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MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE
January 2020 – March 2020

COVID – 19 & Missouri Workers' Compensation

Compensability –

It would be very difficult for a claimant to prove that he or she contracted COVID-19 under the theory of accident as an accident is defined as an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. §287.020.2.

However, COVID-19 could fall under the theory of an occupational disease which is defined as an identifiable disease arising with or without human fault, out of and in the course of employment. Ordinary diseases of life to which the general public is exposed outside of employment shall not be compensable except where the diseases follow as an incident of an occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. §287.067.1

Also, for an injury to be deemed compensable it cannot come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. §287.020.3(2)(b)

Therefore, in order for COVID-19 to be compensable it is likely that a claimant will have to work in the healthcare field, as they have a greater risk of coming into contact with the virus. In other words, a healthcare employee may be able to argue that they have a greater risk of exposure at work than in their normal nonemployment life.

The Effect on Current Claims –

COVID-19 will likely affect how claims are handled, as claimants that are treating may have a delay in that treatment due to doctor's offices closing or taking less patients in a day in order to limit possible contact. Also surgeries could be delayed/postponed. Furthermore, a claimant may become symptomatic and unable to present to a doctor's office. Of course, if a claimant is off work or on restrictions that cannot be accommodated by the employer this could increase TTD exposure.

Furthermore, some employers are closing their doors due to temporary laws or by choice and therefore some employees that were offered light-duty restrictions no longer have that option. Therefore, this would open the employer up to TTD exposure when there was none.

Claimant's Fall Not Compensable Because Claimant's Testimony Regarding Condition of Floor Not Credible

Annayeva vs. SAB of the TSD of the City of St. Louis and Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. SC98122 (Mo. S.Ct. 2020)

FACTS: On January 8, 2013, the claimant, a teacher, sustained an injury when she slipped and fell. She had just entered the school building using 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.

At a Hearing, the ALJ found the claimant's testimony was not credible and denied her claim due to lack of causation. On appeal, the Commission affirmed the ALJ's Award, but based on the grounds that 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. Therefore, the Commission found that 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, and she failed to show that her injury arose out of and in the course and scope of employment.

On appeal, the Court of Appeals reversed the Commission's decision. The Court held that when the Commission rejected the claimant's testimony regarding the condition of the floor and found it was not credible, its opinion was based on conjecture and unsupported by sufficient competent evidence in the record, and the Commission's Award did not provide a reasonable or substantial basis for refusing to believe the uncontradicted testimony of claimant. With respect to the medical records, the Court also held that medical records were meant to provide proof of medical history and diagnosis, not proof of a hazard or risk present on the floor where the claimant fell. Therefore, the fact that they did not mention dirt or ice on the floor was not persuasive. The Court held that the claimant was injured in the course and scope of her employment because the risk of her injury was not simply walking on an even surface, it was walking in the employer's hallway which was dirty with dirt and ice, where she walked every workday as a function of her employment. The Court also found that it did not matter that the claimant had not yet clocked in at the time of her injury because the employer owned and controlled the hallway where she fell. Therefore, the Court reversed the Commission's decision and transfer was granted to the Supreme Court.

HOLDING: The Missouri Supreme Court noted that the Commission determined that the claimant's testimony was not credible. Because the Court is bound by the Commission's credibility determinations when they are expressed in the award or denial of benefits and the weight the Commission gives to conflicting evidence, it must treat the claimant's testimony regarding the condition of the floor as not persuasive. Since the claimant failed to produce any credible evidence regarding the soiled condition of the floor, her walk into school was no different from any other walk taken in her normal, nonemployment life. Therefore, her claim is not compensable, and the Court affirmed the Commission's denial of benefits.

Claimant's Fall Not Compensable Because Claimant Just Walking

Gray v. Hy Vee Food Stores and Treasurer of the State of Missouri Custodian of the Second Injury Fund, Injury No. 14-074997

The claimant, an 82-year-old employee, had walked approximately 15 to 20 steps into the store and fell sustaining an injury to her left shoulder. She did undergo a shoulder replacement on her own. At a hearing she testified that although her Claim for Compensation stated that she slipped due to water on the floor she was not aware of any water on the floor when she fell. She did note that the parking lot was wet with dew and it was likely that she had water on her shoes. She had her normal tennis shoes on which she wore to work everyday and did not believe they had any defect. She testified that she fell suddenly and had no idea why she fell. She was not aware of any condition which would have caused her to fall. There was no water or substance on her clothes when she got up from the floor.

A co-employee testified that she saw no water or food on the floor that could have contributed to the claimant's fall. Also the claimant's supervisor testified at the hearing. She testified that the area where the claimant fell was not an area of normal foot traffic. She found no wet area or water in the area where the claimant fell. She also testified that the claimant told her that her shoes had been sticking and that her son had planned on taking her to get new shoes. Also the kitchen manager testified that he was there shortly after the claimant's fall and there was nothing which could have caused the claimant's fall. He also testified that the claimant said "those darn shoes got me" and said that it was her second fall in her shoes.

Also when she presented to the emergency room it was noted that she "was walking when she tripped over her own feet and landed on her left arm."

The ALJ found that the claimant failed to sustain her burden of proof that she sustained an accident that arose out of and in the course of her employment. There was no evidence that the claimant did anything other than walk into the store and fall after taking 15 to 20 steps. She was not able to identify anything related to Hy Vee or her work for Hy Vee that caused her to fall. There was no evidence that work was the prevailing factor in causing her to slip and fall, and moreover there was no evidence that walking on the grocery store flooring was a hazard or risk to which she was not equally exposed in her nonemployment life. The Commission affirmed the decision of the ALJ.

Claim Denied as Claimant's Condition Due to Degenerative Conditions and Not Unexpected Traumatic Work Accident

<u>Williams v. Lutheran Senior Services and Safety National Casualty</u>, Injury No. 18-001826

On January 15, 2018, the claimant slipped and fell on ice and landed with her left arm extended out from her body trying to brace herself. The employer sent the claimant to BarnesCare and she was referred for an MRI which showed arthritic changes and tendinopathy with tears of the infraspinatus and supraspinatus tendons. The employer then sent the claimant to Dr. Young who opined that the work incident was not the primary and prevailing cause of her shoulder symptoms. He noted the claimant had a severely arthritic shoulder and the work accident exacerbated the underlying symptoms of the severe arthrosis. The direct fall onto the shoulder caused a flare-up of the underlying symptoms related to her chronic underlying condition that relate to her chronic severe arthritis. Dr. Young recommended further treatment including steroid injections and ultimately a shoulder replacement. However, he noted the injury was not directly related to the work incident.

The claimant went on her own to Dr. Wright who opined that she had left shoulder glenohumeral arthritis and a left shoulder full thickness rotator cuff tear. He injected her shoulder and referred her to Dr. Aleem who reviewed the MRI and stated he did not see a full thickness rotator cuff tear but did opine that she would be a good candidate for a total shoulder replacement.

The ALJ found that there was an unexpected traumatic event. However, the evidence shows that a work-related injury did not occur as defined by §287.010.2 which states that an injury is not compensable because work was a triggering or precipitating factor. Additionally, the ALJ found that while the fall exacerbated or triggered the claimant's arthritic left shoulder symptoms and complaints, there was no evidence presented indicating that the claimant's injury was the prevailing factor in causing the injury or need for treatment, and therefore denied the claim.

The claimant then appealed to the Commission. The Commission found that while there was an unexpected traumatic event when the claimant fell, the injury was not caused by this specific event. Additionally, the Commission found that an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability and since Dr. Young credibly opined that the shoulder condition was not directly related to the work incident, the injury was not compensable. Therefore, the Commission affirmed the ALJ's Award denying compensation.

Tinnitus Found Not Work Related

Schlereth v. Aramark Uniform Services Inc., Treasurer of the State of Missouri Second Injury Fund, Case No. ED107806 (Mo. App. 2019)

FACTS: On October 8, 2014, the claimant, a production supervisor, verbally reprimanded two subordinates for leaving wet linen on the production line without spinning it dry and called their actions "stupid." In response, one of the subordinates spit in the claimant's face and punched him repeatedly which caused him to fall and hit his head against a washing machine. After the incident, the claimant was driven to the emergency room and diagnosed with a facial contusion. Nine days after the incident, he saw his treating physician, but did not complain of any ear issues then or on subsequent visits. In October 2017, he filed a Claim alleging tinnitus as a result of the work injury.

Dr. Cohen, the claimant's expert, diagnosed a mild traumatic brain injury and resulting tinnitus. He did admit that tinnitus could be caused by a multitude of other external factors including the medication meloxicam, which the claimant had been taking before the work accident. Dr. Peeples testified on behalf of the employer and it was his opinion that generally people with posttraumatic tinnitus also have symptoms of a traumatic brain injury and the claimant had no such symptoms. The ALJ concluded that the work accident was not the cause of the claimant's tinnitus because he offered "no evidence" of the cause of the same. The ALJ also believed that Dr. Peeples' testimony regarding causation was more persuasive than Dr. Cohen's. The claimant appealed.

The Commission found the ALJ's award was supported by sufficient and competent evidence and affirmed the Award. The claimant again appealed.

HOLDING: The Court affirmed the Commission's decision noting that the Commission reviewed the claimant's emergency room records, which indicated that he had no fractures, mild pain severity, mild ringing in the right ear only, and was released the same day without medication. The Court also noted that the Commission did not error in finding the testimony from Dr. Peeples more persuasive than Dr. Cohen as it is the Commission's function to accept or reject medical evidence. Although the record did not support the Commission's finding that the claimant offered "no evidence" regarding the causation of his tinnitus since he did present testimony from Dr. Cohen, the Court found the Commission properly concluded based on the evidence provided that the work accident did not cause the claimant's tinnitus.

Claimant Entitled to Future Medical Treatment as the Need for Future Medical Care Flowed Directly from the Work-Related Injuries

Hooper v. Missouri Department of Corrections, Injury No. 14-027947

On April 23, 2014, the claimant sustained a twisting type injury to his right knee. Dr. King performed a right knee arthroscopic partial medial meniscectomy on June 3, 2014. He was subsequently released at MMI with no restrictions. On January 27, 2015 the claimant sustained a second injury at work and on March 20, 2015, after failed conservative treatment, Dr. King performed a right knee partial medial meniscectomy and chondroplasty. Thereafter, he was again placed at MMI with no restrictions.

Dr. Volarich assessed 40% disability as a result of the first injury and 30% disability as a result of the second injury. Dr. Thomas also examined the claimant at the claimant's attorney's request and opined the claimant's work injuries and resulting surgeries had aggravated his pre-existing degenerative arthritis to the point where he would require additional treatment. He further stated that the injury lead to the tear in the meniscus which lead to the surgery which lead to the disruption of the mechanics of the knee joint that lead to the degenerative changes necessitating a knee replacement.

Dr. King, the treating surgeon, reviewed the reports and testimony of Drs. Thomas and Volarich and strongly disagreed that his right knee symptomatic arthritis flowed from either work injury. He opined the claimant suffers from a progressive degenerative condition.

The ALJ assessed disability and concluded that the need for future medical care flowed from the work-related injuries.

The employer appealed to the Commission who affirmed the Award of the ALJ as it noted that the claimant was entitled to future medical treatment as may be reasonably required to cure and relieve the effects of the injury.

Part-time Claimant Entitled to Rate Based on Forty Hour Work Week, Not 30 Hour Rule

Graham v. Rosewood Health & Rehabilitation Center LLC and HealthCare Facilities of Missouri, Injury No. 14-073249

On July 15, 2014, the claimant was employed as a part-time CNA and was squatting down in front of an obese patient, moving her catheter so she could help the patient transfer when the patient's leg dropped on the claimant's neck, shoulder and back causing her to fall to her knees.

She was seen by Dr. Patel for neck and chest pain and diagnosed with symptoms consistent with a neck strain, myofascial pain, chest wall pain and thoracic stenosis. He conducted electrodiagnostic studies which did not suggest acute cervical radiculopathy, plexopathy or peripheral nerve injuring the upper lungs. Dr. Patel released the claimant at MMI without any restrictions.

The claimant then requested additional medical treatment. However, it was denied. She went on her own and underwent a second electrodiagnostic study which revealed mild right ulnar nerve compression but no evidence of radiculopathy. She also underwent MRIs of her cervical spine and brain which were normal.

The employer obtained a report from Dr. Fevurly who concluded that the claimant reached MMI when she was placed at MMI by Dr. Patel. He did not recommend any additional treatment and assessed 1% disability to the body.

The claimant's attorney obtained a report from Dr. Stuckmeyer who diagnosed chronic cervical, thoracic and lumbar pain. He recommended an MRI of her thoracic and lumbar spine and assessed 20% disability to the body.

The ALJ determined that the employer was not liable for past medical expenses after she was released at MMI or for future medical care as many of the medical examinations and treatment were repetitive to the treatment she had previously received and none of the medical providers recommended any additional medical treatment. The Judge also determined that the claimant sustained 10% disability and used the 30 hour rule to calculate the rate. The claimant appealed.

The Commission modified the Award of the ALJ with respect to the claimant's rate. The Commission did not believe that the 30 hour rule was appropriate. The claimant testified that she worked between 20 and 40 hours per week and that a full-time CNA worked 40 hours a week. The commission looked to a 1989 Court of Appeals case and stated that public policy encourages equitable compensation rates for part and full-time employees, and therefore, the Commission believed that the rate should be calculated based on a 40 hour workweek, not the 30 hour rule.

Commission Affirmed ALJ's Award of Permanency That Did Not Take Reduction At Elbow For Compensation Placed on Wrist

White v. The Doe Run Company, American Zurich Insurance Company and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 16-011501

The claimant began working for the employer in 2007 and performed repetitive work. He developed bilateral carpal tunnel and bilateral cubital tunnel and underwent surgery for the same. The claimant's attorney obtained a report from Dr. Schlafly who recommended an additional surgery for treatment of the claimant's bilateral cubital tunnel syndrome. The employer obtained a report of Dr. Brown who did not recommend any additional treatment. The doctor further opined that although it is possible performing an anterior transposition of his ulnar nerve might improve his symptoms, there was a risk that surgery might make the claimant worse and therefore he released the claimant from care. At the time of the hearing the claimant testified he wanted the additional medical care but not by Dr. Brown.

The ALJ found that the claimant sustained 17.5% disability of right wrist, 28.75% disability of the right elbow, 17% disability of the left wrist and 26.45% disability of the left elbow. He also awarded 20 weeks of disfigurement and future medical treatment. The employer appealed.

The employer argued that the ALJ's findings on the issue of nature and extent of disability were excessively high and unsupported by competent evidence because his Award exceeded the disability rating of the employer's authorized treating physician, Dr. Brown.

The employer also argued that the ALJ erred when he failed to reduce the amount of PPD awarded to the claimant to account for injuries that involved individual component parts of the same extremity. The employer pointed to a 1992 Commission Decision where it was found that a reduction was appropriate. The Commission noted that the case was never appealed but it does not represent judicial precedent. The Commission also noted that based on strict construction

there is no provision for discounting an Award based on an assessment of disability to individual component parts of the same extremity.

The Commission affirmed the ALJ's assessment of PPD and disfigurement. With respect to the ALJ's Award of future medical relating to the claimant's bilateral carpal tunnel and bilateral cubital tunnel, the Commission found that because the claimant had demonstrated a reasonable probability that future treatment was needed, the Commission affirmed the ALJ's Award of future medical.

Claimant Found to Have Minimal Pre-existing Disability in Hand Despite Prior Settlement of 15% of Hand

Fenwick v. The Doe Run Company, American Zurich Insurance Company and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 14-036462

The claimant began working for the employer in 2007, performed repetitive work and developed bilateral carpal tunnel and underwent releases. Thereafter he had various continuing complaints. The ALJ found that the claimant suffered 20% disability of each wrist and assessed four weeks for disfigurement.

The employer appealed arguing that the ALJ erred in failing to factor in PPD attributable to a 2002 injury involving the claimant's right finger and a right extensor tendon repair. Dr. Rotman assessed 5% disability to the hand as a result of that injury. The claimant settled that claim for 15% of the hand.

The Commission noted that at the claimant's evaluation with Dr. Volarich he found there may be a small amount of disability from the minor extensor lag but that is considered too small to quantify since he was asymptomatic in the right hand leading up to his current work injuries. The Commission also noted that Dr. Cantrell evaluated the claimant in 2015 and there was no rating of pre-existing disability attributable to the claimant's 2002 right hand injury. Therefore, based on these two physicians' opinions the Commission found that the claimant sustained minimal PPD attributable to his 2002 right finger injury and concluded that the ALJ's Award of PPD gave appropriate credit for pre-existing disabilities as his Award specifically stated. Therefore, the Commission affirmed the Award of the ALJ.

Fund Not Liable for Compensation as Claimant did not Prove Work Injury Aggravated or Accelerated Pre-Existing Conditions

Dubuc v. Treasurer of the State of Missouri-Custodian of the Second Injury Fund, Case No. WD82809 (Mo. App. 2020)

FACTS: On October 30, 2015, the claimant fell off a ladder and sustained a laceration of his left kidney with perinephric hematoma and a fracture of his left wrist. The claimant filed a Claim on November 20, 2015. He settled his claim with the employer on for 30% PPD of the left wrist and 13.5% of the body. He went to a hearing against the Fund for PTD benefits.

At the hearing he testified that he had continuing complaints in his hand. He also testified about four pre-existing disabilities: 1) In April of 2010, he sustained fractures to his L2 and L3 vertebrae after falling off a wall while fishing; 2) In August of 2011, he was diagnosed with DVT and Factor V Leiden, a genetic mutation that causes excess blood clotting; and 4) In 2012, he was diagnosed with and treated for depression.

The claimant's attorney obtained reports of Dr. Mullins and Dr. Strauser, a vocational expert, who both opined that the claimant was PTD as a result of a combination of the work injury and his pre-existing conditions. The ALJ concluded that the claimant failed prove that he was PTD as a result of a combination of his work injury and his pre-existing condition as it appears he believed that the claimant was PTD as a result of the work injury alone.

The claimant appealed to the Commission, who reversed the ALJ's Award and found the claimant was PTD. The Fund appealed.

HOLDING: The Fund argued that because the claimant's work injury occurred after January 1, 2014, §287.220.3 applied, and therefore, the claimant was not entitled to compensation from the Fund because his pre-existing conditions did not fall into one of the categories required for Fund liability. The Court agreed and found that the Commission's Award did not address which, if any, of the claimant's pre-existing disabilities were medically documented pre-existing disabilities or whether the claimant's qualifying pre-existing disabilities directly and significantly aggravated and accelerated the subsequent work-related injury. Therefore, the Commission's Award was reversed and remanded.

SIF Not Liable for PTD benefits Because Claimant Filed Claim After January 1, 2014 and Claimant Did Not Prove Pre-existing Conditions Fell into 1 of 4 Categories

Coffer v. Health Management Associates Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 13-104240

The claimant worked at Twin Rivers Regional Medical Center as a PBX operator for 23 years and she developed pain, tingling, numbness and cramping in her hands. She filed her claim on November 24, 2014 and the date of the occupational disease listed was December 13, 2013. She settled her claim against the employer for 18.75% of the body referable to carpal tunnel syndrome in both wrists. She proceeded to a hearing against the Fund for perm total benefits.

The claimant's attorney obtained a report of Dr. Poetz who opined the claimant had pre-existing disabilities in the amount of 15% disability due to anxiety, 35% disability of the cervical spine due to a fusion, 25% disability of the body due to colon cancer, 25% disability of the lumbar spine due to a decompression and 25% disability of the right elbow due to epicondylitis which required surgery. Due to the work injury, Dr. Poetz opined that the claimant sustained 30% disability of the right and 25% of the left hand. Ms. Shea opined the claimant was not employable.

The claimant was also evaluated by Dr. Hinton who opined that the claimant was PTD due to a combination of the work-related injuries and pre-existing conditions and disabilities.

The ALJ found the opinions of Dr. Poetz and Dr. Hinton persuasive and found that the claimant was PTD as a result of the combination of her pre-existing injuries and the work injury, and therefore, the Fund was liable for benefits. The Fund appealed.

The Commission reversed the Award of the ALJ. Since the claimant filed her claim after January 1, 2014, §287.220.3 applies and since the claimant did not prove that her pre-existing conditions fell into one of the categories that would place liability on the Fund, the Fund was not liable for benefits.

Court Confirms It Will Defer to ALJ's Credibility Determinations

Parvin vs. Camcorp Environmental, LLC, Missouri Employers Mutual Ins. Co. and Treasurer of the State of Missouri as Custodian of the Second Injury Fund, Case No. SD36281 (Mo. App. 2020)

FACTS: The claimant began working for the employer in 2012. He operated heavy equipment doing environmental cleanup caused by the Joplin tornado. The claimant filed an occupational disease claim alleging injury to his arms, shoulders and back. He did have a history of rotator cuff surgeries and two lower back surgeries. At a hearing, the ALJ expressly found that the claimant had not proved his claim because he was not a credible witness and his medical expert was not as persuasive as the employer's. The claimant appealed and the Commission affirmed. The claimant again appealed.

HOLDING: The Court noted that they reviewed the ALJ's decision because it was adopted by the Commission and they defer to the ALJ's credibility determination, weighing of evidence, and decision between competing medical theories. It was the claimant's burden to prove all elements of the claim and the Court noted that the statute only allows the Court to grant a claimant relief if "there was not sufficient competent evidence in the record to warrant the making of the Award."

The claimant's three arguments alleged that the ALJ's determinations lacked competent and substantial evidence. The Court noted that the standard of review for this kind of challenge requires that the claimant engage in a specific analytical process which he did not do, and therefore, the Court found that his arguments were stripped of any analytical or persuasive value. In any event, the Court did go on to address the claimant's three arguments and were not persuaded.

The Court concluded it is well settled that weighing of conflicting medical testimony lies within the Commission's sole discretion and cannot be reviewed by this Court. Therefore, they are bound by the ALJ's decision as to which of the various medical experts to believe. Therefore, the Commission's Award was affirmed.

Commission Does Not Have Statutory Authority to Increase Amount of PPD Claimant Received After ALJ Approved Settlement Stipulation Despite Claim that Claimant's Condition Worsened

Ritch vs. Professional Transportation, Inc., and Treasurer of the State of Missouri, Custodian of the Second Injury Fund, Case No. SD36435 (Mo. App. 2020)

FACTS: On June 11, 2014 the claimant suffered a back injury at work. He filed a Claim on November 30, 2015 and on April 17, 2017 an ALJ approved a settlement for 31% of the body referable to the spine. Future medical was left open. On August 7, 2019, the claimant's attorney filed a petition to the Commission alleging that the claimant's condition had worsened since the settlement was approved, and therefore the settlement was no longer reasonable and should be increased. The Commission dismissed the claimant's petition for lack of statutory authority to consider it.

HOLDING: The claimant appealed and argued that since his settlement left future medical open, the Commission had statutory authority under §287.470 to change or review the Award. The Court was not persuaded. The Court noted that §287.470 applies to Awards, not settlements. Also, the Court noted that the claimant was not asking the Commission to decide an issue of future medical care rather he was asking the Commission to set aside the compromise settlement and increase the PPD, and the Commission had no statutory authority to do so. Therefore, the Court affirmed the Commission's decision.

Claimant Entitled to TTD Despite Employer's Allegation That Claimant Not Entitled to TTD Due to Post-Injury Misconduct Because His Absence Was Due to Injury

Hicks vs. State of Missouri, Department of Corrections and Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. ED108023 (Mo. App. 2020)

FACTS: The claimant began working on a probationary status for the Correctional Center as a Corrections Officer in late 2013. He was required to complete both nine months of full-duty employment and a formal training program in the classroom and on the job. On January 2, 2014 during defensive tactics training, he suffered an injury to his left shoulder. Dr. Emanuel performed a shoulder surgery and he was released from care. He requested additional treatment which was denied. The claimant was then terminated on November 25, 2014 specifically citing unauthorized absences, exhaustion of paid leave, failure to request or be approved for leave without pay, failure to return to work and failure to report for a mandatory pre-disciplinary hearing.

The claimant's attorney obtained a report of Dr. Snyder who recommended additional treatment and opined that he was unemployable and unable to compete in the open labor marked since his January 2014 injury. The employer then authorized additional treatment with Dr. Emanuel who performed a second shoulder surgery. Dr. Emanuel released the claimant at MMI, however, the claimant still did not believe his shoulder had improved enough to return to work, and therefore Dr. Emaunel recommended a second opinion. He then saw Dr. Lenarz who performed a third shoulder surgery. He was later released at MMI on February 10, 2016.

The claimant then filed his claim seeking to recover unpaid TTD until he reached MMI on the stipulated date of February 10, 2016. The employer argued TTD was not owed because the claimant was terminated for post injury misconduct. The ALJ concluded the claimant's testimony was credible that he was unable to return to any employment before he reached MMI

on February 10, 2016, and therefore he was entitled to TTD. The employer appealed and the Commission disagreed that the claimant was entitled to TTD benefits since he was terminated for post injury misconduct. The Commission found that the claimant was not terminated "merely" because of his absences but rather because he failed to follow the proper procedure to report the absences which constituted misconduct. The claimant then appealed.

HOLDING: The Court noted that the statue expressly and unambiguously states misconduct "shall not include absence from the workplace due to an injury unless the employee is capable of working with restrictions certified by a physician." The Court found that the employer was not merely left to ponder why the claimant failed to appear for his scheduled shifts but instead was certainly on notice that he refused to return to work without further medical treatment. While the Court agreed with the Commission that the employer could terminate the claimant for misconduct by failing to follow the proper procedure regarding reporting his absences, the denial of TTD benefits was not warranted since the absences related to an injury. Therefore, the Court reversed and remanded the Commission's decision with instructions to reinstate the ALJ's award of TTD benefits.

Claimant Not Entitled to Enhanced Benefits as Employer Could Not Elect to Accept Liability for Enhanced Benefits

Hegger, Deceased v. Valley Farm Dairy Company, et. al., Case No. SC7993 (Mo. S.Ct. 2020)

FACTS: The claimant was last exposed to asbestos at the employer in 1994. The employer went out of business in 1998. The claimant died in 2015 from mesothelioma which was caused by his exposure to asbestos while working for the employer.

At a hearing, the ALJ addressed the sole issue of whether the claimant was entitled to enhanced benefits under §287.200.4(3). The ALJ found that neither of the insurers who insured the employer during the claimant's dates of employment were liable for any enhanced benefits because the enhanced benefit provision did not go into effect until January 1, 2014. The ALJ reason that the employer could not have possibly elected to be liable for enhanced benefits because it went out of business in 1998. Therefore, the claimant was not entitled to enhanced benefits.

On appeal, the Commission affirmed noting that the employer ceased operation 16 years before the statute took effect, and therefore could not have elected to accept enhanced liability under that section. The claimant again appealed to the Court of Appeals and the case was transferred to the Supreme Court.

HOLDING: The claimant argued that because the employer maintained an insurance policy that ensured its entire workers' compensation liability during the time it employed the claimant, the employer elected to accept mesothelioma liability under the plain language of the statute. The Court did not agree and found that the Commission did not err in finding that electing to accept enhanced mesothelioma liability requires an affirmative act by the employer. The term "elect" is the operative verb that is not defined in workers' compensation law. The Court noted that when a term is not defined by statute the Court will give the term its "plain and ordinary meaning as

derived from the dictionary." The Court noted that "elect" per the dictionary is to make the selection or to choose, both of which are an affirmative act. Because the employer ceased operations in 1998 and the enhanced benefit did not exist until 2014 it could not have affirmatively elected to accept liability for the enhanced benefits.

The claimant also argued that defunct employers should be deemed to have elected to accept liability for the enhanced benefit so long as the employer insured its entire workers' compensation liability at the time of the claimant's last exposure. The Court was not persuaded. Therefore, the claimant was not entitled to enhanced benefits under the workers' compensation statute.