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MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

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Court Affirms Commission Decision that Claimant was PTD Due to Exposure to Pigeon Droppings on Roof at Work

Lankford vs. Newton County and Treasurer of Missouri as Custodian of Second Injury Fund, No. SD34269 (Mo. App. 2017)

FACTS: The claimant was employed by employer for 10 years, during which time he took as many as 10 smoke breaks per day on the employer's roof while often discussing work with co-workers. He was exposed to large numbers of pigeons and pigeon droppings while on the roof. In 2007, the claimant underwent a lobectomy and suffered a stroke during his recovery that rendered him permanently and totally disabled before his death. His death certificate states that he died of pneumonia and COPD. The claimant's wife, substituted as a party to the Claim as his sole dependent, alleged that the cause of his PTD was complications from a surgery that was necessitated by an occupational disease caused by his exposure to dried pigeon droppings on the employer's roof.

The ALJ heard testimony from 3 medical experts. Dr. Parmet testified that the claimant required surgery because of an MAI bacterial infection caused by exposure to pigeon droppings on the employer's roof. Dr. Jost testified that MAI could have been contracted anywhere in the claimant's non-employment life. Dr. Hofmann agreed with Dr. Jost and added that the claimant's cigarette smoking was the primary cause of his pulmonary conditions, including contraction of MAI. The ALJ found Dr. Parmet's opinion the most persuasive and held that the claimant experienced a greater risk of exposure to contracting MAI during his employment with Employer than in his non-work activities. Therefore, the Claim was compensable.

On appeal, the Commission affirmed the ALJ's decision but declined to use the ALJ's "unequal exposure" standard and instead only required the claimant to establish that the disease was not an ordinary disease of life to which the general public is exposed. Since all 3 doctors agreed that the infection was extremely rare and at least possible to contract from the employer's roof, the Commission found that the claimant met his burden to establish occupational disease.

FINDING: The employer appealed and argued that the Commission erred by, among other things, holding that the unequal exposure requirement is not applicable to a claim alleging injury by occupational disease. The Court disagreed and found that the unequal exposure requirement

for an injury by accident is not part of the occupational disease requirement after the 2005 amendments to Workers' Compensation Law and instead agreed with the Commission that claimant has to prove only that the disease was not an ordinary disease of life to which the general public is exposed. The Court affirmed the Commission's decision and Award.

Despite Multiple Inconsistent Statements from Claimant Regarding How Injury Occurred, Claimant's Injury from Fall Down Ramp Compensable

Phillips vs. ConAgra Foods, Inc., Injury No. 13-081880

The claimant sustained an injury to his left hip on October 14, 2013 when he was walking up a ramp in the break room and turned to step off the ramp, at which time he fell to the floor. According to medical reports from the claimant's date of injury, he told both an EMT and the doctor that he fell because his left leg gave out. However, the Claim for Compensation alleged that he slipped and fell from the ramp. When the claimant was examined by Dr. Swain, he reported that he did not know why he fell. When he was seen by Dr. Koprivica, he reported that he fell because he caught the heel of his left boot on the edge of the ramp. At a hearing, the claimant testified that he did not remember how he fell but believed he may have caught his heel on the ramp.

At a Hearing, the ALJ found that the claimant sustained an accident in the course and scope of his employment, because he was not equally exposed to the risk of falling from the ramp outside of his employment. The employer pointed out the inconsistencies in the claimant's reports to his doctors and argued that he fell because his left knee gave out. However, the ALJ concluded that even if the claimant fell because his knee gave out, falling from a height of 3 - 5 inches put him at a risk for greater injury. Therefore, his injury arose out of and in the course and scope of his employment either way, and the employer was responsible for benefits.

On appeal, the commission agreed with the ALJ that the claimant statements describing the details of his work accident over a 2 ½ year period varied. However, the Commission stated "we find employee's statements reflect a less-than-perfect recall of the exact circumstance of his injury. We find inconsistencies in employee's account understandable, considering the sudden and unexpected occurrence of the injury and the extreme pain caused by his left hip fracture, along with the effects of the medication administered."

The Commission stated that "an employee's inability to explain why an accident occurred does not preclude compensability, so long as the claimant demonstrates that his injuries came from a hazard or risk related to his employment to which he would not be equally exposed in his normal non-employment life." Therefore, the Commission affirmed the ALJ's decision and Award.

Claimant Did Not Forfeit Benefits When Refused to Take Drug Test Because Employer Did Not Unequivocally Request He Take It on Date of Injury and He Did Take It Two Days Later

Francisco vs. Mega Industries Corporation, Injury No. 15-035903

The claimant sustained a back injury at work on May 13, 2015. When he went to HealthWorks for medical care, his foreman asked him to take a breathalyzer and urinary analysis drug test. He took the breathalyzer but declined to undergo the urinary analysis. The foreman told him he had to take the drug test, and the claimant testified he knew it was the employer's policy to submit to a post-accident drug screen. He advised his foreman that he was anxious to take the test because he had marijuana in his system, and the foreman stated that he did not know what to tell him, and he left without taking the drug test. The claimant denied using drugs and testified that he declined to take the drug test because he had smelled marijuana at a nightclub. The day after his injury, the employer called the claimant and advised that if he wanted to continue to be employed he had to return and take the drug test, which he did the next day on May 15, 2015, which was negative. The employer denied his claim pursuant to a statute that states that a claimant who refuses to take a post-accident drug test when the employer's policy clearly authorizes the same forfeits all workers' compensation benefits.

At a Hearing, the employer argued that the claimant was not entitled to any benefits under workers' compensation law because he refused to take the post-accident drug test. The ALJ found that the employer had a policy for post-accident drug testing, and the claimant knew of this policy but refused to take the drug test on his date of injury. Taking the drug test two days later did not negate his refusal to take it on his date of injury, and if he had taken the test on his date of injury, it may have tested positive for a controlled substance, even though the test he ultimately took was negative. Therefore, because the claimant refused to take the drug test on his date of accident, he forfeited his benefits under Missouri Workers' Compensation law and his claim was denied.

The claimant appealed to the Commission, which reversed the Award and decision of the ALJ. The Commission held that the employer did not unequivocally and unmistakably request the employee to submit to the drug test. Instead, it opined that personnel at the health clinic asked him to perform the drug test and the claimant's supervisor merely reminded him in general terms of what the employer's policy required. The Commission noted that the employer's policy did not address what actions may be deemed a refusal to submit to a drug test and did not provide a time frame for taking the drug test. When the employer first unequivocally requested that he submit to a urinalysis, the claimant underwent the same and that result was negative. Because the Commission found that the employer failed to show that it unequivocally requested that the claimant submit to a drug test on his date of injury, it found that the employer failed to support an affirmative defense. Therefore, the claimant did not forfeit his benefits. The employer was ordered to provide treatment and pay for past medical treatment.

No Safety Penalty for MVA Potentially Caused by Speeding and Failure to Wear Seatbelt, Because Employer Failed to Show It Made Reasonable Efforts to Ensure Compliance with Safety Rules

<u>Elsworth vs. Wayne County Missouri,</u> Injury No. 07-026920

The claimant was severely injured in a motor vehicle accident on March 30, 2007 in Wayne County, Missouri while driving a dump truck for the employer. According to witness reports, the claimant was driving the dump truck when he began to cross the center line and swerved to

the right to avoid hitting a car traveling in the opposite direction. He overcorrected, crossed the center line, and overturned down an embankment on the opposite side of the road. Testimony established that the employer had no written safety rules or procedures prior to the accident, and the employer allowed the claimant to drive the dump truck although he did not have a CDL license. The employer testified that the claimant was instructed to observe all traffic laws and wear a seatbelt, but there was no other evidence to indicate what safety rules or instructions he received. The claimant's wife allegedly reported that he had just texted her before the accident, and it was believed he may have had ADHD. It also appeared from expert testimony from an accident reconstruction expert that the claimant may have been speeding and was not wearing a seatbelt immediately prior to the accident.

At a hearing, the sole issue was whether the employer could assert a safety violation when it alleged that the claimant failed to wear a seatbelt and was speeding, texting while driving, and inattentive due to ADHD. The ALJ held that there was no evidence that the claimant was texting and driving or that either texting or his ADHD contributed in any way to his injury. Also, even if evidence showed that the claimant was not wearing a seatbelt and was speeding immediately prior to the accident, the employer had not made a reasonable effort prior to the date of injury to ensure its employees were using safety devices and obeying traffic laws. Telling employees to "obey all laws" does not qualify as a safety policy under the meaning of the statute. Therefore, the employer was not allowed to take a safety penalty in this matter. On appeal, the Commission affirmed the ALJ's Award and decision and noted that the statutory penalty for safety violations was not an invitation to inject issues of claimant negligence.

Employer to Pay Past Medical Because Unauthorized Treatment Flowed from Effects of Claimant's Compensable Work Injury

Gerlemann vs. Missouri Department of Transportation - Missouri Highway & Transportation, Injury No. 12-039515

On May 24, 2012, the claimant was in a motor vehicle accident where the flatbed dump truck he was sitting in was rear ended by a car on the highway, after which he complained of pain in his left elbow, neck, low back, and left shoulder. The claimant treated conservatively with Dr. Lange and was released from care on June 25, 2012. However, he reported continued neck and left shoulder pain, and Dr. Lange recommended additional physical therapy and released him from care again on November 5, 2013. He subsequently treated on his own with his personal doctor for shoulder pain. The claimant testified that outside of work he raises cattle weighing 400-500 pounds, which involves physically pushing cattle forward through a chute to treat them.

Dr. Volarich examined the claimant at the claimant's attorney's request and opined that his current left shoulder pain was causally related to the work accident. Dr. Mall examined the claimant for the employer and diagnosed AC joint arthritis, which he opined was consistent with the claimant's age and farm work and was not related to the motor vehicle accident.

At a hearing, the ALJ found Dr. Mall's testimony persuasive and found that the claimant's current left shoulder complaints did not arise out of and in the course and scope of his employment but instead could be related to his farm work. Therefore, the employer was not

responsible for any unauthorized medical treatment the claimant underwent for left shoulder after he was released from care by Dr. Lange.

The employee appealed to the Commission, which concluded that the statutory requirements for proving that an injury arises out of and in the course of employment are not applicable to a claim for past medical expenses, which requires that the claimant prove only that the need for additional treatment flows from the effects of the work injury. The Commission pointed to the fact that Dr. Lange opined he would have flare ups of recurrent pain that were related to his work injury and reasoned that the employer had a continuing obligation to provide treatment for these chronic complaints whenever they manifested, even if the claimant had already been released from treatment. The Commission found that the disputed treatment flowed from the effects of the compensable injuries that the claimant sustained in the work accident and ordered the employer to pay for the medical treatment received by the claimant after he was placed at MMI by Dr. Lange.

Need for Future Total Knee Replacement Flowed from Effects of Work Injury, Despite Claimant's Severe Pre-existing Arthritis

Grimes vs. Curators of the University of Missouri, Injury No. 10-044243

The claimant sustained an injury to his left knee on June 2, 2010 when he was standing on a lift moving supplies and his toe caught the lip of the lift causing him to fall forward onto his knees. He was directed to Work Injury Services and then treated with Dr. Komes, who referred him to an orthopedic surgeon. The claimant saw Dr. Stannard, who noted he was remarkably obese and performed diagnostic arthroscopic surgery on April 26, 2011, because the claimant could not fit in the MRI machine. Dr. Komes did not impose restrictions related to his work injury, although he opined the claimant could not perform a physically demanding job due to his size.

Dr. Gross evaluated the claimant for an IME on behalf of the employer and opined that part of the claimant's pathology could be due to his injury but the majority was related to underlying degenerative changes due to his age and size. The doctor placed him at MMI without restrictions referable to his work injury. The claimant was also evaluated by Dr. Frisella on behalf of the employer, at which time the doctor opined that his current complaints were due to his degenerative condition. The doctor opined that he would require bilateral knee replacements in the future, but he did not believe the need for these replacements flowed from his work injury.

Dr. Volarich evaluated the claimant at the request of the claimant's attorney and opined his complaints would worsen over time due to his age and further degeneration, which was accelerated due to his size. The doctor further opined he would require a left knee replacement in the future, the need for which flowed directly from the work injury.

At a hearing, the ALJ noted that Drs. Gross and Frisella were knee surgeons and therefore more credible than Dr. Volarich. The ALJ held that while the claimant would require bilateral knee replacements in the future, the need for these replacements was related to his degenerative condition and not to the work accident. Therefore, the employer was ordered to pay PPD benefits but was not responsible for future medical.

On appeal, the Commission held that the claimant's need for a future left total knee replacement did flow from the effects of the work injury. The Commission held that it was irrelevant that he would have needed total knee replacements in the future even without the work injury and that he had not sought additional medical treatment for his left knee during the several years since he reached MMI. It reasoned that the fact that the claimant did not currently require additional treatment for his work injury did not mean that he would not require the same in the future. Therefore, the employer was ordered to provide future medical treatment, including a left total knee replacement.

Claimant PTD After Last Injury Alone Because Now Has to Lie Down Several Times Per Day and Frequently Change Positions

Nichols vs. Belleview R-III School District and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 09-109067

On October 29, 2007, the claimant fell down some steps and landed on the left side of her body, at which time she sustained injuries to her neck, low back, and left shoulder. She subsequently developed numbness in her left forearm and the fingers of her left hand. She denied any injuries or complaints to her neck or low back prior to her work injury. She underwent physical therapy and treated on her own with multiple doctors. Dr. Paletta performed a left elbow ulnar nerve transposition on February 22, 2011, and he subsequently performed a left rotator cuff repair on January 12, 2012. However, the claimant continued to have neck and low back complaints.

The claimant had pre-existing conditions, including a stroke that caused twitching in the left side of her face, bleeding and anemia which caused fatigue, and COPD/emphysema that required her to use inhalers multiple times per week. Prior to her work injury, she worked full duty without restrictions, although her pre-existing conditions and fatigue made her slower when performing job duties.

The claimant was sent to Dr. Chabot, who opined that her continued complaints were not related to her work accident because her treating doctors did not document severe injuries to her neck or back and her neck and back complaints had essentially resolved as of December 7, 2009. Dr. Chabot did not believe the claimant was PTD, and vocational expert Mr. England agreed.

Dr. Volarich opined that the work injury exacerbated pre-existing degenerative conditions in her lumbar and cervical spine. He opined that she was PTD as a result of her last injury alone and gave her restrictions including not remaining in a fixed position for more than 60 minutes at a time, changing positions frequently to maximize comfort, and resting when needed. The claimant testified that after her accident she has to lie down 5 - 6 times per day due to pain. Vocational expert Ms. Gonzalez testified on behalf of the claimant that based on Dr. Volarich's restrictions she was PTD.

At a hearing, the ALJ found Dr. Volarich's and Ms. Gonzalez' testimony more persuasive than that of Dr. Chabot and Mr. England, and he noted that Dr. Chabot did not review all of the claimant's treatment records prior to rendering his opinion. The ALJ found that the claimant was

PTD due to her need to frequently lie down and change positions, and he found that she was PTD as a result of the last injury alone because her pre-existing degenerative conditions did not require any restrictions and did not prevent her from working prior to her accident. The employer appealed, and the Commission affirmed the ALJ's decision.

Claimant PTD as Result of Last Injury Alone Following Right Foot Injury Despite Claimant's Testimony That He Missed Work Due to Back Injury Prior to 2009 Date of Injury

<u>Bernand vs. Paris Ready-Mix and Precast and Treasurer of Missouri as Custodian of Second Injury Fund</u>, Injury No. 09-040541

On June 5, 2009, the claimant was changing a tire and wheel on a Bobcat when either the tire or the pry bar he was holding hit his right foot and caused him to fall backwards. He treated with Dr. Turnbaugh, who diagnosed comminuted fractures of the distal phalanges of the second through fifth toes of his right foot and recommended a CAM boot and physical therapy. He was referred to Dr. Tiede for pain management. He was then seen by Dr. Krause, who ordered physical therapy and released the claimant from care on December 18, 2009. The claimant returned to Dr. Turnbaugh on January 30, 2010, at which time he was referred to Dr. Trevino for desensitization therapy and pain management. He denied any problems with his right foot prior to his date of injury.

The claimant had a prior work-related low back injury that caused back pain when walking, bending, stooping, and lifting and caused him to miss 2 – 3 days of work each year. Prior to his 2009 work injury, he continued to have low back pain 1 – 2 times per week and took over the counter medication for the same.

The claimant testified that after the 2009 work injury, his right foot feels frozen and he has constant pain from his toes to the ball of his foot. Standing and walking increases his right foot pain, and he testified that he has to recline 1 - 3 times per day for a half-hour to one and a half hours at a time due to the pain.

Dr. Russell, the claimant's expert, evaluated the claimant and diagnosed complex regional pain syndrome due to his work accident and opined he was PTD as a result of his right foot injury alone. Dr. Shuter testified on behalf of the claimant and agreed that he was PTD due to his last injury alone in light of the fact that he has to lie down during the day as a result of that accident. Mr. England concluded that the claimant would be unemployable due to his need to lie down during the day. The claimant's treating physician, Dr. Krause, disagreed and opined that the claimant did not suffer from complex regional pain syndrome and assessed 0% PPD due to the work accident.

At a hearing, an ALJ found that the claimant was PTD as a result of his June 5, 2009 work accident alone, despite his testimony that he had ongoing low back pain from a previous injury that caused him to miss 2 – 3 days of work each year. She noted that every doctor who treated or evaluated the claimant diagnosed complex regional pain syndrome, except for Dr. Krause, and she found Dr. Russell's expert opinion persuasive on the issue of PTD. The ALJ ordered the

employer to pay PTD benefits. On appeal, the Commission affirmed the ALJ's Award and decision.

Employer Responsible for PTD Benefits After Claimant Sustained Low Back Injury

Clift vs. Queen City Winnelson Company and Treasurer of Missouri as Custodian of Second Injury Fund. Injury No. 13-051327

The claimant, a 45-year-old employee without a high school diploma or GED, worked in the warehouse loading/unloading equipment and stocking items. He developed low back pain and numbness in his right leg to his foot while working in the warehouse. He was seen in the emergency room, at which time an MRI of his low back revealed a herniated disc, and Dr. Crabtree performed back surgery on June 19, 2013. However, the claimant continued to have low back complaints, and an MRI showed enhancing epidural fibrosis and possible arachnoiditis. The claimant testified that he cannot lift more than 10 pounds, cannot walk for more than 30 minutes, and cannot sit or stand for more than 30 - 45 minutes. He also testified that he has to lie down several times per day due to his ongoing pain.

The claimant had pre-existing conditions. He sustained an injury to his right knee in the 1990's for which he underwent arthroscopic surgery. He lacerated his right hand in 2000 and developed reflex sympathetic dystrophy in his right upper extremity for which he underwent surgery on February 1, 2000. He was hospitalized after a heart attack in 2009, and he was diagnosed with sleep apnea in 2009 and used a C-PAP machine. The claimant testified that none of these conditions prevented him from working, and he denied any difficulty performing job duties prior to his work for the employer.

Dr. Parmet examined the claimant and recommended work restrictions for the 2013 injury, including changing positions frequently and alternating between sitting and standing. However, both he and the employer's expert, Dr. Koprivica, concluded the claimant was PTD due to a combination of his 2013 injury and pre-existing disabilities.

Vocational expert Mr. Eldred testified on behalf of the claimant that none of his pre-existing conditions were a hindrance or obstacle to employment. He also noted that since the 2013 work injury, the claimant needed to lie down multiple times per day for at least 30 minutes to an hour, which would alone preclude him from employment. Mr. Eldred also noted the claimant's limited educational background, and opined he had no capacity to be retrained, and concluded he was PTD due to the last injury alone.

At a hearing, the ALJ found the testimony of Mr. Eldred persuasive and noted that the claimant had to lie down several times per day due to the pain in his low back, which he developed after his work injury. The ALJ also noted the claimant's limited education and Mr. Eldred's opinion that he could not be retrained. Therefore, the employer was responsible for PTD benefits and future medical. On appeal, the Commission affirmed the ALJ's decision and Award.

Employer Responsible for PTD Benefits After Claimant Developed Complex Regional Pain Syndrome After Right Foot Injury

Wetzel vs. Production Castings, Inc.; Injury No. 12-009601

The claimant worked as a die maintenance worker, and on February 14, 2012, he slipped and fell while carrying a heavy die casting and sustained an injury to his right foot. Dr. Krause performed surgery on February 21, 2012. The claimant continued to have complaints in his foot and complained of difficulty staying awake at work due to lack of sleep at night. He was initially placed at MMI on January 14, 2013. However, in light of his continued pain, Dr. Krause referred him to Dr. Hurford, who diagnosed complex regional pain and imposed permanent restrictions of alternating sitting and standing and no climbing ladders or operating machinery. The claimant returned to Dr. Krause, who placed him at MMI without restrictions and assessed 10% PPD of the right ankle. Dr. Hurford continued to treat the claimant for his pain.

At a Hearing, the claimant testified that he either lies down or sits half the day, has trouble sleeping at night, and can only walk about 15 minutes before his pain becomes severe.

Dr. Guarino and Dr. Volarich examined the claimant at the request of the claimant's attorney and diagnosed complex fusional pain syndrome, which was related to the claimant's work injury. Dr. Volarich opined the claimant was PTD as a result of the last injury alone. Dr. Nadaud and Dr. Dunteman examined the claimant on behalf of the employer and concluded that he did not have complex regional pain syndrome and did not require any additional treatment.

Vocational expert Mr. Lalk opined the claimant was unemployable and noted that he needed to change positions after an hour to either recline or lie down and sometimes has to lie down for 1 - 3 hours in the morning after taking his medication. Ms. Abram testified on behalf of the employer and noted that the claimant had experience supervising and using smart phones and computers and had also previously completed college level courses in medical billing and coding and was capable of perform work in that field.

At a Hearing, the ALJ noted the claimant's high GPA in college and found Ms. Abram's testimony more persuasive than that of Mr. Lalk and Dr. Volarich. The ALJ found that the claimant was not PTD but was entitled to future medical treatment in the form of pain management. Therefore, the ALJ found that the claimant sustained 75% PPD of the right lower extremity at 160-week level and awarded future medical.

The claimant appealed to the Commission, which modified the ALJ's Award. The Commission concluded that because the ALJ did not directly address the issue of the claimant's credibility, they could not defer to the ALJ's credibility determinations with respect to the claimant's testimony. The Commission found the claimant's testimony to be persuasive and also found the testimony of Dr. Hurford, Dr. Guarino, and Dr. Volarich more persuasive that that of Dr. Krause. The Commission concluded that the claimant suffered from CRPS as a result of his 2012 work injury and had to lie down for most of the day. The Commission found the claimant was therefore PTD due to the last injury alone, and the employer was ordered to pay PTD benefits.

Fund Responsible for PTD Benefits After Low Back Injury

Barnes vs. Park Express LLC, Injury No. 09-099109

On November 11, 2009, the claimant was carrying a bus tire when he felt a pop in his back that caused severe low back and buttock pain that radiated down his right leg. He treated with Dr. Doll and underwent multiple ESIs and physical therapy. Dr. Wilkey subsequently performed a lumbar fusion and imposed permanent restrictions of lying down for 15 minutes every two hours as needed and changing positions often. The doctor also predicted that he would need to miss as many as 24 work days per year due to his pain. The claimant testified that after surgery, he has to recline three or four times per day and is unable to get out of bed on some days due to pain.

The claimant had prior low back injuries. He was in motor vehicle accidents in 1993, 2000, and 2004, after which he treated for low back pain. He was diagnosed with a herniated disk and underwent lumbar surgery following the 2000 MVA, and he settled with his employer for 25% of the lumbar spine. He also had flare-ups of low back pain from 2001 through 2004. The claimant underwent physical therapy for a left shoulder injury that he sustained in 2007. However, he frequently missed therapy appointments due to exacerbation of his back pain. He also reported to the physical therapist in November 2008 that his back still gave out at times since his 2001 surgery. However, despite multiple low back injuries, the claimant continued to work overtime with occasional flare-ups in a heavy labor position without accommodation.

Dr. Doll and Dr. Kitchens did not believe the claimant sustained any permanent disability from his 2009 injury. Dr. Wilkey opined the claimant had some disability from a pre-existing back injury in 2000 but did not opine how much disability he had due to the pre-existing condition. Both vocational rehabilitation specialists agreed that assuming Dr. Wilkey's restrictions, the claimant was PTD due to his need to frequently lie down.

At a hearing, the ALJ found that the claimant was PTD due to the last injury alone and pointed out Dr. Wilkey's permanent restrictions that the claimant had to lie down and change position often and would have approximately two absences from work per month due to his injury. Therefore, the employer was ordered to pay TTD, PTD, and past and future medical expenses.

On appeal, the Commission modified the ALJ's Award and decision with respect to PTD benefits. The Commission agreed that the claimant was PTD, but it held that he was PTD due to the combination of his primary injury and prior low back injuries. The Commission found that the ALJ and experts focused solely on the claimant's overall level of functioning after the 2009 work injury but did not consider whether his condition and permanent restrictions resulted solely from the last work injury alone. The Commission did not believe that the claimant would be PTD following the 2009 work injury if it were not for his prior low back injuries, despite the fact that he continued to perform heavy duty work prior to his 2009 work injury. Therefore, the Commission found the Fund liable for paying PTD benefits.

Insurer to Pay Enhanced Death Benefits Even Though there was No Exposure During the Policy Period Because It Provided Insurance to Employer with Mesothelioma Endorsement and Claimant Diagnosed with Mesothelioma During Policy Period

Casey vs. E.J. Cody Company, Inc., Injury No. 14-102671

The claimant worked as a flooring installer applying vinyl asbestos tile from 1984 until April 1990 when he retired. He was diagnosed with mesothelioma on October 14, 2014 and died from the same on October 11, 2015. His diagnosis and the fact that mesothelioma was the prevailing cause of the claimant's death was not at issue. The insurer provided the employer with worker's compensation insurance with a mesothelioma endorsement which was in effect as of the date the claimant was diagnosed with mesothelioma.

At a Hearing, the insurer argued that it was not responsible for paying benefits because the claimant was exposed to asbestos prior to the beginning of its insurance coverage and that the responsible party was the insurer in 1990. However, the ALJ found that the insurer was responsible for paying benefits. The ALJ noted that the mesothelioma endorsement itself provided coverage for mesothelioma benefits; specifically referred to the statute dealing with mesothelioma and stated that "[y]our policy provides insurance for these additional benefits." Furthermore, any provision in the policy stating that the exposure must occur during the policy period is essentially voided by the endorsement. The ALJ also noted that the date of diagnosis determines what insurer is liable for benefits under the statute.

On appeal, the Commission modified the Award but ultimately agreed with the ALJ that the insurer was responsible for paying benefits. The Commission did agree with the ALJ that the insurer's mesothelioma endorsement applied to this claim since the date of diagnosis was after the Amendments which went into effect on January 1, 2014 and the claimant was diagnosed with mesothelioma during the insurer's policy. The Commission did not agree with the insurer's argument that the section of the statute that shifts all liability to the last employer in whose employment the employee was last exposed to the hazard also shifts liability to the last insurer.

Editor's Note: Therefore, it appears that the date of diagnosis determines the responsible insurer, but this matter is being appealed to the Court of Appeals. Also, please note this case only deals with mesothelioma which is the only occupational disease to toxic exposure which requires an employer to either accept or reject coverage. Also in this case the claimant was diagnosed after the Amendments went into effect and therefore there is still a question as to whether the statute applies to cases where a claimant is diagnosed prior to January 1, 2014. Also, there is a constitutionality issue that has not been addressed as the ALJ and Commission do not have the authority to decide the same.