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**MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE**

**July 2016 - September 2016**

**Commission Overruled ALJ's Decision That Work Injury was Prevailing Factor Causing Injury, Because Claimant's Expert's Opinion was Based on Erroneous Information**

**Cole v. Alan Wire Company, Inc., Injury No. 14-069626**

The claimant worked as an Order-Puller for the employer, and on September 15, 2014, after unloading a truck with the forklift, he parked it and stepped down to the ground from a height of about 15-20 inches. When he took a step, he heard a pop in his right knee which was accompanied by immediate pain and swelling. The claimant did have previous instability in his right knee and experienced buckling for several years which caused some unexpected falls when his right knee gave out. He also experienced popping in his right knee prior his work accident. The employer sent the claimant to Dr. Marsh, who diagnosed a pre-existing right anterior medial line nodule and released him from care. He then treated on his own with Dr. Sanders, who performed arthroscopic surgery to excise meniscal cysts. During the surgery, the doctor also found an intact but stranding and thinning ACL.

At a hearing, Dr. Woiteshek and Dr. Sanders testified on behalf of the claimant. Dr. Woiteshek opined that stepping off the forklift was the prevailing factor causing traumatic internal derangement of the right knee but the cysts found by Dr. Sanders pre-existed the work accident. Dr. Sanders opined that the cysts were the cause of the claimant's current condition and *could have* resulted from trauma sustained at the work accident. Dr. Choi testified on behalf of the employer that the claimant's condition in his right knee was pre-existing and the thinning and stranding in his ACL was age appropriate and not work related. The ALJ found the injury compensable and ordered the employer to provide additional medical treatment and pay TTD benefits.

On appeal, the Commission reversed the ALJ's decision. It found that Dr. Woiteshek's opinion was based on erroneous information because he assumed the claimant did not suffer from any pre-existing instability or buckling of his right knee prior to the work injury and testified that surgery was reasonably required to cure and relieve the effects of the injury even though he opined that the cysts removed by Dr. Sanders were pre-existing. Therefore, the Commission found the medical testimony of Dr. Choi more persuasive and found that the work accident was not the prevailing factor causing the claimant's medical condition and right knee injury.

**Claimant's Injury Compensable Because Risk Source of Injury, Colliding with a Maintenance Worker's Cart as it Was Pushed out of a Darkened Elevator, Was One to Which She Was Not Equally Exposed in her Normal Non-employment Life**

**Jensen-Price v. Encompass Medical Group and Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. WD79526 (Mo. App. 2016)**

**FACTS:** 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 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, and because the claimant was going home from work at the time of her injury. On appeal, the Commission held that because the claimant was carrying her laptop in order to work from home, she was essentially going from one work site to another and was performing a work activity for her employer at the time of the accident. Nevertheless, the Commission affirmed the ALJ's decision to deny benefits finding that the record was too vague to determine that the claimant's employment exposed her to an increased risk of injury than in her normal non-employment life.

**HOLDING:** The claimant appealed, and the Court of Appeals reversed and remanded, finding that the facts were sufficient to show that work exposed the claimant to an increased risk of colliding with a maintenance worker's cart as it was pushed out of a darkened elevator. The Court noted that because the claimant worked on the fourth floor of a commercial office building where maintenance workers use the elevator to transport their carts, she did face an increased risk of injury due to her employment.

**Injury Sustained in Motor Vehicle Accident While Driving Company Vehicle to Office Found Compensable**

**Bain v. April Healthcare Group, Inc., Injury No. 15-030879**

The claimant worked as a technician, which required him to drive a company van to make deliveries and service calls. He was on call the night before his date of injury, which required him to drive the employer's van home, keep an employer issued cell phone on his person at all times, and answer or return calls within ten minutes. He was not allowed to use the company van for any personal errands while on call, and he was to remain on call until his shift began at 8:00 a.m. the next morning. He did not receive any service calls while on call that night or the next morning, which was his date of injury. That morning, the claimant drove the company van to work to begin his normal shift. Before arriving at work, he stopped at a red light and was rear ended by another vehicle, at which time he sustained multiple injuries.

At a hearing, the ALJ found that the claimant's injury was not compensable because it did not arise out of or in the course and scope of his employment. Even though he was on call at the time of the injury, he was not responding to a call or performing any work to benefit the employer. He was merely traveling to work from home.

The claimant appealed, and the Commission reversed the ALJ's decision. The employer first argued that the claimant was not in the course and scope of employment because he was traveling from home to the employer's principal place of business. The Commission rejected this argument, noting that the employer failed to prove which of its eight locations was its principal place of business. It held that merely showing he was driving from home to his normal place of work was not enough to meet the employer's burden of proof. The employer next argued that the claimant's injuries arose out of a hazard or risk to which he was equally exposed in his normal non-employment life. The Commission also rejected this argument, finding that the risk of injury was being involved in a motor vehicle accident while driving the company van, which was one of the claimant's primary job duties. Also, the claimant was supposed to drive the company van to work that morning while he was still on call. Therefore, the Commission reversed the ALJ's decision and found that the employer was responsible for TTD benefits and medical treatment.

### **Injury Sustained When Claimant Wrecked His Motorcycle on Employer's Premises Not Compensable because Riding Motorcycles Unrelated to Job Duties**

#### **Wood v. Gann Asphalt, Inc., Injury No. 05-096794**

During his shift, the claimant maneuvered his personal motorcycle behind a line of vehicles in the employer's parking lot in order to power wash it. As he turned it, it skidded out from underneath him, at which time he sustained an injury to his left wrist. His testimony at his deposition and at the hearing was inconsistent with respect to why he was moving his motorcycle and exactly how the wreck occurred.

At a hearing, the ALJ found that the claimant's accident did not arise out of or in the course and scope of his employment, because moving his motorcycle had nothing to do with his work duties. Also, in light of the fact that a co-worker told him that he could power wash his bike during work hours as long as the company owners did not catch him, he clearly knew or should have known that the employer prohibited personal tasks during work. Therefore, his injury was not compensable.

The claimant appealed, and the Commission affirmed, noting that the risk of injury was wrecking his motorcycle while turning it to be washed, which is a risk that was not related to his employment. Also, there was no evidence that his employment required him to operate a motorcycle or exposed him to greater risk of wrecking a motorcycle than in his normal non-employment life. Therefore, the claimant's injury was not compensable.

### **Claimant's Death Caused by Injuries Sustained in Motor Vehicle Accident While Driving Company Vehicle Compensable, Because Claimant Frequently Drove Company Vehicle to Make Sales Calls and Performed Work Over the Phone While Driving**

**Campbell (deceased) v. Trees Unlimited, Inc., Case No. SD34090 (Mo. App. 2016)**

**FACTS:** The claimant's job duties included working as a salesperson. He frequently traveled while making sales calls, visiting potential customers and competitors, and making work calls. When traveling for work, he would drive an employer-owned vehicle. He kept regular work hours, and it was typical for him to spend the morning traveling for work and then come into the office in the afternoon. Coworkers testified it was uncommon for him to conduct personal business during the work day or take time off without first informing the employer by phone. At noon on the date of the accident, the claimant was involved in a fatal single motor vehicle accident. The accident occurred around 7 miles from the employer's place of business on a route that the claimant frequently used to travel to the office after visiting customers in Neosho. His phone records showed that he made calls to a potential customer that morning. Testimony showed he had not called the employer to inform them that he would be pursuing personal business that day.

At a hearing, the ALJ held that the claimant's wife met her burden of proof to show that the claimant was in the course and scope of his employment at the time of the motor vehicle accident and awarded death benefits and funeral expenses to the deceased claimant's spouse. The Commission affirmed the ALJ's decision and Award.

**HOLDING:** The employer appealed, arguing that the Commission erred by finding that the claimant was within the course and scope of employment at the time of his motor vehicle accident, because the claimant had not performed work that morning and "was still in transit between his home and the principal place of employment." The Court found that the evidence supported the Commission's conclusion that the claimant was where he "was reasonably supposed to be" at the time of the accident in order to conduct his normal job duties for the employer. It also concluded that it was reasonable for the Commission conclude from the evidence that he had not abandoned his job duties in order to pursue a personal errand at the time of the accident. Therefore, the Court affirmed the Commission's decision and Award.

**Fund Responsible for PTD Benefits Because Court Found Claimant's Expert Opinion Based on Subjective Findings More Credible than Fund's Expert Opinion Based on Objective Findings. Opinion Based on Subjective Findings More Credible Because Objective Test Performed Did Not Measure Claimant's Disability.**

**Hall v. Missouri State Treasurer as Custodian of the Second Injury Fund, Case No. SD34140 (Mo. App. 2016)**

**FACTS:** The claimant worked for the employer for 36 years around loud machinery, which caused her to develop tinnitus, which made it difficult for her to understand conversation. She also had pre-existing disabilities to her heart, bilateral knees, and body. The claimant filed a claim against the Fund for PTD benefits based on the combination of her pre-existing conditions and her tinnitus.

At a hearing, Dr. Koprivica testified for the claimant and opined that she had 12.5% PPD due to her primary injury referable to abnormal audiograms and subjective reports of buzzing in her ears.

Dr. Parmet testified on behalf of the Fund that the claimant had no permanent disability due to the primary injury, based on normal SRTT test results. Dr. Parmet did note that the SRTT test does not measure ability to understand conversation. The Fund argued that it was not responsible for PTD benefits because the claimant sustained no permanent disability as a result of her primary injury. The ALJ disagreed and found the Fund responsible for PTD benefits. The Commission affirmed.

**HOLDING:** The Fund appealed arguing that the Commission should have credited Dr. Parmet's testimony over Dr. Koprivica's testimony, because it was based on objective medical findings as opposed to subjective findings. The Court affirmed the Commission's decision, holding that the objective medical findings used by Dr. Parmet did not address the dispositive issue, which was the claimant's ability to understand speech as a result of her tinnitus. Therefore, the ALJ did not err in relying on Dr. Koprivica's testimony, and the Fund was responsible for PTD benefits.

**Claim for Psychological Injury Not Compensable Because Claimant's Expert's Opinion was Based Solely on Claimant's Subjective Complaints and Claimant's Testimony Found Not Credible**

**Bowman v. Central Missouri Aviation, Inc., and Treasurer of the State of Missouri as Custodian for the Second Injury Fund, Case No. WD79276 (Mo. App. 2016)**

**FACTS:** The claimant alleged psychiatric injury after a co-worker assaulted him at work in 2007. However, he was also the victim of a home invasion, forcible abduction, and armed robbery in 2003, which the employer's expert believed was the primary cause of his psychiatric injury. The claimant's medical expert disagreed and testified that the 2007 assault was the prevailing factor in causing the claimant's PTSD and that he was PTD as a result of that injury alone. At the hearing, the ALJ found the reports from the claimant's expert inadmissible and denied benefits.

On appeal, the Commission found the claimant's expert's reports admissible but still affirmed the ALJ's Award on other grounds. The claimant's expert Dr. Daniel administered a psychological test, but he later found the results to be invalid. Since no other psychological testing was performed, his opinion was based entirely on the claimant's subjective complaints and symptoms. The Commission found that the claimant's testimony was not credible, because of material inconsistencies between his testimony and his statements to other physicians which made him an inconsistent and unreliable witness. Therefore, the Commission found Dr. Daniel's causation opinion not credible, because it was largely based on the claimant's subjective complaints, and the claimant was not a credible witness. Therefore, the Commission held that the claimant failed to prove that the 2007 work accident was the prevailing factor causing his psychiatric condition, and the claim was not compensable.

**HOLDING:** The claimant appealed, arguing that the Commission erred by discrediting Dr. Daniel's expert opinion. The Court held that the evidence supported the Commission's finding regarding the credibility and persuasiveness of the claimant's testimony and Dr. Daniel's medical opinion. Therefore, the Commission did not error by finding that the claimant failed to meet his burden of proof, and the Court affirmed the Commission's decision.

## **Employer Responsible for Future Medical Treatment, Despite the Fact That Claimant Was Receiving the Same Treatment He Was Receiving Prior to the Work Injury**

### **Davis v. Enerfab, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 11-105117**

In 2011, the fifty-three year old claimant was in an elevator when it dropped 40-50 feet, at which time he sustained injuries to his left hip and low back. Dr. Randolph assessed 22% PPD of the body referable to the lumbar spine (5% due to the work accident and 17% pre-existing) as well as 2% PPD of the left hip.

The claimant had several pre-existing conditions. He injured his lower back in 2002 and was diagnosed with a herniated disc at L5-S1, for which he underwent a laminotomy and microdiscectomy, and settled for 25% of the body. He then re-injured his lower back while working in his backyard and underwent another surgery in 2003. In 2006, he was diagnosed with a new disc herniation at L3-4, recurrent disc herniation at L5-S1, and failed back syndrome. He also had pre-existing diagnoses of post-operative epidural fibrosis, an annular tear at L4-5, retrolisthesis at L3-4, and chronic cervical syndrome. He continued to take opioids for his back pain up to his work injury. After his 2011 work injury, the claimant continued to take opioids for back pain but in greater amounts.

The claimant's expert Dr. Volarich opined that he was PTD due to a combination of his pre-existing and primary injuries and he would require future medical in the form of pain medication and physical therapy due to his primary injury. At a hearing, the ALJ found that the claimant was PTD due to a combination of his pre-existing and primary injuries and was entitled to future medical treatment from the employer/insurer.

The employer appealed to the Commission arguing that the claimant was not entitled to future medical because the only medical care he has received since the hearing is what he was already receiving for his pre-existing conditions. The Commission affirmed the ALJ's decision, finding that just because a claimant has not yet sought treatment beyond what he was already receiving before his work injury does not mean that he will not require such treatment in the future. It also noted that the fact that treatment needed for a work injury may also benefit a non-compensable or pre-existing injury is irrelevant.

## **Medical Provider's Application for Payment of Additional Reimbursement of Medical Fees was Untimely because It was Filed More Than One Year After the First Notice of Dispute of the Medical Charges**

### **Rathgeber v. Phelps County Regional Medical Center, Injury No. 12-003925, Medical Fee No. 12-01320**

The claimant was an employee of Phelps County Regional Medical Center when she sustained an injury and received authorized treatment at St. Louis Spine & Orthopedic Surgery Center

(Provider) on August 8, 2013. The Insurer mailed an EOB and a check in partial payment of the Provider's medical bill, which the Provider received and deposited on September 20, 2013. Over fourteen months later, the Provider filed an Application for Payment of Additional Reimbursement of Medical Fees with the Division.

The ALJ denied the Provider's Application for Payment, finding that it was barred by the statute of limitations under §287.140.4. Since the date of service in question occurred after July 1, 2013, the Provider had one year from the first notice of dispute of the medical charge in which to file its Application for Payment. The first notice of dispute occurred when the Provider received the partial payment check and EOB on September 20, 2013. Since the Provider did not file its Application for Payment within one year after receiving the check and EOB, its Application for Payment was untimely and barred by the statute of limitations. The Commission affirmed.

**Twenty-Nine Year Old Claimant Found PTD from Last Injury Alone, Despite Pre-existing Disabilities, Because Primary Injury Makes it Necessary for Him to Lie Down Three to Four Times Per Day**

**Brumble v. Missouri Department of Corrections and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 12-101047**

The claimant was a 29 year old employee of the Department of Corrections. On December 6, 2012, he was lifting a "cambro" container during breakfast when he felt a pop or pull in his right hip. Dr. Taylor diagnosed an L5-S1 annular tear and performed surgery in May of 2013. The claimant also had pre-existing injuries. On February 20, 2011, he hit his right elbow on a food cart, after which he had continuing pain in his elbow and stiffness. On January 24, 2012, he tripped on a doorframe and injured his left knee, after which he had weakness in the same as well as pain. It appears that he received minimal treatment and did not undergo surgery for these conditions. He testified that neither condition interfered with his ability to perform his job duties.

At a hearing, the claimant alleged to be permanently and totally disabled and testified that he is no longer able to sit or stand for very long and has to lie down during the day to relieve his back pain.

Dr. Taylor, the treating physician, opined the claimant could work at the medium demand level, noting that he had been lifting up to 50 pounds at physical therapy, bending down, butchering roosters, chopping wood with a log splitter and cutting logs with a chainsaw. The claimant's expert Dr. Volarich opined that he was permanently and totally disabled as a result of the December 6, 2012 injury alone due to his need to lie down during the day. Vocational counselor Mr. Eldred noted that the claimant's pre-existing disabilities were not sufficient to prevent him from working prior to his December 6, 2012 injury and noted that he now needs to lie down four times a day, which would make him unemployable in the open labor market.

The ALJ found that the claimant was permanently and totally disabled as a result of his December 6, 2012 injury alone, in light of his need to recline during the day to alleviate his back pain. Since he was PTD as a result of the last injury alone, the Fund was not liable for PTD benefits. On appeal, the Commission affirmed the ALJ's decision.

## **Court Affirmed Commission's Finding that Claimant PTD as Result of Last Injury Alone**

### **Palmer v. City of Columbia and Treasurer of the State of Missouri as Custodian of the Second Injury Fund, Case No. WD79225 (Mo. App. 2016)**

**FACTS:** The claimant was a 61 year old man with a low IQ who received a high school diploma before working as a trash collector for 38 years. His left shoulder was crushed in 2011 when a trash truck pinned it against a pole, requiring surgery. He filed a claim for PTD benefits against the employer and the Fund.

After testimony from the claimant and expert witnesses for both sides, the ALJ found the claimant PTD as a result of his left shoulder injury alone, reasoning that he was an older worker with a low IQ and no transferable skills or possibility of retraining. Therefore, the ALJ ordered the employer to pay PTD benefits beginning after the original MMI date and all future medical. His claim against the Fund was denied in full. On appeal by the Employer, the Commission affirmed the ALJ's decision.

**HOLDING:** The employer appealed, arguing that the Commission's finding that the claimant was PTD due to the last injury alone was not supported by competent and substantial evidence. The Court found that the Commission was free to credit the opinions of the claimant's experts and reject the contrary medical opinions of the employer's experts. After reviewing the evidence on the record, the Court also found that the Commission's decision was based on substantial and competent evidence on the record and affirmed the Commission's decision.

## **Employer Responsible for PTD Benefits After Pain from Primary Injury Caused Need to Frequently Lie Down Throughout the Day**

### **Hunt v. Hendrick Automotive Group/Superior Buick Cadillac and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 11-014882**

The fifty year old claimant was walking from one area of the employer's premises to another when some co-employees stuck a broom handle between his legs, causing him to fall and twist his leg. He treated with Dr. Dugan and Dr. Gurba, who performed a total of six left knee surgeries which provided no relief. Over time the claimant developed complaints in his left hip and low back due to his left knee injury and also injured his right knee when he fell down after his left knee locked. He was subsequently released from care in 2014 and referred to pain management. He also had a pre-existing, non-work related left knee injury and underwent surgery in 2008. He did not miss any time from work as a result of his 2008 left knee injury, had no difficulty obtaining employment, and testified that his personal hobbies and activities were not restricted in any way by this injury.

At a hearing, the claimant testified that he now uses a walker and continues to have pain in his low back, left hip, and bilateral knees, which prevents him from sleeping well at night. As a result, he



must lie down during the day to sleep. He also testified that he had been seeking employment but has not worked since his injury.

The claimant's expert, Dr. Stuckmeyer recommended restrictions of no prolonged standing or walking and that he be allowed to lie down frequently throughout the day and opined that if the claimant were PTD it was due to the primary injury alone. Another claimant's expert, Dr. Abrams diagnosed chronic pain syndrome and also recommended that he be allowed to frequently lie down throughout the day. The treating doctor, Dr. Gurba provided permanent restrictions of sedentary work only and alternate sitting and standing as needed. Mr. Dreiling performed a vocational evaluation and found the claimant to be unemployable due to his need to alternate between sitting and standing and lie down throughout the day. Mr. Cordray also testified that if Dr. Stuckmeyer's restrictions required him to frequently lie down throughout the day, then he would be PTD.

The ALJ found that the claimant was PTD as a result of his last injury alone and noted that all expert testimony as well as that of the claimant indicate that his prior 2008 left knee injury did not prevent him from working and was not a hindrance or obstacle to employment. Therefore, the ALJ found that the employer was responsible for PTD benefits and future medical care. The employer appealed, and the Commission affirmed the ALJ's decision.

### **Employer Responsible for PTD Benefits After Claimant Could Only Perform Right-Handed Work Following Left Shoulder Injury**

#### **Payton v. Maryville RII School District and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 14-019253**

On March 10, 2014, the claimant, a fifty-eight year old man with a high school education, helped a co-worker lift a soccer goal that weighed 200 pounds, at which time he heard a loud pop and felt excruciating pain in his left shoulder. He treated on his own with Dr. Atteberry, who diagnosed a rotator cuff tear and performed left shoulder surgery on May 12, 2014. He filed a claim against the employer for PTD benefits.

The claimant testified that his left shoulder pain interrupts his sleep and he now has to lie down or recline multiple times during the day and sometimes has difficulty concentrating due to his sleep deprivation. Dr. Koprivica testified on behalf of the claimant that he did not have any permanent disability to his left shoulder prior to his 2014 injury. The doctor also placed a permanent work restriction on the claimant due to the 2014 injury alone, including the need to recline and take naps on an unpredictable basis during the work day due to sleep interruption due to his pain. The doctor opined that he was unemployable based on these restrictions. Vocational expert Mr. Dreiling agreed that the claimant was unemployable due to the 2014 work accident alone because of his need to recline during the day. Another vocational expert, Mr. Cordray agreed that relying on Dr. Koprivica's restrictions, the claimant would be considered unemployable in the open labor market.

At a hearing, the ALJ found the claimant's testimony and Dr. Koprivica's opinion credible. The ALJ noted that he was able to work full time without restrictions and regularly lifted 50 pounds at work prior to his 2014 work injury, and he did not have sleep interruption or need to sleep during the day prior to his 2014 work injury. Therefore, the ALJ found the claimant PTD due to the 2014 work injury alone and ordered the employer to pay PTD benefits and provide future medical treatment. On appeal, the Commission affirmed the ALJ's decision.

**Court Reversed Commission's Decision that Claimant Failed to Meet Burden of Proving the Accident was Prevailing Factor, Because Commission Ignored Plain Meaning of Dr. Koprivica's Testimony**

**Malam v. State of Missouri Department of Corrections, Case No. SC95170 (Mo. S.Ct. 2016)**

**FACTS:** The claimant, along with two co-employees, subdued a prisoner. After escorting the prisoner, the claimant went into his office to get a drink and began to spit up blood. An ambulance was called and the claimant eventually lost consciousness, which he regained one week later. The majority of the medical records stated that he fell and someone fell on top of his chest.

The treating physicians were uncertain whether the incident aggravated the claimant's pre-existing cardiac and respiratory conditions and caused the hypertensive crisis or the hypertensive crisis was a direct result of the incident alone. The employer's expert, Dr. Puricelli testified that the claimant's pre-existing health problems were the prevailing factor in causing his hypertensive crisis. The claimant's expert, Dr. Koprivica, believed that the work incident was the prevailing factor in precipitating his hypertensive crisis, as he felt that absent the work incident, it would be impossible to predict that the claimant would have developed the hypertensive crisis. At a hearing, the ALJ found for the employer based on Dr. Puricelli's testimony.

The claimant appealed, and the Commission agreed that the claimant was not entitled to benefits because he failed to prove that the incident was the prevailing factor in causing his hypertensive crisis. It found Dr. Koprivica's testimony equivocal because he testified that the incident was "the direct, proximate and prevailing factor precipitating [the claimant's] hypertensive crisis." The Commission interpreted this to mean that Dr. Koprivica believed that the altercation was both the prevailing factor *and* a triggering factor.

**HOLDING:** The claimant appealed to the Missouri Supreme Court arguing that the Commission erred by disregarding Dr. Koprivica's testimony. The Court reversed and found that the Commission was overly technical and ignored the plain meaning of Dr. Koprivica's testimony, which was that the accident was the prevailing factor causing the hypertensive crisis. Therefore, the Commission's decision was reversed and remanded.

**ALJ Not Bound by Stipulation Regarding a Pre-existing Disability When Determining Fund Liability for Pre-existing Conditions**

**Carroll v. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 12-106262**

The claimant developed right cubital tunnel syndrome on or about October 1, 2012 for which he underwent surgical intervention. He settled his claim with the employer for 17.5% PPD of the right upper extremity at the elbow.

The claimant sustained a prior injury to his left hand in 1986, which he settled with the employer for 14.57% PPD of the left hand.

Dr. Stuckmeyer testified on behalf of the claimant that he had 30% pre-existing PPD of the left hand due to his 1986 work injury. The Second Injury Fund did not provide expert medical opinion testimony providing a current rating for the 1986 work injury.

At a hearing, the ALJ found that the claimant failed to meet the minimum threshold to trigger Fund liability because he was bound to find that the claimant had 14.57% pre-existing PPD of the left hand pursuant to the 1986 settlement agreement.

The claimant appealed to the Commission, which reversed the ALJ's Award. The Commission found that although an ALJ is bound to accept the percentage of PPD agreed upon in a compromise settlement agreement with respect to a primary injury, it is not bound to accept the percentage of PPD that was agreed upon in a prior compromise settlement agreement when determining the Fund's liability with respect to pre-existing conditions. To hold otherwise would fail to take into account additional disability involving the same body part such as degeneration due to the normal aging process. Also, pursuant to statute, the minimum threshold to trigger Fund liability refers to the nature and extent of pre-existing disability as it exists on the date of the primary injury, not at the time of a prior settlement. Therefore, the Fund was liable for enhanced PPD benefits.

### **ALJ's Conclusion that Statute Requires Physician Certification to Find PTD Reversed by the Court**

#### **Treasurer of the State of Missouri v. Daryl Majors, Case No. WD79465 (Mo. App. 2016)**

**FACTS:** 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, which required surgery. 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 recommended a right total knee replacement as well as 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. The Commission reversed, finding that Statute does not require specific language as

long as the doctor otherwise confirms the extent of the claimant's diagnoses, medical conditions, and restrictions. Here, Dr. Stuckmeyer provided a diagnosis, identified permanent restrictions, and recommended a vocational evaluation, which amounted to a certification of the claimant's PTD status. Therefore, the Fund was responsible for PTD benefits.

**HOLDING:** The Fund appealed the Commission's decision, and the Court of Appeals affirmed.

**Fund Responsible for PTD Benefits Because of Pre-existing Conditions Prior to Claimant's Date of Disability for Primary Claim**

**Wickam vs. Treasurer of the State of Missouri Custodian of the Second Injury Fund, Case No. WD79188 (Mo. App. 2016)**

**FACTS:** The claimant sustained a right shoulder injury on August 17, 1999 and subsequently developed bilateral carpal tunnel syndrome, which required bilateral carpal tunnel releases in 2003.

The claimant had numerous other conditions. He sustained a right shoulder injury and underwent a total shoulder replacement in 2000. He also presented testimony that he suffered from ADHD and a personality disorder. He underwent a tracheostomy in 2003 for sleep apnea followed by a stoma revision in 2004. Finally, he presented evidence of bilateral knee disability due to a knee problem he had for 20-30 years. Dr. Thomas diagnosed retropatellar crepitation of the left knee and performed surgery on the same on February 5, 2004, along with a medial meniscectomy and debridement.

The claimant's expert Dr. Koprivica evaluated the claimant on November 1, 2001, diagnosed bilateral carpal tunnel syndrome, and recommended surgical intervention. In a later report, the doctor opined that claimant's right shoulder, psychological condition, sleep apnea, and bilateral knee conditions pre-existed his bilateral carpal tunnel syndrome and he was PTD due to a combination of his primary and pre-existing conditions. Dr. Koprivica's opinion was not contradicted by any other expert's opinion.

The Commission found that the correct date of disability for his bilateral carpal tunnel syndrome was November 1, 2001, because that was the date Dr. Koprivica recommended surgery. Therefore, it found that his bilateral knee and sleep apnea conditions did not pre-exist the primary injury and should not be considered when evaluating the Fund's liability. Because Dr. Koprivica's report included consideration of his bilateral knees and sleep apnea when finding him PTD, the Commission also declined to find that he was PTD.

**HOLDING:** Both the claimant and the Fund cross-appealed. The claimant argued that the correct dates of disability for his carpal tunnel syndrome should be September 2003 and December 2003, the dates he was no longer able to work due to his need for surgery. The Fund argued that the date of disability should be November 6, 2000, the date he was first diagnosed with carpal tunnel syndrome. The Court of Appeals held that the correct date of disability was September 12, 2003, because there was no evidence that the claimant's earning ability was impaired prior to that

date and he was capable of working without restrictions up to the date of that surgery. Therefore, the claimant's sleep apnea and bilateral knee conditions were pre-existing conditions, the claimant was PTD based on Dr. Koprivica's report, and the Fund was responsible for PTD benefits.