period the claimant was working light duty and was limited to working no more than 40 hours per week, because she was earning less per week than her pre-injury average weekly wage, because she was previously working overtime. On Appeal, the Commission affirmed the ALJ's decision and Award.

Court Rejected Employer/Insurer Appeal Because Brief Failed to Include Specific Page References to The Record and Failed to Address the Evidence on The Record That Supported Commission's Award

<u>Customer Engineering Services vs. Odom</u>, Case No. SD35638 (Mo. App. 2019)

FACTS: The 56-year-old claimant was injured on June 21, 2012 while lifting a large photo printer with two other people. He treated with Dr. Roeder, who diagnosed tendinopathy and a partial right distal biceps tendon tear and performed right elbow surgery. The doctor subsequently diagnosed CRPS of the right upper extremity and referred the claimant for ganglion blocks. The claimant also treated with Dr. Lennard, who placed him at MMI on August 26, 2013. He proceeded to treat on his own and underwent pain management. The claimant did also have pre-existing disabilities, including a left knee injury which required surgery in 2010. He obtained an Associate's Degree in Photo Production Technology and had a history of working as a field support technician for photo labs.

At a Hearing, the ALJ found the claimant was PTD as a result of the work injury alone and noted he had unpredictable chronic pain that required opioid medication that caused cognitive deficits, and he had permanent restrictions from Dr. Lennard and Dr. Roeder. On appeal, the Commission affirmed the ALJ's decision and Award. The employer appealed the Commission's decision and Award. It argued there was not sufficient evidence on the record to support an Award of PTD or future medical.

HOLDING: The Court of Appeals noted that the employer's brief did not include page references to the record on appeal, and it failed to address the favorable evidence on the record that supported an Award of PTD benefits and future medical, which stripped the employer's argument of any analytical or persuasive value. The Court affirmed the Commission's decision and Award, although it did modify the amount of past medical owed by the employer/insurer.