MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

January 2016 – March 2016

Temporary Employer Found Responsible for Temporary Employee's Fall on Customer's Property since Customer Owned and Controlled Parking Lot and Temporary Employer and Customer Found to be Joint Employers

Anhalt v. Penmac Personnel Services, Inc., Injury No. 09-006127

The claimant worked for Reckitt-Benckiser (RB), through Penmac, the employer, as a field associate. On January 30, 2009, the claimant finished her shift and was walking across the parking lot owned and controlled by RB to her vehicle when she slipped on a patch of ice and fell, landing on her outstretched right hand. She was diagnosed with a right distal radius fracture and an ulnar styloid fracture with displacement. Dr. Goodman performed a closed reduction of the right distal radius fracture.

The claimant filed a Claim against Penmac only. At a hearing, the ALJ denied the Claim because she was walking across a parking lot after work when she was injured. The ALJ reasoned that the extension of premises doctrine did not apply because Penmac did not own or control the property, and RB was not named as an employer in the claim.

On appeal, the Commission reversed the ALJ's Award. The Commission noted that the claimant was working as a field associate performing temporary or seasonal services for RB. Penmac and RB jointly developed a training/orientation program for the field associates working at RB. Penmac administered the orientation program before the field associates went to work at RB. The temporary employees would have to check in at the guard station before proceeding to the plant. Also there was a separate time clock installed on RB's premises for the temporary employees. While working at RB, the temporary employees reported to a supervisor employed by Penmac but employees of RB had authority to direct work of the temporary employees if they saw them doing something unsafe.

The Commission noted the claimant's work involved performing services under the simultaneous direction and control of both Penmac and its client RB. The Commission determined that Penmac and RB were joint employers of the claimant. The Commission noted that joint employment occurs when a single employee under contract with two employers and under simultaneous control of both performs services for both employers and the services provided are the same or closely related to that of the other. The Commission was convinced that the claimant was in the joint service of both Penmac and RB when she was injured since both shared the simultaneous right to direct and control the manner and means of her services. The Commission further noted that both Penmac and RB enjoyed a benefit from the claimant's service. Therefore, the liability of Penmac and RB was joint and several. Since RB owned and controlled the parking lot as a joint employer, the claimant could file a Claim against Penmac, and the Claim was

compensable.

Claimant's Injuries Not Compensable Because No Evidence Her Employment Exposed Her to Greater Risk of Injury Than in Her Normal Non-Employment Life

Jensen-Price v. Encompass Medical Group and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 10-066736

The claimant left work for the day and brought her laptop with her in order to continue working from home. She left the office and took the hallway to the public elevator. When the elevator door opened, a housekeeping cart bumped into her, causing her to fall and sustain multiple injuries. The employer rented space in the building from the landlord, and the elevators were accessed using a hallway outside of the space the employer rented. The lease gave the landlord exclusive control over common areas, including the hallway and elevators. The employer had no rights with regard to the elevators.

At a hearing, the ALJ found that the claimant's injuries were not compensable, because the hallway and elevator were common areas that were not owned or controlled by the employer.

On appeal, the Commission stated that the ALJ applied the wrong test. It found that because the claimant was carrying her laptop for the purpose of working from home, she was essentially engaged in going from one worksite to another and was therefore performing a work activity for her employer at the time of the accident and had not ended her work shift. The Commission held the issue was whether the claimant's employment exposed her to a greater risk of injury than her normal non-employment life. The Commission found that the record was too vague to determine that the claimant's employment exposed her to an increased risk of injury, and because of that, it affirmed the ALJ's decision to deny benefits.

Injury Sustained During a Return to Work Evaluation for a Non-Work Related Condition Arose Out of and in the Course and Scope of Employment and Found Compensable

Sanders v. Rollet Brothers Trucking Company, Injury No. 13-077155

The claimant had a heart condition since 1999. He was off work from September 17, 2013 to October 1, 2013 after undergoing a non work related heart surgery. When he was released to return to work, he was directed to the Work STEPS program for a physical evaluation, as there was a mandatory policy that any employee who missed more than 3 days of work had to complete the program before returning to work. The employer scheduled the appointment and paid for the claimant to attend the program. During the program on October 1, 2013, the claimant was lifting weighted boxes when he felt something snap in his back and experienced immediate lower back pain. He was seen by a physician under worker's compensation, at which time he was diagnosed with a lumbar sprain/strain with sciatica and underwent an injection. He continued to follow up and undergo physical therapy for about a month, after which he was informed he would have to use his personal health insurance for further treatment. In December

2013, the employer requested that he turn in his uniform, and he assumed his employment had ended.

The claimant filed a Claim for Compensation and sought additional treatment for his back injury. The employer argued that the claimant was not being paid wages or reimbursed for travel for attending the program and he was not employed on his date of injury, because the program was a condition he had to meet before returning to employment. The ALJ disagreed and held the injury arose out of and in the course of employment because the claimant was required to attend the program or else he would be terminated and the employer scheduled and paid for the program. Moreover, the claimant was not equally exposed to the risk of injury outside of his employment, because he only participated in it in order to remain employed. Therefore, the injury was compensable.

On appeal, the Commission affirmed the ALJ's Award, finding that the statute does not require the employee to be "on the clock" or receiving compensation at the time a work injury occurs, and therefore, the claimant's injury was compensable.

Truck Driver Awarded PTD for Back Injury Sustained When He Tripped on a Fuel Hose

Price v. BMS Transportation Company, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 12-096454

On August 7, 2012, the claimant, a truck driver, was driving on assignment when he stopped to fuel up the truck. While the truck was still fueling, he climbed out of the cab, stepped on the fuel hose, and fell to the ground, at which time he sustained a back injury. He had no prior history of back pain, injuries, or surgeries.

The claimant was diagnosed with a large herniated disc at L4-5. His authorized treating physician Dr. Meredith opined that a spinal fusion surgery would typically be the only course of treatment, which only had a 50/50 chance of improving his symptoms. However, Dr. Meredith noted the claimant was not a good candidate for surgical intervention since he had lived a physically strenuous life, and he was not interested in surgical intervention anyway. Dr. Koprivica agreed that the claimant had continued back pain but was not a good candidate for back surgery. Dr. Koprivica also felt he was PTD as a result of his work injury alone. Vocational expert Mr. Dreiling found that the claimant was unemployable.

The ALJ found that the claimant was at MMI from the date Dr. Meredith determined he was not a surgical candidate. The ALJ also held that the claimant was PTD from the August 7, 2012 work injury alone and awarded PTD benefits from the employer. On appeal, the Commission affirmed the ALJ's Award.

Employer Responsible for PTD Benefits After Head Injury, Despite Pre-existing Cavernous Malformation which Caused Headaches and Left Sided Numbness Since 2000

Schroer v. City of Fulton and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 09-068337

The claimant worked as a Senior Construction Inspector, and on September 1, 2009, he was climbing out of a manhole after inspecting it when he slipped and hit the back of his head. He reported he saw stars but did not lose consciousness. While driving away from the scene of his accident, he became sick and his left side went numb. The claimant's treating physician Dr. Scher diagnosed the claimant with post concussive/posttraumatic syndrome and a history of pontine cavernous malformation and found the claimant PTD due to his primary injury alone. The claimant admitted his pre-existing cavernous malformation caused headaches and left sided numbness beginning in 2000 and he did miss some work because of it, although it did not otherwise affect his ability to work prior to his work injury. After his work injury, he testified he was not able to work due to headaches, migraines, left sided numbness, double vision, and memory problems.

Dr. Shuter, the claimant's expert, found the claimant PTD as a result of his work injury and assessed 10% PPD to the body referable to the claimant's pre-existing cavernous malformation. The claimant's psychiatric expert, Dr. Daniel, diagnosed an anxiety disorder, cognitive disorder, post-concussive disorder, traumatic brain injury, and pontine cavernous malformation. Dr. Daniel causally related the claimant's condition to his work accident and found him PTD due to the combination of the psychological and physical disabilities resulting from his work injury. Mr. Weimholt performed a vocational evaluation on behalf of the claimant and concluded he was not employable due to his work accident.

The employer's expert Dr. Selhorst performed an IME and found the claimant's complaints most consistent with PTSD. Dr. Stillings performed a psychiatric IME on behalf of the employer and opined the claimant's work accident was not the prevailing cause of any neuropsychiatric disorder, as the claimant had a pre-existing personality disorder, and assessed no traumatic brain injury or post-concussive syndrome.

At a hearing, the ALJ found the expert opinions of Dr. Shuter, Dr. Daniel, Dr. Scher, and Mr. Weimholt more credible and persuasive on the issue of PTD. Therefore, the ALJ found the claimant PTD based on the primary work injury alone and ordered the employer/insurer to pay future medical care. On appeal, the Commission affirmed the ALJ's award.

Claimant's Death Not Compensable because His Work was not the Prevailing Factor in Causing His Heart Attack

White v. ConAgra Packaged Foods, LLC, Injury No. 12-048291

The claimant worked as a machinist before he died on June 30, 2012 while at work. His autopsy showed severe coronary artery disease, and his Certificate of Death listed his cause of death as

acute myocardial infarction and heart failure. His surviving spouse filed for death benefits under workers' compensation.

Testimony established that the claimant operated a lathe in a machine shop on the day of his death and the weather was extremely hot. The machine shop was being cooled by opening the doors/windows and running a pedestal fan. It also established that the claimant was wearing a brace for a foot injury on his date of death and he typically worked 12 hours/day, 6 days/week. The autopsy revealed a 75-80% blockage of his left arteries.

The claimant's expert Dr. Schuman testified that the claimant's work was the prevailing factor in causing his death, because the extreme heat combined with the claimant's physically demanding work duties and leg brace placed added stress on his already strained heart. He testified that although the claimant performed his normal job duties and was already at risk of cardiac arrest, his heart had to work extra hard that day due to work conditions.

The employer's expert Dr. Farrar testified that the claimant died from ventricular fibrillation caused by myocardial ischemia which was caused by his coronary artery disease and other heart conditions. He opined the claimant's sudden death was not related to his work activities, although he admitted that pain from a prior injury and heat can cause stress that can trigger a cardiac event.

At a hearing, the ALJ found that the claimant's surviving spouse failed to sustain her burden of proof that the claimant sustained an accident or occupational disease. The ALJ found that the claimant's underlying heart conditions caused his death, which was supported by both experts' testimony as well the autopsy report. Therefore, the claim was not compensable.

The claimant appealed, and the Commission affirmed the ALJ's Award with a supplemental opinion. It found there was no persuasive expert testimony on the issue of medical causation, and ruled that the claimant's work was not the prevailing factor in causing his heart attack or death. Therefore, the ALJ's decision denying death benefits was affirmed.

Commission Reverses ALJ's Opinion that Employer's Expert is Most Credible

<u>Wright v. TG Missouri Corporation</u>, Injury No. 10-074011

On July 6, 2010, the claimant was pushing a 1000 pound mold on a cart when it slammed into a machine and he felt a sharp pain in his low back that radiated into his right buttock. He initially treated with Dr. Kapp, who diagnosed left sciatica with left lower lumbar pain and radicular symptoms. The claimant was then seen by Dr. Chabot in February 2012, who diagnosed a back strain, released him at MMI, and assessed no PPD as a result of the work accident and opined no additional treatment was needed.

Two months later, the claimant demanded additional treatment, which was denied. He then began treating on his own for lower back, neck, and bilateral leg complaints, right greater than

left. Dr. Fonn performed low back surgery in September 2012 and released him from care in March 2013.

In August 2013, Dr. Poetz diagnosed pre-existing lumbar degenerative disc disease, disc herniations at L3-4 and L4-5 with annular tears, foraminal stenosis, radiculopathy, and exacerbation of lumbar degenerative disc disease for which the claimant's work accident on July 6, 2010 was the prevailing factor. Dr. Poetz assessed 5% PPD due to his pre-existing condition and 45% of the body due to the claimant's work accident. Dr. Chabot issued an addendum to his February 2012 opinion, in which he opined that any complaints after February 2012 were not related to the claimant's work accident.

The ALJ found Dr. Chabot's opinion credible and noted that the claimant's symptoms were distinctly different on February 10, 2012 than they were when he requested additional treatment in May 2012. The ALJ noted that on February 10, 2012, the complaints were primarily to the low back, left buttock, and left proximal leg, with no mention of right leg complaints. Three months later, the claimant complained of back pain radiating into both legs, right greater than left with constant aching and tingling in his bilateral legs. The ALJ found that the claimant failed to prove medical causation for any treatment he received after February 12, 2012. However, the ALJ awarded 10% PPD of the body as a whole referable to the claimant's lower back as a result of his work injury.

The claimant appealed to the Commission, which disagreed with the ALJ with respect to the persuasiveness of each party's medical expert and found that Dr. Poetz's medical opinion was more persuasive. The Commission believed the ALJ focused too much on variations in the claimant's symptoms over time. It found the claimant's testimony regarding his complaints to be credible and found that his complaints in May 2012 and onward were medically causally related to his July 6, 2010 work accident. Therefore, the Commission found the employer was responsible for the claimant's past medical treatment, any future medical treatment, TTD, and 30% PPD to his low back.

Video Surveillance not Admissible at Hearing Since Employer did not Comply with Continuing Request for Production

Burlison v. Department of Public Safety and Treasurer of Missouri as Custodian of Second Injury Fund, Case Nos. SD33809 & 33816 Consolidated (Mo. App. 2016)

FACTS: 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 attempted to submit into evidence video surveillance which was taken of the claimant, but the ALJ refused to consider it 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, which 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 it 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, the ALJ found there is a continuing duty to produce the video, so once the employer obtained the video, they were required to provide the claimant's attorney the same. The Commission affirmed the ALJ's decision.

HOLDING: On Appeal, the court found that the rules of procedure governing civil depositions also apply to worker's compensation depositions, and the employer had a duty to supplement the deposition testimony and supply the video. Since it failed to forward the surveillance video to the claimant's attorney before the hearing, it violated the rules of discovery, and the surveillance video was correctly excluded from the hearing.

Fund Liable for PTD Benefits After Claimant Injured His Right Knee, Even Though the Treating Doctor did Not Explicitly Find the Claimant PTD

Majors v. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 12-023216

The claimant stepped off a street sweeper truck onto a cobblestone curb while working on March 29, 2012, at which time his foot slipped into a hole and he sustained an injury to his right knee. Dr. Stechschulte performed a partial meniscectomy, patellofemoral chondroplasty, and arthroscopic debridement of a partial thickness ACL tear. The claimant settled his claim against the employer for 38.5% PPD of the right knee with future medical left open.
The claimant also had significant prior injuries to his left knee, including surgery to repair MCL and ACL tears in 1973 and a total knee replacement in 2002. Dr. Stuckmeyer examined the claimant at his attorney's request and assessed 60% PPD of the right knee due to the primary injury and 50% PPD of the left knee due to prior injuries/surgeries and recommended right total knee replacement. The doctor opined the combined disability due to the claimant's left and right knee injuries was greater than the simple sum, assigned a 15% multiplicity factor, and recommended a vocational assessment to determine the claimant's employability. The claimant then underwent a vocational evaluation with Mr. Cordray, who opined the claimant was not employable due to the combination of his primary injury and his pre-existing left knee condition.

The ALJ noted that although Mr. Cordray opined that the claimant was unemployable, he was not a doctor, and Dr. Stuckmeyer did not explicitly find the claimant to be PTD. The ALJ held that he could not award PTD since Statute requires physician certification of PTD in order to award PTD benefits. Therefore, the ALJ awarded PPD benefits from the Fund by finding 50% PPD to the right knee as a result of the primary injury and a 15% multiplicity factor.

The Commission found Mr. Cordray's opinion persuasive and reasoned that Statute does not

require specific language to certify a claimant as PTD by using the phrase "permanent total disability" as long as the doctor otherwise confirms the extent of the claimant's diagnoses, medical conditions, and restrictions. Here, Dr. Stuckmeyer diagnosed the claimant, identified permanent restrictions, and recommended a vocational evaluation, which amounted to a certification of the claimant's PTD status. The Commission found the claimant PTD as a result of the primary injury combined with the effects of his prior medical conditions, and the Fund was therefore liable for PTD benefits.

PTD Denied as Claimant did not Present Evidence as to Why She Stopped Working

Robertson v. Second Injury Fund, Injury No. 09-071549

On September 17, 2009, the claimant slipped in water and experienced a jarring/twisting motion to her low back. She was diagnosed with a low back strain and left knee contusion. She also had an extensive history of 6 prior lower back surgeries between 2005 and 2009 for degenerative disk disease. In August 2010, the claimant complained of back pain and reported she was losing feeling from her fall at work and believed the hardware from her previous surgery had come loose. Dr. deGrange performed an IME at the employer's request and diagnosed a lumbar strain that had resolved. He opined her current back pain was due to failed back surgery syndrome from her 6 prior back surgeries, rather than to her work accident, and placed her at MMI. However, the claimant continued to treat, and in 2012, Dr. Abernathie performed hardware removal at L3-S1, before placing her at MMI with permanent restrictions. The claimant returned to work full duty for a few weeks before quitting.

Dr. Margolis performed an IME at the claimant's attorney's request and assessed 70% PPD referable to her low back, 40% of which was preexisting and 30% of which he attributed to her work accident. She settled with her employer for 17.5% PPD referable to her low back.
The ALJ agreed with Dr. deGrange that the work accident was not the prevailing cause of the claimant's condition and resulting disability. The ALJ also found the Fund was not responsible for PTD benefits due to her extensive preexisting and deteriorating back condition, the fact that she continued working almost 3 years after the accident, the lack of any objective evidence of a physical change following the work accident, and the claimant's lack of credibility as a historian.

The claimant appealed, and the Commission reversed the ALJ's decision. It credited her testimony that she experienced a permanent increase in her pain after the work accident and found Dr. Margolis' IME reasonable. However, the Commission found she was not PTD, because it was unclear why she stopped working. Therefore, the Commission found the work accident was the prevailing factor in causing a low back strain and awarded 10% PPD to the body from the Fund, due to her significant preexisting condition and prior surgeries.

Fund Responsible for PTD Benefits Due to Combination of Pre-Existing Physical and Psychological Conditions and Work Injury

Valentine v. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No.

06-013126

On February 23, 2006, the 67-year old claimant fell 6 feet off a ladder and injured his right ankle/foot. He was diagnosed with a right foot intra-articular calcaneus fracture and underwent subtalar arthrodesis followed by 2 additional surgeries for non-unions. He sought psychiatric help for depression and was given medication. The claimant also had pre-existing injuries, including a right rotator cuff tear and tendinitis, bilateral shoulder pain, and DJD in his bilateral knees. With respect to his pre-existing psychological condition, he was previously diagnosed with dysfunctional family origin, poly-substance abuse and dependency, pain disorder, and personality disorder. He was placed at MMI in February 2008, by which time he had retired, and in February 2015, he settled with his employer for 50% PPD of the right ankle and 11.5% PPD to the body referable to his psychological condition.

Dr. Volarich examined the claimant at his request and assessed 65% PPD of the right foot/ankle referable to his work injury as well as 25% of the right shoulder, 15% of the left shoulder, and 30% of each knee due to pre-existing conditions. The doctor opined he was PTD due to a combination of his primary and pre-existing conditions, age, and limited education. Dr. Stillings examined the claimant for psychiatric disorders at his request and assessed a primary psychiatric injury of 45% PPD of the body referable to mood, pain, and anxiety disorders. He agreed the claimant was PTD, due to his primary and pre-existing psychiatric conditions. Mr. England and Ms. Blaine also found the claimant PTD and unemployable.

At a hearing against the Fund, the ALJ found the expert opinions of Dr. Volarich, Dr. Stillings, Mr. England, and Ms. Blaine persuasive. Therefore, the ALJ found the claimant was PTD due to a combination of his primary injury and pre-existing conditions, and the Fund was liable. On appeal, the Commission affirmed the ALJ's decision.

Claim for Benefits Denied after Claimant Failed to Appear at Trial

Stovall v. Convergys and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 11-022817

The claimant injured her right lower extremity while working for the employer on February 27, 2011. She requested additional treatment but never provided medical evidence substantiating her request. Her case was set for trial on three occasions but continued at the claimant's request to give her time to obtain additional evidence.

The case was set for trial on August 20, 2015, and a final notice was sent by certified mail. Attorneys for the claimant, employer, and Fund appeared for trial at 9:30 a.m. However, as of 11:15 a.m., the claimant had still not appeared for trial, although she was in touch when her attorney multiple times during the morning and claimed to be on her way to the Division. The claimant's attorney requested a delay, to which the employer objected. The ALJ concluded the trial and awarded a default judgment denying any benefits and finding that the claimant failed to establish a compensable injury by failing to appear for scheduled hearings or present

substantiating evidence. The claimant appealed, and the Commission affirmed the ALJ's decision.

Claimant's PTD Benefits Commutated to a Lump Sum to Avoid Undue Financial Hardship to the Claimant

Thomas v. Forsyth Care Center and Missouri Nursing Home Insurance Trust, Case No. SD34151 (Mo. App. 2016)

FACTS: The claimant was awarded a Temporary Award on December 10, 2007. The employer failed to comply with the Temporary Award. The claimant was unable to obtain treatment, and her condition worsened. At a final hearing, the ALJ determined she was PTD, and the Commission and Court of Appeals affirmed. The claimant then filed a Motion for Commutation of her PTD benefits, arguing that she has been required to pre-pay for her treatment and prescriptions and then wait almost a month for reimbursement from the employer, which was an undue hardship on her fixed income. The Commission found the employer had a well documented history of disregarding the ALJ's Temporary Award and found that the unusual circumstances presented by the claimant called for payment of her anticipated benefits in a lump sum. The employer appealed.

HOLDING: On appeal, the court relied on the Commission's findings of fact and credibility determinations to find that the employer repeatedly made it difficult for the claimant to receive treatment and reimbursement for medical costs. Therefore, the court found there were unusual circumstances which justified commutation of the PTD benefits, and the Commission's Award was affirmed.