MISSOURI WORKERS' COMPENSATION

CASE LAW UPDATE

JULY 2014 – SEPTEMBER 2014

Absent a Showing of Fraud, Undue Influence, or Violation of a Party's Rights, the Commission Must Approve a Voluntary Settlement

Hinkle v. A.B. Dick Company, Case No. WD76952 (Mo. App. Ct. 2014)

FACTS: The claimant died in a motor vehicle accident while in the course and scope of his employment. His widow subsequently filed a Claim. An ALJ approved weekly death benefits for the widow in March 2007. In September 2013, the widow and the employer/insurer voluntarily entered into a lump sum settlement for commutation of the March 2007 Award. However, the Commission refused to approve the settlement because: 1) settlement was not reached to resolve any pending claim or dispute between the parties; 2) the widow would waive her rights under the Missouri Workers' Compensation Statute because she would only receive 49% of the present value of the death benefits awarded; 3) the settlement was not in accordance with the widow's rights; and 4) the proposed lump sum did not equal the present value of the death benefit installments under the Award and the parties showed no unusual circumstances warranting departure from the normal method of payment. The widow appealed.

HOLDING: On Appeal, the Appellate Court reversed the Commission and noted that the Missouri Workers' Compensation Statute required the Commission to approve a voluntary settlement absent a showing that that settlement violated the rights of any party or was the result of undue influence or fraud. The Court noted that in this instance, the widow understood her rights and benefits, and the settlement was not the product of undue influence or fraud. Therefore, the Commission erred as a matter of law in not approving the settlement.

Returning to Work Post-Injury Does Not Preclude Finding of PTD

Brashers v. Treasury of the State of Missouri, Case No. SD32872 (Mo. App. Ct. 2014)

FACTS: The claimant was injured as a result of a fall at work. However, she also had extensive pre-existing injuries including Moyamoya (a condition which causes strokes, seizures, and balance problems), a neck surgery and fusion, surgically treated bilateral carpal tunnel, a rotator cuff repair, arthroscopic surgeries on both knees, one knee replacement, depression, fibromyalgia, bilateral ulnar neuropathy, and osteoarthritis. Prior to this injury she was incapable of anything other than sedentary work. Following the claimant's work injury, she returned to work on light duty working about 5 hours a day, which was similar to her pre-injury work hours. However, she was terminated 10 months later after her employer received a report from Dr. Koprivica who stated that the claimant was not employable and should not be employed. At a

hearing, an ALJ determined that the claimant was not PTD before the injury because she had maintained employment for 2 ½ years prior to her injury and held that the claimant was PTD as a combination of the work injury and her prior injuries. On appeal, the Commission affirmed and noted that the claimant sustained new permanent disabilities as a result of her work injury. Additionally, the Commission noted that it was consistent with the purposes of the Fund to award compensation to an employee who, until her work injury, was tenacious enough to compete on the open labor market. On appeal from the Commission's decision, the Fund argued that the claimant was already PTD at the time of her work injury. Alternatively, the Fund argued that if the claimant was not PTD before the work injury, she could not have been rendered PTD by a combination of the work injury and her pre-existing disabilities because she returned to her regular job following the work injury.

HOLDING: On Appeal, the Court affirmed noting that because the claimant worked part-time prior to her injury she was still able to compete on the open labor market and, in fact, obtained her position through the open labor market so she was not PTD. The Court also found that simply returning to her prior position does not show she is not PTD and therefore, the Fund was responsible for benefits. The key question in the Court's opinion was whether any employer in the ordinary course of business would hire the claimant.

In **Christy v. Missouri Department of Higher Education/Southwest Missouri State University and Treasurer of Missouri, Injury No. 06-004801**, the claimant worked for the employer from 1995 through her retirement in 2008. Evidence showed that she was a good employee for many years. In 2006, she suffered carpal tunnel syndrome. She underwent releases and then returned to work. Upon returning to work, the claimant's job performance ratings indicated that her performance had decreased but was still satisfactory to her employer. She also had two pre-existing conditions which did not interfere with her ability to perform her work duties. At a hearing, the ALJ determined she was not PTD and awarded 17.5% PPD of each upper extremity at the 200-week level and a 10% load. The ALJ found that the claimant was not PTD because her return to work after her surgeries showed that she competed in the open labor market.

On Appeal, the Commission affirmed the ALJ's ruling that the claimant was not PTD but disagreed with the ALJ's logic. The Commission found that an employee's return to work for her employer did not necessarily mean that the employee is not PTD or that the employer would have hired her after she recovered from her injury given her resulting disabilities. Specifically, the Commission noted that the claimant returned to a position she already had and did not compete on the *open* labor market. They went on to state that several considerations, such as loyalty, could have persuaded the employer to re-hire the claimant and those considerations may not be shared by other employers.

Despite Claimant's Expert's Testimony That He Was PTD as a Result of Prior Injuries and His Work Injury, Commission Can Still Find Him PTD as a Result of Work Injury Alone

Hembree v. Treasurer of the State of Missouri, Case No. SD32982 (Mo. App. Ct. 2014)

FACTS: In 2003 the claimant fell from a scaffolding, sustaining injuries to his back, head and ribs, and received a settlement. He was again injured in 2006 after falling off scaffolding, when he sustained injuries to his ribs, right lung and right arm. Following his 2006 injury, the claimant was left with virtually no use of his right arm and was forced to rely almost exclusively on his left arm to perform his job duties. Mr. Lala, the claimant's vocational expert, issued a May 2008 report finding that the claimant was PTD. Later, the claimant sustained a third injury in October 2008 when he developed a cyst in his left hand. Shortly thereafter, the claimant left his job and never worked thereafter. The claimant settled his 2006 and 2008 claims with the employer, and proceeded to trial against the Fund on both his 2006 and 2008 injuries. In 2011, Mr. Lala issued an addendum to his May 2008 report, finding that the claimant was PTD as a "combination of all of his disabilities." At a hearing, an ALJ determined that the claimant was PTD as a result of a combination of his 2008 injury and previous injuries. The Fund appealed.

On Appeal, the Commission reversed the ALJ's finding and held that the claimant was PTD before his 2008 injury. While the Commission noted that the claimant did return to work following his 2006 injury, he returned as a tuck pointer, which was a position created for him. Additionally, it noted that this tuck pointing work would basically consist of clean up work that amounted to light duty. Therefore, the Commission found that the Fund was not liable for PTD benefits. The claimant appealed.

HOLDING: On Appeal, the claimant argued that the Fund provided no vocational expert opinion to support its decision that the claimant was PTD prior to the 2008 injury. The Court noted that the credibility of experts is within the province of the Commission, and the Fund is not required to present its own vocational expert. In light of Mr. Lala's conflicting opinions, the Court found that there was competent and substantial evidence on which the Commission could base its opinion.

Poor Academic Record Does Not Create Permanent Learning Disability to Establish Pre-Existing Condition

In **Curbow v. Hillhouse Services, Inc. and Treasurer of Missouri, Injury No. 10-006952**, the claimant had pre-existing injuries to his low back. Additionally, the claimant was poorly educated due to his lack of interest in school. The claimant sustained an injury in the course and scope of his employment to his low back. The day after his injury, he saw his chiropractor, who he had been seeing for his prior low back condition, at which time he reported he was not getting better, but denied any trauma. At trial, the claimant denied the history recorded in the chiropractor's record and explained that he was perhaps confused by what the word "trauma" meant. An ALJ determined that the claimant was injured in the course and scope of his employment and assessed 12.5% PPD of the body referable to the work injury. Regarding the claimant's argument that he was PTD as a result of the combination of his work injury and his learning disability, the ALJ determined that the claimant was not completely illiterate and his problems with reading and writing were not permanent in nature. Specifically, the ALJ noted that the claimant voluntarily dropped out in the 9th grade, never attempted to obtain a GED, and had a

very poor attendance rate while in the 8th grade. Therefore, the ALJ found that the claimant did not show any initiative towards bettering his education and his mental deficiency was not permanent. Moreover, it was noted that the claimant had never been diagnosed with an actual learning disability. On Appeal, the Commission summarily affirmed.

The First Question is Whether the Claimant is PTD From the Last Injury Alone

In **Peek v. Treasurer of Missouri, Injury No. 10-090162,** the claimant sustained an injury to her neck in the course and scope of her employment. The claimant also had a pre-existing rotator cuff tear although she was able to continue with her employment without any restrictions or accommodations. Following her work injury she was placed on light duty and had problems even doing that work due to the pain in her neck as she had to look at the computer screen. Additionally, she had to lay down intermittently during the day because her pain in her neck was so bad. She settled her claim against her employer and proceeded to trial against the Fund alleging PTD. At a hearing, the ALJ noted that the first question is whether the claimant is PTD from the last injury alone. The ALJ found that the claimant, due to her difficulty working light duty and need to intermittently lie down, was PTD as a result of the work injury alone. Consequently, the ALJ refused to impose liability on the Fund. On appeal, the Commission summarily affirmed.

Treating Physician More Credible than Employer's Five Experts

Beatrice v. Curators of the University of Missouri, Case No. WD76807 (Mo. App. Ct. 2014)

FACTS: The claimant was injured while assisting a struggling patient. She underwent surgery and was post-operatively diagnosed with a bulging disc and annular tears at L4-5 and L5-S1. The employer's experts, Drs. Conway, Coyle, Bridwell, Carr and Chabot testified at a hearing that the claimant sustained only a back strain as a result of the accident. Conversely, the claimant's primary expert, Dr. Highland, who performed her surgery, believed she sustained lumbar disc bulges and associated annular tears as a result of the accident. The ALJ found that the claimant sustained an L4-5 disc bulge and an L5-S1 annular tear, and that the work accident was the prevailing factor in causing those injuries, and awarded 23% PPD of the body as a whole. The employer appealed to the Commission who affirmed. The employer again appealed essentially arguing that the Commission's ruling was not supported by substantial and competent evidence as it sided with Dr. Highland's sole report finding the claimant's injury was work-related whereas the employer provided testimony from five credible medical experts.

HOLDING: On Appeal, the Appellate Court stated that this was a dispute between the claimant's and employer's experts. It noted that the credibility afforded to experts is for the Commission to decide. It was further noted that the Commission's decision was supported by substantial and competent evidence.

Unless Squarely Contradicted, Expert Testimony will be Found Credible

In **Chambers v. Sunnen Products Company and Treasurer of Missouri, Injury No. 02-002046**, the claimant was injured while at work. At a hearing, her medical experts, Dr. deGrange and Dr. Volarich opined that future medical treatment was necessary. Specifically, Dr. deGrange recommended a third surgery to address the claimant's condition, while Dr. Volarich stated that additional surgery was not indicated but recommended ongoing conservative treatment. The employer's expert, Dr. Coyle, opined that no future medical treatment would be needed. At a hearing, an ALJ found that the claimant was 50% PPD referable to the work injury, but did not award any future medical treatment. The claimant appealed.
On Appeal, the Commission noted that Dr. Coyle did not specifically address the issue of whether conservative treatment might relieve the claimant's ongoing back pain and symptoms, and therefore, his opinion did not contradict Dr. Volarich's opinion that non-surgical conservative treatment may be needed. Therefore, the Commission felt that Dr. Volarich was the most persuasive and ordered the employer to furnish non-surgical future medical treatment that may be reasonably required to cure and relieve the effects of the work injury.

Surgical Physician More Credible on Causation

In **Dierks v. Kraft Foods and Treasurer of Missouri, Injury No. 09-040114**, the claimant's feet became entangled in an air hose that had been left on her employer's floor, causing her to trip and fall, sustaining injury to her left knee. At trial, the employer and its experts argued that the work injury only caused a knee contusion, given that the MRI film showed a degenerative torn meniscus. Conversely, the claimant's expert, Dr. Buchert, acknowledged that the MRI film suggested a degenerative tear, but stated that while he was performing surgery on the claimant's knee and personally examined the medial meniscus, he found the tears to be acute and not degenerative. The ALJ determined Dr. Buchert was the most credible, as he had the benefit of personally examining the meniscal tears and the ALJ found that those tears were caused by the work accident. The Commission summarily affirmed.

Expert's Revision of Their Report Does Not Impair Credibility if Based on New Records

In **Yelverton v. Kuna Foods Service and the Treasurer of Missouri, Injury No. 02-101407**, the claimant was driving a pallet jack when his right leg was impaled on the blades of a fork lift. He also had pre-existing injuries including a fracture of his left tibia, for which he underwent surgery and compression fractures of L1, L2 and L3 as a result of a bicycle accident. While these prior injuries did not cause the claimant to miss any work, he did have difficulty maintaining a fixed position for over two hours, as well as chronic back pain that radiated down the back of his left leg, which was ongoing and lasted up to and through his work injury.

The employer's vocational expert, Mr. England, initially issued a report finding that the claimant could pursue entry level service employment or acquire additional skills through the help of the State Division of Vocational Rehabilitation and did not feel the claimant was totally disabled from all forms of employment. Subsequent to Mr. England's report, the claimant saw Dr.

Volarich, the only doctor who examined the claimant's back, who noted that the claimant had lumbar radicular syndrome and therefore was unable to tolerate standing for more than 20 or 30 minutes, and would possibly need to lie down periodically. After review of Dr. Volarich's IME, Mr. England issued a second report wherein he stated that if one assumes that the claimant needs to lie down periodically due to his low back pain, as Dr. Volarich indicated, then that could preclude his ability to work and he could be totally disabled as a combination of the prior back problems and the work injury.

The claimant's vocational expert, Ms. Browning, initially issued a report finding that the claimant could potentially work in a limited number of security guard and entry level customer service positions that include on the top training, and also did not feel that the claimant was PTD. However, Ms. Browning had no records relating to the claimant's back when she provided her initial report. Subsequent to Ms. Browning's initial report, she reviewed additional records regarding the claimant's pre-existing back injury referable to the bicycle incident, and then issued a second report wherein she did find the claimant PTD as a result of his pre-existing back condition and his work injury. At a hearing, an ALJ found that the claimant sustained 85% PPD of the right knee as a result of the work injury, but did not find he was PTD. Specifically, the ALJ found Mr. England more credible than Ms. Browning because Ms. Browning originally wrote in her report that the claimant was employable and the additional back records she reviewed consisted only of five pages from one medical visit.

On Appeal, the Commission reversed the ALJ's finding and found that the claimant was PTD as a result of his pre-existing and work injury together. Specifically, the Commission noted that Ms. Browning's change of opinion due to newly obtained information was no reason to find the witness less credible and that as Dr. Volarich was the only doctor to physically examine the claimant's back, he was believed the most qualified expert to speak on his back disability.

Claimant's Constantly Changing Story Impaired Credibility and Prevented Him From Satisfying His Burden of Proof

In **Pounds v. Gilster-Mary Lee Corp., Injury No. 10-073936,** the claimant testified at trial that he slipped off of a fork lift and sustained immediate pain and injury to his back. He then stated on direct that he never gave different information regarding the incident to anyone. However, medical records showed inconsistent histories: 1) his injury was not a work injury; 2) he injured himself while lifting boxes over a period of time; 3) his symptoms had gradually increased for one year prior to his date of injury; 4) he was unsure what his mechanism of injury was; and 5) he gave several different histories regarding the alleged fork lift incident. Additionally, the claimant gave conflicting testimony at his hearing and his deposition regarding how his fork lift incident occurred. Ultimately, the ALJ found that the claimant failed to meet his burden and show his injury was work related and therefore, denied compensability. On appeal, the Commission affirmed.

Determination of Whether Claimant Was Injured In Scope and Course of Employment is Whether She Was Injured *Because* She Was at Work Not Merely *While* She Was at Work

Randolph County, Missouri v. Moore-Ransdell, Case No. WD76709 (Mo. App. Ct. 2014)

FACTS: While at work, the claimant squatted down, reached in the back of a file drawer, and twisted her body in an attempt to remove a file, sustaining injury to her low back. She treated with Dr. Highland, who diagnosed her with an acute lumbar strain and internal disc disruption to L3-4, L4-5 and L5-S1 secondary to the work injury. He subsequently performed surgery. At trial, Dr. Highland testified on direct that the work injury caused the claimant's injury and need for surgery. On cross-examination, Dr. Highland admitted that the claimant had increasing stenosis and continuing degeneration of the aforementioned discs which were the source of her pain, and that without her pre-existing disc degeneration the lumbar strain that she suffered as a result of the work injury would not have necessarily required the three level fusion procedure he performed. An ALJ found that the work injury caused the claimant's low back pain, subsequent surgery, and related medical treatment. Consequently, the ALJ awarded medical expenses, TTD benefits and 25% PPD of the body as a whole. The employer appealed and the Commission affirmed.

HOLDING: In its first point on appeal, the employer argued that the claimant's injury did not arise out of her employment because her injury came from a hazard or risk to which she was equally exposed in normal non-employment life. Specifically, the employer argued that the risk was bending over which was not unique to the claimant's job. The Court disagreed with this argument and stated that the claimant was injured when squatting down, reaching into the back of a file drawer and twisting, which was a risk she would not have been equally exposed to in her normal non-employment life, and noted that the claimant was injured because she was at work, not merely while she was at work. In its second point on appeal, the employer argued that the Commission's determination was not supported by competent and substantial evidence because the medical evidence showed that her work accident was merely a triggering or precipitating factor and not the prevailing factor in causing her medical condition and disability. The Court also disagreed with this point, because the Commission relied on Dr. Highland's direct testimony, which the Court found constituted competent and substantial evidence. Therefore, the court affirmed.

Following Termination, Employee is Allowed a "Reasonable Time" to Leave Employer's Premises Before Employment Relationship is Severed

In **Hartman v. DJSCMS, Inc., Injury No.: 12-003592**, the claimant worked as a car salesman and on his date of injury, was scheduled to work from 9:00 A.M. - 9:00 P.M. However, he was fired sometime around 4:00 P.M. Almost immediately after he was fired, the claimant slipped and fell in the employer's parking lot. According to the claimant, after being fired he drove to the finance department to get credit for the deals that he had in process, but upon arrival he discovered that the office door was closed. He then returned to his car to get his paperwork and it was at that time that he fell. According to the employer's GM, he had never known of a salesman who finished deals after being terminated and also believed it was unlikely that the claimant was finishing deals because he was not selling cars due to the winding down of the business. The

undisputed facts were that following his termination the claimant had not closed out any deals, emptied his desk, or cleaned out/turned over the demo car he was given for personal use.

At trial, the employer argued that the claimant's accident did not arise out of and in the course of his employment because he was fired immediately before his accident. However, an ALJ disagreed and stated that following termination the employee is entitled a "reasonable time" to leave the premises of his employer before it can be said that the relationship of the employer and employee is completely severed. Therefore, the ALJ determined that the claimant was within the course and scope of his employment when injured. Additionally, the ALJ determined that the claimant's average weekly wage could not be fairly and justly determined by the standard calculation of his 13 weeks prior to the termination. Specifically, the ALJ noted that his sales location was in the process of being shut down, the inventory was low, the mark ups were cut and his sales were atypical. Therefore, the ALJ ordered his average weekly wage to be calculated based on all of his earnings in the 39 weeks of his employment. The ALJ further noted that the claimant's use of the demo vehicle should be included in his gross wages because it was an economic gain received in consideration for work. Finally, the ALJ noted that Dr. Volarich was the only medical expert to opine on PPD and, therefore, he adopted Dr. Volarich's assessment of 60% PPD of the body as a whole. On Appeal, the Commission summarily affirmed.

Fall on Icy Parking Lot Found Compensable

In **Whorton v. Silgan Container, Injury No. 07-125897**, the claimant arrived at work and then checked on her assigned duties for the day. As she was assigned cleaning tasks, she returned to her car to obtain gloves, which she used for her cleaning tasks. Additionally, on her way to the car, the claimant had with her a fix-a-flat to address one of the flat tires on her personal vehicle. While walking to her vehicle she slipped on ice in her employer's parking lot and fell, sustaining injury. At a hearing, an ALJ noted that when an employee is performing an act for the mutual benefit of both themselves and the employer, an injury arising out of that activity is usually compensable even though the advantage to the employer is slight. The ALJ further noted that in instances of mutual benefit, the injury will not be deemed to have arisen out of the course and scope of employment when the indirect benefit to the employer "becomes so tenuous as to be impercetible." In this case however, the ALJ found that the claimant was injured in the course and scope of her employment because she was not traveling to her car merely for personal business but was also acting in the employer's interests by getting gloves from her car to perform her assigned duties. The ALJ found that the claimant sustained 40% PPD of her right ankle, 30% PPD of the right knee and 20% of the lumbosacral spine.

On Appeal, the Commission affirmed the ALJ's finding that the claimant was injured in the course and scope of her employment, but reached that conclusion on different reasoning. Specifically, the Commission noted that there is no evidence in the record to support a finding that the claimant was equally exposed to the risk of falling on the icy parking lot in her normal non-employment life and stated that there was no need to consider the mutual benefit doctrine as the ALJ did.

Finding of Employer-Employee Relationship Requires the Employee to Be in the Service and Control of the Employer

In **Marty Warren (Deceased) v. David Warren, Injury No. 02-148212**, the claimant was working with his father applying siding to the home of the father's friend. The claimant was instructed by his father to remove a nail, but in the process of doing so he lost his balance and fell to the ground, sustaining fatal injuries. The sole issue in this case was whether the claimant was an employee of his father at the time of the injury. At trial, the claimant's sister testified that he was living with her on the date of injury and he had issues with alcohol and substance abuse. She further stated that on the date of injury, she asked her father to take the claimant with him because she was going out-of-town and did not want the claimant to be alone in her home given his alcohol and substance issues. Similarly, the father testified that he was doing his daughter a favor and allowed the claimant to tag along on the siding job. The claimant's widow testified he had told her prior to the date of injury that he would be working on a siding job and making between $600.00 - $1,000.00. Additionally, she testified that the claimant had worked 6 - 8 jobs for his father in the past. At a hearing, an ALJ believed the testimony of the father and sister more credible and found that the father was simply helping his daughter by taking the claimant to work. The ALJ did not find the widow credible because she was a poor historian and the claimant was not living with her at the time of his injury.

On Appeal, the Commission affirmed, noting that in order to find an employment relationship, it must be shown that 1) the claimant was in the service of the alleged employer and 2) the services were controllable by the employer. Ultimately, it found that the father did not control the services of the claimant.

Eight Factors Determine Whether Worker is an Employee or Independent Contractor

In **Parks v. Independent Living Center of Southeast Missouri, Injury No. 10-069477**, the claimant was injured while working, but it was disputed whether or not she was an employee or an independent contractor at the time of her injury. Evidence showed that she was hired as a caregiver to administer Medicaid and home health services to disabled senior citizens know as "consumers." At a hearing, testimony demonstrated that the alleged employer acted as a "vendor" who provided services such as orientation and training, assisting consumers by performing background checks on their caregivers, receiving Applications for Employment and necessary tax documents, and administering the payroll. Essentially, the testimony demonstrated that the alleged employer assisted caregivers in finding consumers and receiving payment but was thereafter uninvolved in the relationship between the caregiver and consumer. An ALJ found that the claimant was an independent contractor at the time of her injury, and therefore, her injury was not compensable.

On Appeal, the Commission noted that the definition of "employee" is a factual question which depends on several factors. The Court listed out eight factors, including: 1) The extent of control; 2) The actual exercise of control; 3) The duration of the employment; 4) The right to discharge; 5) The method of payment; 6) The degree to which the alleged employer furnished equipment; 7)

The extent of which the work is the regular business of the alleged employer; and 8) The employment contract. The Commission found that only two of the eight factors had been satisfied and therefore, the claimant was not an employee but an independent contractor.

Claimant Bears the Burden of Proof

In **Welty v. Mississippi Lime Co.**, **Injury No. 12-040559,** the claimant developed tinnitus and binaural hearing loss, which he claimed was due to repeated exposure to loud noise at his employer's facility. The claimant's expert, Dr. Mason, testified at a hearing that the claimant's hearing loss could be the result of the noise or it could be the result of the claimant's family history of hearing loss. Therefore, the ALJ determined that the claimant failed to meet his burden on the issue of medical causation. On appeal, the Commission summarily affirmed.

Job Duties Need Not Be Strenuous to Meet Burden of Proving Occupational Disease

In **Szigeti v. Metropolitan St. Louis Sewer Dist., Injury No. 10-044815,** the claimant worked as a file clerk full-time from 1996 through 2011. When the customers finished with the files or drawings, they placed them in a basket for the claimant to re-file. The drawings were stored in three foot tubes, and the claimant rolled them up to return them to the tube. When she was not waiting on customers, she manually moved all inappropriately stored information out of the database and put it in to the correct spot in the new database. In addition, she worked on a project to scan drawings into a digital format, which required slowly feeding the drawings into a scanner, similar to copying a piece of paper. The claimant eventually developed symptoms in her bilateral wrists and was diagnosed with bilateral carpal tunnel syndrome. At a hearing, the employer's experts testified that her job duties were not hand intensive enough to cause her work injury. Conversely, her experts testified her injuries were due to her repetitive job duties. The ALJ found the claimant's experts were more credible and held her injuries were compensable. On appeal, the Commission summarily affirmed.

Statute of Limitations Begins to Run When the Employer-Insurer Make the Last Payment on the Claim

In **Tracy v. Glazders Wholesale Drug Company, Injury No. 09-013530,** the claimant sustained an injury to his back on February 20, 2009. The employer initially authorized medical treatment which the claimant underwent. Dr. Kitchens, a treating physician, stated on March 31, 2009 that the claimant's work injury was the primary factor in aggravating her spondylolisthesis. However, on June 3, 2009 the employer abruptly notified Dr. Kitchens that the claim was now being denied and no further treatment would be authorized. Although it is not specified why treatment was abruptly stopped, it appears the employer-insurer discovered a statute of limitations issue. Thereafter, he treated on his own. At a hearing, the employer argued that the claim was barred by the statute of limitations, as the report of injury was timely filed and the claimant did not bring his claim within you two year period. The claimant argued that the two year period did not begin to run until August 2010, the date that Dr. Volarich, his expert, opined he was at MMI. Additionally, the claimant argued that the period did not begin to run until the

last payment was made *by his private insurer.* Specifically, the claimant argued that the statute was silent as to who made the last payment on the claim and therefore, pursuant to strict construction, the period should not begin to run until the last payment was made on that claim by any entity. The ALJ disagreed with the claimant's latter argument and found that payments made by a private insurer do not toll the statute of limitations. Additionally, the ALJ was not persuaded by the claimant's former argument that the period for bringing his claim did not begin to run until August 2010. Consequently, the ALJ found that the Claim was time-barred by the statute of limitations because the period for bringing his claim began to run in June 2009, when the employer-insurer made its last payment on the claim. On appeal, the Commission affirmed.

Losing at a Hearing on an Accident Claim Does Not Bar Claimant From Bringing an Occupational Disease Claim For the Same Injury

In **Trimmer v. Johnson Controls, Inc., Injury No. 03-147616,** the claimant worked a strenuous job which required constant heavy lifting and caused aches and pains as a result. In 2003, he fell at work and sustained an injury to his shoulder. At the first hearing on this claim, testimony of Dr. Fretz was introduced by the employer which noted that the claimant did work in a strenuous position but the claimant had no specific event that caused the beginning of his shoulder pain. Based on that testimony, the ALJ found that the claimant failed to prove he suffered an accident but the ALJ went on to note that she felt the matter should be found compensable based on the claimant's repetitive strenuous job duties.

The claimant subsequently re-filed his claim as an occupational disease and a second hearing was held. At the second hearing, the employer-insurer argued that the claim had already been adjudicated and could not be re-litigated. However, the ALJ found that the second claim was not barred by the initial claim in that it alleged an occupational disease as opposed to an accident and therefore, the evidence necessary to sustain these two claims differed. The ALJ further noted that in the initial hearing the ALJ did not make any findings regarding the occupational disease claim and as such, the second claim was not barred. Finding that the claim was not barred, the ALJ went on to find that the claimant did sustain an occupational disease as a result of his job duties and awarded benefits. On appeal, the Commission affirmed.

Minor Subsequent Injury Can Expose Employer to PTD Liability

In **Gray v. Jack Cooper Transport Company and Treasurer of Missouri, Injury No.: 05-015019**, the claimant had multiple pre-existing conditions. He had scarring and deformities which affected the thumb and fingers of his left hand. Additionally, the claimant had pre-existing issues with depression and anxiety, for which he had been receiving medical care since the 1980s. Finally, in the early 1990s the claimant suffered a hyperextension of his left elbow.
On June 26, 2003 the claimant suffered his first work injury to his low back for which he underwent a fusion. While still treating for his 2003 injury, he sustained another injury to his low back on January 31, 2005, which is the primary injury in this case. The claimant continued to treat with Dr. Robson, his treating physician for the 2003 injury, until he was placed at MMI in 2006. He settled his 2003 injury against his employer for 44% PPD of the body as a whole.

At a hearing for the 2005 claim, the claimant testified that he was still in pain from his 2003 injury until his 2005 injury but stated that following his 2005 injury, his symptoms were much worse. The employer-insurer argued that the claimant's symptoms stemmed from his prior conditions, most notably, his 2003 back injury. The ALJ noted that Dr. Robson's 2006 report, wherein he placed the claimant at MMI, made no reference to his 2005 injury or any resulting disability from that injury. The ALJ also noted that Dr. Poetz, the claimant's expert, believed that the claimant was PTD as a combination of his work injury and his pre-existing conditions. Ultimately, the ALJ found Dr. Robson more credible and determined that the claimant's ongoing disabilities were a result of his 2003 accident and not the result of his 2005 injury. Moreover, the ALJ found that the claimant did not suffer a new injury in 2005 because his alleged strain was merely the product of the on and off exacerbations of his 2003 injury. Therefore, the ALJ determined that the 2005 work injury was not compensable.

The Commission overturned the ALJ's finding and determined that the claimant and his experts were more credible. Moreover, the Commission determined that the claimant was PTD as a result of the 2005 work accident and his pre-existing disabilities. The Commission stated that the 2005 work accident caused a 20% PPD to the body. Additionally, the Commission imposed liability on the Second Injury Fund finding that each of the claimant's aforementioned pre-existing conditions were serious enough to constitute hindrances or obstacles to employment.

To Impose Liability Against the Fund, Claimant's Prior Injuries Need Not Be at MMI at Time of Primary Injury if Claimant Seeks PTD Benefits

Lewis v. Treasurer of the State of Missouri, Case No. ED100657 (Mo. App. Ct. 2014)

FACTS: The claimant sustained a work injury in 2007. He also had several prior injuries, one of which was a 2004 injury to his left shoulder and another was for a 2006 carpal tunnel syndrome. The claimant was not placed at MMI for his 2004 or 2006 injuries until after his primary injury, which was the 2007 injury. At a hearing, the claimant testified regarding his injuries and stated that the symptoms caused by his 2004 shoulder injury never improved with treatment and had never completely resolved. An ALJ found that the claimant was PTD as a result of his primary injury and his pre-existing conditions, and imposed liability against the Fund. The Fund appealed to the Commission. On Appeal, the Commission affirmed. The Fund's primary argument on appeal was that the Commission erred in its analysis because it included pre-existing disabilities from the claimant's 2004 left shoulder injury and his 2006 carpal tunnel injury, which could not be considered because those injuries had not reached MMI at the time of the primary injury.

HOLDING: Addressing the Fund's first point, the Appellate Court noted that pre-existing disabilities need not be at MMI in order to be considered for PTD benefits. Specifically, the Appellate Court noted that determining the specific amount of disability from pre-existing injuries is relevant for the calculation of PPD benefits, but not PTD benefits. In order to establish liability against the Fund for PTD, the claimant need only show the extent or percentage of the PPD resulting from the primary injury and then prove that a combination of the primary injury

and the pre-existing disability resulted in PTD.

Test For Fund Liability is the Potential That the Pre-Existing Condition May Combine with the Work Injury to Result in Greater Disability

In **Broekhoven v. Treasurer of Missouri, Injury No. 07-012863**, the claimant sustained a work injury involving his lumbar spine in early 2007. Prior to his work injury, the claimant had been diagnosed with degeneration and a herniated disc in the lumbar spine for which surgery had been recommended but the claimant declined to undergo. He settled his claim against the employer and proceeded to a hearing against the Fund. At a hearing, the ALJ determined that the claimant was PTD solely as a result of the January 2007 work injury. The claimant appealed, arguing that he was PTD, but not as a result of the work injury alone, rather, as a result of a combination of the work injury and his pre-existing disabilities.

On Appeal, the Commission stated that the test for Fund liability is the potential that the pre-existing condition may combine with a work-related injury in the future so as to cause a greater degree of disability then would have resulted in the absence of the pre-existing condition. The Commission stated that the claimant had serious medical conditions prior to his work injury, and noted that all of the testifying experts agreed that the claimant did have some pre-existing disability. Therefore, the Commission reversed the ALJ's Award, and found that the claimant was PTD as a result of the work injury and his pre-existing disabilities.

Exclusivity of Division's Jurisdiction Should Be Raised as an Affirmative Defense

Pierce v. Zurich American Insurance Company, Case No. WD77095 (Mo. App. Ct. 2014)

FACTS: In 2009 the claimant sustained a knee injury while working for his employer. The employer/insurer's treating physician opined that the claimant would ultimately need a total knee replacement, but it would not be due to his work injury. Conversely, the claimant's treating physician opined that he would need a total knee replacement which would be related to his work injury. Ultimately, in May 2012 the parties entered into a settlement for 26% of the knee with supplemental language agreeing to leave any medical treatment provided in Section 287.140.8 open for one year after settlement. For reference, Section 287.140.8 is the prosthetics clause commonly referred to as the Reactivation Provision. In June 2012, one month after settlement, the claimant requested a knee replacement. When this treatment was denied, the claimant filed a civil suit requesting that the trial court compel the insurer to provide knee replacement surgery. In response, the insurer filed a motion to dismiss arguing that the trial court lacked subject matter jurisdiction because the Division had exclusive jurisdiction. The trial court granted the claimant's motion finding that the Division did have exclusive jurisdiction.

HOLDING: On Appeal, the Court found error in the trial court's decision to dismiss for lack of subject matter jurisdiction noting that the issue was not whether subject matter jurisdiction existed but whether the claimant had a statutory right to proceed in civil court. The Court looked

to the stipulation language noting that the claimant requested a knee replacement, a prosthetic device, which would be covered under the Reactivation Provision. Therefore, the Court found that the Reactivation Provision applied and the exclusive remedy for the claimant is through workers' compensation. The Court also noted that the proper way to contest the claimant's civil suit would have been for the insurer to file, as an affirmative defense, a motion to dismiss for failure to state a claim upon which relief could be granted.

Civil Claim For Co-Employee Negligence Requires "Something More"

Peters v. Wady Industries Inc. and Terrio, Case No. ED100699 (Mo. App. Ct. 2014)

FACTS: On September 24, 2008, the claimant was injured when a stack of dowel baskets fell on him while he was unloading them at a construction site. He pursued a workers' compensation claim and filed a civil action against his supervisor, Mr. Terrio, alleging that Mr. Terrio ignored multiple warnings from employees concerning safety hazards posed by the stacked dowel baskets. Specifically, the claimant argued that his injury was caused by Mr. Terrio's failure to deliver the dowel baskets in a safe manner. Mr. Terrio filed a Motion to Dismiss for Failure to state a claim upon which relief could be granted, on the basis that the claimant's exclusive remedy lied in Missouri Workers' Compensation Law. Specifically, Mr. Terrio argued that the claimant's petition failed to allege any conduct by Mr. Terrio outside the scope of his employer's non-delegable duty to provide a safe work place. In other words, Mr. Terrio argued that the claimant failed to show that Mr. Terrio was personally liable because he had not engaged in any improper conduct that the employer did not have a duty to prevent. The trial Court agreed and granted the Motion to Dismiss. The claimant appealed.

HOLDING: The Court began by noting the historical changes this area of the law has recently undergone. Prior to 2005, co-workers were liable to one another for mere negligence. However, in 2012, the legislature amended that approach and codified the "something more" doctrine. Under that doctrine, for a co-worker to be personally liable to another worker, that co-worker must have engaged in some affirmative, purposeful, and dangerous act outside the scope of the employer's normal duties to keep the workplace safe. Worded differently, the co-worker/defendant's conduct must be independent of his employer's duties. The Court stated that since Mr. Terrio was a supervisor, he was the employee chosen to implement the employer's duty to provide a reasonably safe workplace and general failure to fulfill that duty results in no actionable negligence. Therefore, the Appellate Court held that the trial court did not err in dismissing the plaintiff's petition for failure to state a claim on which relief could be granted.