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# MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

## July 2018 – September 2018

### Claimant Failed to Prove Exposure To Cracked Truck Battery at Work Was Prevailing Factor in Causing Any of His Alleged Symptoms and Health Conditions

**Davenport vs. LTI Trucking Services, Inc., Injury No. 15-075326**

The claimant, a 51-year-old truck driver, alleged that he suffered multiple injuries as a result of inhaling sulfuric acid from a leak in a cracked truck battery. He drove the truck for five months, during which time multiple mechanics inspected it but found no problems. On October 5, 2015, the vehicle was inspected again, and one of its batteries was cracked. The claim was denied, and the claimant proceeded to treat on his own. His doctors diagnosed COPD but also noted that he smoked a half pack of cigarettes per day. Dr. Sifers opined there was no evidence to show that a car battery leak could cause significant sulfuric acid toxicity to drivers, and he also opined that the claimant's gastritis complaints were better explained by H. Pylori, which was non-work-related, than toxic exposure.

At a Hearing, the claimant testified that although he continued to smoke a half a pack of cigarettes per day, he did not believe his smoking was "heavy enough" to cause COPD, which he related back to sulfuric acid exposure. The claimant submitted select pages of a handful of medical reports, but the only one that clearly addressed causation was Dr. Sifers' report. The ALJ ultimately found the claimant's injury was not compensable, because he failed to prove that exposure to a cracked truck battery at work was the prevailing factor in causing any of his symptoms or health conditions. The claimant appealed to the Commission, which affirmed the ALJ's decision and Award.

### Employee's Death from Pulmonary Embolus Causally Related Back to Work-Related Ankle Fracture Due to Confinement to Wheelchair

**Joan Knutter, Karl Knutter and Michael Knutter vs. American National Insurance, Injury No. 13-020414**

On March 25, 2013, the employee sustained a non-displaced right ankle malleolus fracture,

which was treated conservatively, including use of a wheelchair. Less than two months later, she died as the result of a pulmonary embolism. Due to the employee's cremation, there was not an autopsy. The claimant filed a Claim for Compensation for death benefits on behalf of the employee.

Doctors disagreed as to whether the claimant's ankle injury was the prevailing factor in causing the PE and death. Dr. Wright opined that the claimant had underlying risk factors, but the claimant's immobility following her ankle injury was the tipping point that caused the PE. Dr. R. Mullins opined there was a lack of evidence directly tying the ankle fracture to a DVT or blood clot, and he noted that the claimant had other contributing factors such as obesity, a sedentary lifestyle, obstructive sleep apnea, and chronic kidney disease, all of which raised her risk of DVT. Dr. Cross reviewed the medical records and opined that without an autopsy, it was impossible to conclude that the claimant had a DVT in the lower extremity that may have caused a PE to the lungs.

After a Hearing, the ALJ denied death benefits. The ALJ opined there was no evidence in the medical records directly tying a blood clot or DVT to the claimant's injury or the use of a wheelchair, and the ALJ concluded it would be pure speculation to causally relate the PE back to the work injury because there was no autopsy. On appeal, the Commission reversed the ALJ's decision and Award. The Commission found the expert opinion of Dr. Wright credible and persuasive and concluded that it was not coincidental that the claimant developed a PE just 45 days after being confined to a wheelchair due to her injury.

**Co-Employee Liable for Negligence Because He Purposefully Removed Safety Guard and Instructed Claimant to Clean Machine While in Operation**

**Brock vs. Peter Dunne, in his capacity as DAL for Mark Edwards, Deceased, Case No. ED105739 (Mo. App. 2018)**

**FACTS:** On his date of injury, the claimant worked for JMC Manufacturing, and Edwards was his supervisor. The claimant worked on a lamination machine that had two sets of rollers and a safety guard, that was attached by hinges that could be lifted to provide access to the bottom of the rollers if they needed to be cleaned. The safety guard prevented objects from becoming stuck between the rollers while the machine was in operation. On April 30, 2013, Edwards spotted glue on one of the bottom rollers and removed the safety guard while the machine was still operating. The claimant testified that Edwards told him to use a wet rag to squeeze water onto the roller while simultaneously using a brush underneath the roller to scrape the glue off of it. He testified that Edwards did not give him any specific instructions to accomplish the task and was standing immediately next to him while he completed this task with the machine running. While squeezing water onto the roller, the rag became caught in the pinch point between the bottom rollers and pulled the rag into the rollers along with the claimant's thumb. This injury occurred after the 2012 amendment to workers' compensation statute regarding co-employee liability. The claimant filed a suit for negligence in Circuit Court against Edwards, and a jury returned a verdict finding that Edwards was partially at fault for the injury and awarding

damages.

On appeal, the Court noted the 2012 amendment to workers' compensation statute, which states that any employee shall not be liable for any injury for which compensation is recoverable under workers' compensation law, unless the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. The Court also noted prior decisions that held that employers have a nondelegable duty to provide a safe workplace, which is limited to injuries that are reasonably foreseeable, and a co-employee is only personally liable if the co-employee breached a duty that was separate and distinct from the employer's duty. Therefore, the claimant had to show that Edwards owed a duty of care that was separate and distinct from the employer's nondelegable duty *and* that Edwards engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.

**HOLDING**: The Court held that Edwards breached a duty of care that was separate and distinct from the employer's nondelegable duties because his actions were not reasonably foreseeable by the employer, because he violated many safety rules, instructions, and warnings against removing the safety guard. Edwards also created a hazardous condition by removing the guard and instructing the claimant to clean the machine while it was still running, and that affirmative negligent act created an additional danger that would not otherwise have been present in the workplace. Edwards did not have to intend to injure the claimant for his actions to be purposeful and affirmative under the statute. It was enough that he intentionally removed the guard and directed the claimant to clean the machine while it was in operation. Therefore, the Court affirmed the Circuit Court's judgement.

**Injury Sustained While Playing Volleyball on Unpaid Lunch Break Not Compensable**

**Wilkerson vs. CMMG, Inc., Injury No. 13-104108**

The claimant worked for the employer and had an unpaid lunch break during which he was allowed to leave the premises. There was a volleyball court on the employer's premises, and employees often played volleyball and may have been encouraged by the employer to play volleyball during the lunch hour. On May 23, 2013, the claimant was playing volleyball during his unpaid lunch break and sustained an injury to his right hand when he attempted to block a spike.

At a Hearing, the ALJ found the claimant's injury was not compensable because he sustained the injury while participating in a recreational activity that was also the prevailing cause of his injury. The ALJ noted that the claimant's lunch break was unpaid, no employees were ever directly ordered to participate in the volleyball games, and there was no showing that the injury occurred due to an unsafe condition on the employer's premises. Therefore, the claimant forfeited any benefits under workers' compensation for injuries sustained as a result of his participation in the volleyball game. On appeal, the Commission affirmed the ALJ's decision and Award.

**Claimant Not Injured in Course and Scope Because She Was Equally Exposed to Hazzard or Risk of Walking on an Even Paved Surface Outside of Work and Had History of Falls Due to Weakness in Left Lower Extremity**

**Wall vs. Bass Pro Outdoor World LLC, Injury No. 15-046929**

On July 1, 2015, the claimant, a 66-year-old employee of Bass Pro, was walking down the main aisle of the fishing department on an even, paved surface while pushing a shopping cart when she stepped to the right of the cart, shifted her weight onto her left foot, fell, and injured her right shoulder. The claimant had a history of polio to her left foot and leg in 1955 and a left ankle fusion in 1993. She also fell twice on a camping trip, one month prior to her alleged work injury, after which she had pain in her shoulder. Following her alleged work injury, the claimant gave three separate statements, wherein she advised there was nothing about the floor that caused her to fall, and she "just fell." There was also a co-worker who was walking directly behind her at the time of her injury who testified there was nothing the claimant could have tripped over.

At a hearing, the ALJ found that the claimant had not sustained an injury in the course and scope of her employment, because the hazard or risk of her injury was walking on a dry, flat concrete floor, which was an activity that she performed regularly in her non-employment life, and there was nothing particular about the location of the fall that was unique to her work that created a unique exposure to that risk. The ALJ noted that the claimant testified she regularly walked on identical flooring while shopping outside of work. The ALJ also noted that the claimant had a history of frequent falls due to weakness in her left lower extremity due to her childhood polio and prior left ankle fusion. Therefore, the injury was not compensable, and no benefits were awarded. On appeal, the Commission affirmed the ALJ's decision and Award.

**Claimant Injured in Course and Scope When Two-Wheel Cart Carrying Personal Items to Work Became Stuck and Caused Claimant to Fall Because Not Equally Exposed to Risk of Cart Becoming Stuck in Busy Entryway Outside of Employment**

**McDowell vs. St. Luke's Hospital of Kanas City, Injury No. 16-051794**

On July 13, 2016, the claimant was pulling a two-wheeled cart behind her, which contained her purse, lunch, medicine, and paperwork related to work. The claimant began using this cart in 2013 following a personal hip replacement, when the cart was suggested by her supervisor to help her carry items to and from work while using a cane. She denied using the cart for anything besides travelling to and from work. On her date of injury, the claimant was exiting the parking garage that was owned and controlled by the employer. Due to some congestion, she moved to the right of the path to allow other people to pass, at which time the wheel of her cart became stuck in the doorframe and caused her to fall to the ground. She sustained a left wrist distal radius fracture, and Dr. Langford performed an ORIF on July 18, 2016. Medical experts for both parties agreed that the claimant's fall was the prevailing factor in causing her fracture. However, the employer argued that the claimant was not injured in the course and scope of her employment because the risk source of her injury was the cart that she used to transport personal items to and

from work.

At a Hearing, the ALJ found that the risk of injury caused by the cart was work-related because the claimant only used it to haul materials to and from work, and the personal items she transported, such as her lunch and medications, were necessary for her to successfully complete her work. The ALJ also noted that another risk of injury was congestion in the walkway at the exit to the parking garage, which the claimant commonly encountered due to shift changes around the time that she began work, which would also be a work-related risk. Therefore, the employer was ordered to pay PPD, past medical expenses, future medical referable to hardware removal, and TTD. On appeal, the Commission affirmed the ALJ's decision and Award.

**Claim Not Compensable Because Claimant Failed to Establish That He Was Working For An "Employer" Subject to Missouri Workers' Compensation Law**

**Mealer vs. Russ Jackson Transportation and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 13-085074**

The claimant worked as a driver for the employer and sustained an injury on October 25, 2013, when three front teeth were broken at the gumline. The claimant was prescribed partial dentures, and he was subsequently referred for an implant consultation. During the course of his treatment, the claimant requested that treatment be provided by the employer, but the employer refused because it did not carry workers' compensation insurance because it had less than five employees. The claimant filed a Claim, which was not answered, and at a Hearing before an ALJ, the claimant appeared, but no one appeared on behalf of the employer.

At the Hearing, the ALJ did not award any benefits. The ALJ found that the claimant did sustain an injury by accident, but he failed to present any evidence regarding how many employees worked for the company on his date of injury. The ALJ also found that the claimant failed to identify the medical bills as being related to treatment for his teeth that was related back to the date of injury or that he was at MMI, and therefore, an Award could not be made for PPD, past medical, or future medical.

The claimant appealed, and the Commission affirmed the ALJ's decision and Award. The Commission concluded the claimant was not working for an "employer" subject to Missouri Workers' Compensation Law. The claimant failed to present any evidence at the Hearing that would support a factual finding that the employer had five or more employees on the date of injury, that the employer made an election to become subject to the provisions of Missouri Workers' Compensation Law, or that the employer was engaged in the construction industry as of the claimant's date of injury. Therefore, the Commission found that an employment relationship subject to Missouri Workers' Compensation Law was not established, and although the employer failed to file an Answer to the Claim, lack of subject matter jurisdiction cannot be waived by default.

**Claimant was Independent Contractor on Date of Injury Because Used His Tools and**

**Work Was of Limited Duration and Outside Scope of Employer's Regular Course of Business**

**Densmore vs. Barnes Industrial Group, Inc., Injury No. 11-076364**

The claimant was discussing an employment relationship with the employer, wherein he was to help start a new division of the employer's company involving a new service area. The employer would supply all of the necessary tools for the projects and secure the work he was to do, and the claimant was to be an employee as opposed to an independent contractor. The claimant signed an employment contract on July 6, 2011. However, he made additional demands on that date, and the employer advised it would consider his demands and get back with him. The employer did not sign the contract, and it subsequently decided not to hire the claimant or open the new division. However, prior to coming to this decision, on July 16, 2011, the claimant was working a job for the employer where the claimant used his own tools because the employer had not yet purchased the necessary equipment to do this type of work. While installing a bin, the claimant's left middle finger was smashed between two pieces of steel and was partially amputated. The claimant filed a Claim for Compensation against the employer, and the employer argued that it was not the claimant's employer under workers' compensation.

At a hearing, the claimant argued that he was already an employee on his date of injury because he had discussed the employment relationship with the employer and had signed the contract. The employer argued he was not an employee because it had not agreed to the additional demands he made, and in any event, the claimant was working as an independent contractor on his date of injury because he provided the service truck and the tools to perform the work on that job. Both parties admitted this type of project was not performed as part of the employer's regular course of business. The claimant did receive payment for four hours of work, but no taxes were withheld.

The ALJ found that the claimant was operating as an independent contractor on his date of injury because the job was of limited duration, the employer did not control the claimant's work because it had no experience performing that type of work, the employer did not furnish any of the equipment needed for the job because it did not yet own any, and the employer paid the claimant a premium for use of his equipment. Therefore, the employer was not liable for benefits. On appeal, the Commission affirmed the ALJ's decision and Award, and it noted that even if the claimant and employer had entered into an employment agreement, the work the claimant was performing on his date of injury was not a part of that agreement.

**Appellate Court Lacked Authority to Review Temporary Award from Commission Awarding TTD Benefits**

**AB Electrical, Inc. vs. Franklin, Case No. WD81156 (Mo. App. 2018)**

**FACTS**: The claimant was injured on December 7, 2015 when he fell off of scaffolding. After a Hearing on the issue of TTD, the ALJ declined to award any benefits and found that the

claimant had forfeited his right to the same because his use of marijuana was the proximate cause of his injury. The Commission subsequently reversed the ALJ's decision and Award and issued a temporary Award of TTD benefits and past medical expenses. However, the Award was deemed "temporary or partial", and the Commission left the matter open until a final Award was issued. The employer appealed the Commission's decision to the Court of Appeals.

**HOLDING**: The Court noted that it must have express statutory authorization to review workers' compensation cases, and under Workers' Compensation Law, it is only allowed to review final Awards. The Court noted a previously recognized exception to that general rule, wherein Courts have previously found that they had authority to review temporary Awards where the employer/insurer denied any liability for the injuries. This exception was based on the fact that Appellate Courts have authority to review temporary or partial Awards of PTD benefits and a Missouri regulation finding that the Commission has authority to review Awards where benefits were granted but the employer/insurer disputed that they had liability for the injury. The Court noted that this exception was created under liberal construction of the Workers' Compensation Law, and after the 2005 amendments, all workers' compensation statutes must be strictly construed. The Court held that strict construction eliminated the prior exception. Therefore, Appellate Courts do not have authority to review temporary or partial Awards that are not for PTD, *even if* the employer/insurer denied any liability for the injury. Notably, the Court did not address the merits of the case, and this matter could still be appealed after the Commission renders a final Award in this matter.

**No Award of Prejudgment Interest Permitted Under Strict Construction of Missouri Statute Governing Medical Fee Disputes**

**<u>Goss vs. St. Luke's Hospital</u>, Injury No. 14-01645**

The claimant underwent a brain MRI at St. Luke's Hospital on March 20, 2015 in the context of a workers' compensation injury. The provider filed an Application for Payment of Additional Reimbursement with the Division on May 25, 2017. On June 30, 2017, the Division mailed a Notice of Evidentiary Hearing on the Application to the provider and employer/insurer. The employer/insurer did not file an Answer to the Application or attend the hearing. The ALJ issued a default judgment against the employer/insurer finding them responsible for unpaid medical fees as well as prejudgment interest on those fees in the amount of $480.60, and the ALJ also awarded attorney's costs and fees, finding that the employer/insurer defended this matter without reasonable grounds by failing to respond to or Answer the Application or appear for the hearing.

The employer/insurer appealed the ALJ's decision and Award arguing that the insurer was not provided notice of the hearing pursuant to statue, and award of prejudgment interest was against strict construction of Missouri statute. The Commission modified the ALJ's decision and Award with respect to prejudgment interest and found that under strict construction, statute did not provide for the award of prejudgment interest in favor of the medical provider in the context of an Application for Payment of Additional Reimbursement of Medical Fees. It specifically found

that a prior Court decision that authorized prejudgment interest in favor of employees with respect to unpaid medical fees, did not apply to medical fee disputes and the question of prejudgment interest on unpaid medical fees to be made to a medical provider.

**Employer Not Prejudiced By Lack of Timely Written Notice Because It Had Actual Notice of Accident and Associated Injury, and Claimant Did Not Have to Identify All Specific Body Parts Injured When Providing Actual Notice**

**Harley Davidson Motor Company, Inc. vs. Jones and Treasurer of the State of Missouri Custodian of Second Injury Fund, Case No. WD81155 (Mo. App. 2018)**

**FACTS**: The claimant sustained an injury while working for the employer on July 13, 2011 while using a torque gun that jerked his body. On his date of injury, he reported an injury to his right elbow and was directed for medical care by the employer. He subsequently developed back pain that worsened over time. He mentioned his back symptoms to the treating doctor in September 2011 and was referred to Dr. Drisko, who related his back complaints back to the work accident. The claimant then contacted the employer to notify them of Dr. Drisko's causation opinion. The employer accepted the right elbow injury but denied the back injury, and the claimant proceeded to treat on his own.

The claimant filed a claim for the back injury, and after a Hearing, the ALJ found both the right elbow and low back injury compensable. The employer/insurer appealed, and the Commission affirmed the ALJ's decision and Award with a supplement opinion. The employer/insurer appealed the Commission's decision and argued that the Commission erred because the claimant failed to provide timely written notice of the specific injury to his lower back.

**HOLDING**: The Court affirmed the Commission's decision and Award. It reasoned that the claimant initially had the burden to prove the employer/insurer were not prejudiced by lack of timely written notice of the back injury. When he showed that the employer had actual notice of the accident and the elbow injury on the date of injury, the burden shifted to the employer/insurer to show that it was prejudiced. However, the employer/insurer did not present any evidence showing that it was unable to timely investigate the accident or that lack of written notice cause an exacerbation of the injury. The Court held that the employer/insurer was not prejudiced because it had actual notice of the elbow injury, and the claimant did not need to identify all of the specific body parts that were injured in the accident.

**Employer Responsible for PTD after Psychological Injury. Employer Not Prejudiced by Lack of Written Notice, Because Employer had Actual Notice of Accident and Injury**

**Fronek vs. Production Delivery Services, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 11-106035**

The claimant, a 63-year-old truck driver, was injured on April 10, 2011 when he was struck by a vehicle in a parking lot. The accident was captured on security camera footage, and there was

also a witness present, who notified the claimant's supervisor. The claimant was seen once at the hospital but did not request any additional treatment. An HR officer spoke with the claimant a few days after the accident and filed a report. The claimant developed headaches as well as behavioral changes including a fear of cars and driving, irritability, and forgetfulness. He continued to work without additional medical care from April to October 2011. In October, he was referred to a neurologist, who diagnosed post-concussion syndrome and PTSD and recommended psychiatric care. The claimant then reported a work injury and submitted bills for his medical treatment. The employer/insurer admitted it had actual notice of the claimant's accident and injury, but it argued that it did not have written notice of a *work* injury because the claimant never said he was "on duty" at the time of the accident, and it also argued it did not have written notice of a head injury within 30 days of the date of injury. The claimant continued to work, but he had anger and disciplinary problems, and he was ultimately terminated. He has not worked since then.

The employer/insurer did provide medical treatment after the claimant's termination. The authorized providers diagnosed post-concussion syndrome and headaches, PTSD, major depression, and balance, memory, and sleep problems. One of those providers, Dr. Ferguson, opined the claimant could not return to working as a driver due to his PTSD, and he would need ongoing counseling. Mr. Weimholt evaluated the claimant at his attorney's request and opined he was unemployable due to his sleep and memory problems and behavioral issues that were related back to his work injury as well as his limited education.

Following a Hearing, the ALJ found there was no prejudice for lack of written notice because the employer had actual notice of the accident and injury, and the claimant notified them of his psychological injury within days of his diagnosis in October. The ALJ also held that the claimant was PTD as a result of his psychological injuries alone and found the employer/insurer responsible for the same.

On appeal, the Commission affirmed the ALJ's decision and Award. The Commission held that the employer had actual notice of the claimant's accident and injury and was not prejudiced by lack of written notice. The Commission reasoned that statute requires the employer be notified regarding the time, place, and nature of an injury, but a claimant is not required to provide his employer with a medical diagnosis or keep the employer apprised of symptoms and/or opinions regarding the etiology of said symptoms.

**Employer Responsible for PTD After Claimant Developed CRPS Following Surgery for Right Biceps Tendon Tear**

**<u>Odom vs. Customer Engineering Services, LLC</u>, Injury No. 12-046620**

The claimant, a 56-year-old with an Associate's Degree in Photo Production Technology and a history of working as a field support technician for photo labs, sustained an injury on June 21, 2012 while working for the employer. He was working with two other people to move a large ink jet photo printer when his right elbow popped. He treated with Dr. Roeder, who diagnosed

tendinopathy and a partial right distal biceps tendon tear and performed right elbow surgery. The doctor subsequently diagnosed CRPS of the right upper extremity and referred the claimant for ganglion blocks. The claimant also treated with Dr. Lennard, who placed him at MMI on August 26, 2013. He proceeded to treat on his own and underwent pain management. The claimant did also have pre-existing disabilities, including a left knee injury for which he underwent surgery in 2010.

Dr. Paul evaluated the claimant at his attorney's request and found him PTD as a result of the work injury alone due to CRPS and recommended permanent restrictions of lifting no more than five pounds with the right hand on occasion. Dr. Lennard recommended permanent restrictions of no repetitive use or lifting over five pounds with the right arm due to the work injury alone, and the doctor noted that the claimant was taking Fentanyl for CRPS, which would cause drowsiness and lethargy. Mr. Eldred, a vocational rehabilitation consultant, found the claimant unemployable as a result of the work injury alone due to his constant pain and narcotic pain medications. Ms. Brokover evaluated the claimant on behalf of the employer/insurer and opined that based on the work restrictions of Dr. Paul, the claimant was unemployable in the open labor market. The claimant testified that he had continued chronic pain and instability in his knee and unpredictable pain that give him good days and bad days, and when taking his narcotic pain medication, he was unable to drive and had difficulty maintaining a train of thought.

After a Hearing, the ALJ found the employer/insurer responsible for ongoing pain management for CRPS due to the work accident. The ALJ found the claimant was PTD as a result of the work injury alone and noted he had unpredictable chronic pain that required opioid medication that caused cognitive deficits and had permanent restrictions from Dr. Lennard and Dr. Roeder. On appeal, the Commission affirmed the ALJ's decision and Award.