MISSOURI WORKERS' COMPENSATION

CASE LAW UPDATE

OCTOBER 2014 - DECEMBER 2014

Claim Denied Due to Inconsistencies Between Claimant's Testimony and the Records

In **Gower v. Technical Plastics**, **Injury No. 05-135562**, the claimant alleged that on December 1, 2005 he was pushing a large container when he slipped and fell to the ground, sustaining injury to his back. This incident was not witnessed but the claimant did report it to his supervisors. Evidence at the hearing showed that the claimant was incarcerated from May 1998 - April 2005, and during his incarceration he sustained at least five separate injuries to his back. He treated with several providers for his back from 2001 - August 31, 2005, a mere three months prior to his alleged injury. The records further showed that at the first medical visit following the alleged injury, which occurred on December 7, 2005, the claimant reported that his symptoms were the product of being beaten while he was incarcerated and there was no mention of any work injury sustained on December 1, 2005. However, at subsequent medical visits the claimant reported his symptoms were the product of a work injury that occurred on December 1, 2005. He denied any prior back issues.

The claimant's testimony at the Hearing contained many inconsistencies and was contradictory to the objective evidence. His attorney produced a report from Dr. Musich which stated that the claimant's work injury was the prevailing factor in his condition, and he assessed 50% PPD of the body. Alternatively, the employer/insurer's expert, Dr. Lange, felt that the claimant had 25% PPD of the body, but there was no way to suggest that his disability was referable to the alleged work incident. The ALJ determined that Dr. Lange was more credible and also believed that the claimant was not credible or persuasive. Therefore, the ALJ ruled in favor of the employer/insurer finding that the claimant failed to meet his burden. On Appeal, the Commission summarily affirmed.

Repetitive Motion Claim Denied Because Employer/Insurer's Expert Found More Credible Because He Reviewed More Records

In **Anderson v. New World Pasta**, **Injury No. 11-107122**, the 66-year old claimant worked for the employer from September 1991 - January 2012, and for the last ten years of her employment she worked as a packer. Her job duties as a packer required her to lift 50 - 60 pound rolls of plastic film from floor to shoulder level, approximately 3 - 4 times a day; load blank boxes from pallets to shoulder level that weighed a few pounds; use her right arm to wind/pump an operating jack; and lift partially filled boxes if the packing machine did not fill them properly, which

occurred 0 - 4 times per shift. If the packing machine was running properly, the claimant simply stood and observed it.

The claimant alleged injuries to her right shoulder as a result of her repetitive job duties. Additionally, she had a separate claim, which was not part of this case, wherein she developed right long and ring finger triggering. The claimant was initially seen by Dr. Schlafly for her hand complaints, who recommended that she be seen by an orthopedic shoulder specialist for her right shoulder complaints, but based on the claimant's description of her job duties, he did opine that her job duties were the prevailing factor in her need for right shoulder treatment. Thereafter, she treated with Dr. Rende, who reviewed a description of the claimant's job duties both from her and from her employer, and ultimately diagnosed the claimant with severe degenerative osteoarthritis, which he believed had been present for 10 - 15 years. Dr. Rende did not believe that the claimant's job duties were the prevailing factor in causing her condition.

Subsequently, the claimant obtained an MRI of the right shoulder on her own, which showed severe arthritic changes; severe tendinopathy with partial thickness tearing, as well as a full thickness supraspinatus tear; and longhead biceps tendinopathy with tearing. Both Dr. Schlafly and Dr. Rende reviewed the MRI and reiterated their prior opinions regarding causation. Specifically, Dr. Rende stated that shoulders, as opposed to weight bearing joints such as knees and hips, wear out as a result of the aging process and typically tear slowly and steadily. The tears are not the result of an injury but rather due to the normal process of aging. Additionally, evidence was introduced that the claimant had a history of pre-existing right shoulder complaints and received a settlement for 7.5% PPD of the right shoulder referable to a 1997 accident, as well as 7.5% PPD of the right shoulder referable to a 2006 injury.

At a Hearing, an ALJ noted that Dr. Rende took a much more detailed work history from the claimant, and also reviewed a job description provided by the employer, whereas Dr. Schlafly relied solely on the claimant's description of her job duties. Additionally, the ALJ noted that Dr. Rende was an orthopedic surgeon, whereas Dr. Schlafly was a hand surgeon. The ALJ found Dr. Rende's opinion more credible and persuasive, and held that the claimant failed to meet her burden and denied compensability. On Appeal, the Commission summarily affirmed.

Carpal Tunnel Claim Denied Because Employer/Insurer's Expert More Credible Because He Reviewed the Claimant's Job Duties

In **Almany v. Union Electric Company, Injury No. 10-025613**, the claimant, a lubrication technician, alleged recurrent carpal tunnel syndrome as a result of his job duties. He had bilateral carpal tunnel syndrome in 2005 for which he underwent releases and received a settlement. In 2008 or 2009 the claimant was diagnosed with high blood pressure and Type II diabetes, for which he was placed on medication. When the claimant began treating for his recurrent bilateral carpal tunnel syndrome, he did not report his blood pressure or diabetes to any of the treating physicians, and even denied those conditions to one provider. At a Hearing, the employer-insurer introduced DVDs of the claimant's work duties. The first DVD was an 11 minute clip showing the work that the claimant performed three days per week. On those three days, the claimant

performed the work depicted in the DVD for all eight hours of his work shift. In that 11 minute period, the claimant used his hands for a total of 65 seconds, which consisted of holding a flashlight to view oil levels and raising a dipstick to check oil levels. The second DVD showed the work that the claimant did the other two days a week, and demonstrated that on those days he would spend approximately 32 minutes and 35 seconds performing hand intensive duties.

The employer's general supervisor, who was previously employed as a lubrication technician, testified that the claimant would use his hands 20% or less during the day based on his personal experience and past knowledge. Dr. Ollinger testified as the employer/insurer's medical expert, and believed that the claimant's job duties were not the prevailing factor in his carpal tunnel syndrome, but believed his condition was referable to his underlying diabetes. Conversely, Dr. Volarich testified that the claimant's job duties were the prevailing factor in his carpal tunnel syndrome, as he had hand intensive duties. The ALJ noted that when Dr. Volarich rendered his opinion, he did not review the DVDs of the claimant's job duties. The ALJ found Dr. Ollinger more persuasive and denied compensability. On appeal, the Commission summarily affirmed.

Pro Se Claimant Awarded Only 15% Disability of Shoulder Because His Expert's Rating Did Not Distinguish Between Pre-existing and Current Disability

In **Tillis v. City of St. Louis, Injury No. 08-009726**, the claimant was working as a police officer when during an arrest he sustained an injury to his right arm, shoulder and hand in 2008. The employer/insurer picked the matter up as compensable and provided treatment. The claimant had a prior right shoulder injury in 2005.

At a Hearing, the claimant represented himself pro se. Hearsay objections were made to the majority of the medical evidence that the claimant attempted to introduce, and therefore there was no evidence with respect to permanency admitted at the Hearing. The ALJ noted that because the claimant did not offer competent evidence regarding the distribution of disability resulting from his 2005 injury and his 2008 work injury, his PPD Award would be somewhat limited. The ALJ did find that the claimant sustained a compensable injury based on the fact that the employer/insurer accepted liability in the case and the claimant received authorized treatment, including surgery. Ultimately, the ALJ awarded 15% PPD of the right shoulder. On Appeal, the Commission affirmed.

Video of Claimant's Job Duties Must Be an Accurate Representation

In **Buchanan v. SRG Global, Injury No. 12-103444**, the claimant alleged bilateral rotator cuff tears as a result of his repetitive job duties. The claimant was employed with the employer for 32 years both as a "racker" and as a "lead person." The racker job involved lifting plastic car parts that weighed several ounces up to 5 pounds. She had to attach the parts to racks. The racker job required overhead work about 33% of the time. The lead person job involved paperwork and administrative duties, such as counting the number of racks that were filled. In May 2009, she worked as a racker and a lead person. She worked exclusively as a racker from 2010 - 2012. She

was scheduled to work 40 hours a week, but her pay stubs reflected that she frequently worked numerous overtime hours.

The employer/insurer's expert, Dr. Emanuel, initially found that the claimant's work was the prevailing factor in her bilateral shoulder problems but changed his mind after watching a video supplied by the employer depicting the claimant's job duties. After review of that video, Dr. Emanuel believed that the claimant worked at a very leisurely pace and her job duties were not the prevailing factor in her condition. Conversely, Dr. Woiteshek, the claimant's expert, believed that the claimant's job duties were the prevailing factor in causing her shoulder problems. Specifically, Dr. Woiteshek noted that there was a vast difference between lifting near the body and lifting with the arms extended, as the claimant was required to do.

At a Hearing, an ALJ found Dr. Emanuel more persuasive, and therefore, found that the claimant's job duties were not the prevailing factor in her injuries, and denied compensation.

On appeal, the Commission reversed and found her injuries compensable. Specifically, the Commission stated that they also reviewed the video of the claimant's job duties provided to Dr. Emanuel, and disagreed with his assessment that she worked at a leisurely pace. Additionally, they stated that the claimant's co-worker testified that the employer could run the line at various speeds so it was unclear whether the video accurately represented the typical work the claimant performed or the pace at which it was performed. Therefore, the Commission found Dr. Woiteshek more persuasive and found that the claimant's job duties were the prevailing factor in her shoulder problems.

Without Expert Testimony Claimant Can Not Establish Causation

In **Fineman v. Stan Koch & Sons, Injury No. 13-078932**, the claimant was employed as a commercial truck driver. At the hearing, his deposition, and in his recorded statement, the claimant stated that on October 18, 2013 he began to feel pain in his left arm. At his deposition, the claimant stated that he believed he hurt his arm either while pulling the fifth wheel or while raising and lowering the landing gear. At trial, he testified he did not recall what caused the pain. In his recorded statement, the claimant stated he had no clue if he did something to acutely injure his arm or if his condition happened over time, but stated he could not think of a specific incident that caused his symptoms. The claimant treated on his own. His medical records indicated that he frequently denied any traumatic event when asked by providers. It was not until a December 5, 2013 visit to Dr. Wells, approximately three months after the date of injury, that the doctor noted the claimant did have a job as a truck driver with repetitive motions. However, Dr. Wells did not indicate an exact diagnosis. Neither the employer/insurer nor the claimant obtained a causation report.

At a Hearing, the claimant asserted that he either suffered an accident or an occupational disease, and that the Division of Workers' Compensation could, and should, determine if the injury was compensable despite not having any expert testimony, particularly since the employer/insurer refused to provide treatment. Conversely, the employer/insurer argued that the claimant failed to

meet his burden, as he did not provide an expert causation opinion. The ALJ agreed with the employer/insurer and found that the claimant failed to meet his burden to show that his symptoms were causally related to a work accident or occupational disease. On Appeal, the Commission summarily affirmed.

Claim Compensable Because Lease Grants Exclusive Use of Parking Lot

Scholastic, Inc. v. Viley, Case No. WD77546 (Mo. App. Ct. 2014)

FACTS: At the end of his shift, the claimant was walking outside of his employer's building and as he walked across the adjacent parking lot heading for his vehicle, he slipped and fell on snow and ice, sustaining an injury to his right knee. At a Hearing, the claimant testified that he always parked in the same parking lot, which was across the road from his employer. Evidence demonstrated that the employer did not own the parking lot where the claimant's accident occurred. Instead, the employer leased the parking lot in which the claimant fell. The lease included a provision granting the employer the "exclusive use for parking of tenants' automobiles." The ALJ found that the claimant's injury was not compensable. On Appeal, the Commission reversed, finding the injury was compensable.

HOLDING: On Appeal, the Court stated that the Extension of Premises doctrine applies, and an injury is compensable, if the area in which the accident occurs is owned or controlled by the employer. The Court was particularly persuaded by the fact that the lease granted the employer the exclusive use of the parking lot. Therefore, they found that the employer did control the parking lot and as such, the claimant's injury arose out of and in the course of his employment.

Claim Compensable Because Employer Exercised Power by Removing Snow From the Parking Lot it Leased

In **Beem v. Missouri Department of Social Services, Injury No. 10-005912**, the claimant was injured when she fell on her employer's parking lot sustaining an injury to her ankle. Her employer leased its building and the parking lot. The parking lot in which the claimant fell was used by other employees and was adjacent to the employer's building. The lease contained language granting the employer 23 parking spaces and stating that the lessor agrees to direct and pay for removal of snow and ice from the sidewalks and parking area. Evidence showed that while the lessor was obligated to remove the snow on the parking lot, they often did not do so and in such occasions, the employer would remove the snow either on its own or by hiring a third party. Prior to her date of injury, the claimant arrived at the employer and found the parking had not yet been cleared of snow. The claimant then contacted the lessor who stated he had no one under contract to clear the snow. Therefore, the claimant contacted a third party, Crain's, to remove the snow. Subsequently, the lessor did contract with Crain's to remove snow from the parking lot, who cleared the lot after the snow event which occurred just before the claimant's injury. On that occasion, the third party removed and piled the snow onto the sidewalk, which subsequently melted onto the parking lot and froze to form the black ice patch on which the claimant fell.

At a Hearing, an ALJ determined that the claimant's injury was not compensable because it did not arise out of and in the course of scope in her employment because the employer did not own or control the parking lot in which the injury occurred.

On Appeal, the Commission reversed. The Commission began by stating that the test to determine whether the claimant was injured in the course and scope of her employment was 1) Whether the injury producing accident occurred on the premises owned or controlled by the employer; 2) Whether that portion of such premises is part of the customary, or . . . usual and acceptable route or means used by workers to get to and depart from their places of labor; and 3) That portion of such premises was being used by the injured worker to get to or depart from a place of labor at the time of the injury. The Commission determined that all three prongs were met.

The Commission was persuaded by the fact that the lease contained no language which reserved exclusive control of the parking lot to the lessor. Also, the lease did not contain language which prohibited the employer from removing snow and ice from the parking lot area on its own. Additionally, the Commission stated that the employer exerted control over the lot by removing snow from the lot and contracting a third party to clear the parking lot on at least one occasion. Therefore, the Commission found that the employer controlled the parking lot. The Commission further noted that the black ice that the claimant slipped on was formed due to the manner in which the snow was cleared from the parking lot and therefore, she would not have been equally exposed to that hazard in her normal non-employment life. Consequently, the Commission found that the claimant's injury was compensable.

Safety Violation by Employer Only Results in a Penalty if the Violation Caused the Claimant's Injury

In **Horne v. Price Gregory, Injury No. 09-106524**, the claimant was a truck driver who was injured when his tractor trailer was involved in a motor vehicle accident on October 7, 2009. The claimant could not recall whether the accident occurred because of fatigue or because the load he was transporting shifted. Between July 12, 2009 and October 4, 2009, a 12 week period, the claimant averaged a little over 86 hours of work per week. Additionally, from October 4, 2009 through the claimant's date of accident, October 7, 2009, he had worked 36 hours and had worked 76 hours the week prior, for a total of 112 hours over the course of 10 days. This was in clear violation of Statute which states that drivers shall not be allowed to drive 70 hours or more during 8 consecutive days.

Immediately following the incident, the claimant experienced cervical spine symptoms. He did not begin experiencing symptoms in his right arm until November 1, 2011, when he turned his neck and felt a sharp pain radiating down his arm. The employer/insurer did provide treatment for the claimant's right arm symptoms until their expert, Dr. Kitchens, opined that the claimant's right arm symptoms were not caused by his cervical injury and therefore, not related to the work injury. The claimant was placed at MMI on April 29, 2010.

At a Hearing, the main issues were compensability of the claimant's right arm and whether the employer/insurer committed a safety violation.

With respect to the compensability of the claimant's right arm, the ALJ found Dr. Koprivica, the claimant's expert, more credible and determined that the claimant's right arm symptoms were the product of the claimant's injury.

With respect to whether the employer/insurer committed a safety violation, the claimant asserted that he should be entitled to a safety violation because his employer allowed him to drive for more than 70 hours during 8 consecutive days. At the Hearing, Mr. Ezell, the safety manager for the employer, testified that the regulation on number of hours drivers could work were designed to prevent accidents. Based on that testimony, the ALJ determined that the claimant was entitled to a 15% increase in all benefits paid based on violating a safety Statute.

On Appeal, the Commission affirmed the decision except it disagreed with the ALJ's imposition of a 15% increase in benefits pursuant to a safety violation. Specifically, the Commission did not believe that the employer's allowing the claimant to drive in excess of the maximum hours permitted by Statute caused the claimant's injuries. The Commission noted that the claimant remembered very little about the accident and he testified that the accident occurred either from the load shifting or the fact that he was tired from working and his reaction time was slowed. As such, the Commission believed that it was speculative to state that the claimant's injury was a result of the employer's violation of the Statute.

Under Old Law Employer Can Not Terminate Benefits on its own Because Claimant Refused to Submit for Medical Examination

SSM Healthcare v. Hartgroves, Case No. WD77560 (Mo. App. Ct. 2014)

FACTS: The claimant injured her back in 2001 while lifting a 300 pound stroke patient. She proceeded to a hearing, at which time an ALJ found that she was PTD. On appeal, the Commission affirmed and awarded PTD benefits. Thereafter, the employer scheduled the claimant for a medical examination which she did not attend. The employer/insurer then suspended her benefits. The claimant filed a Motion to Compel the employer to comply with the Commission's Final Award. The employer filed a response, along with a request that the Commission compel the employee to attend a medical examination, and asserted that it was justified in terminating the claimant's benefits because she failed to appear for the previously scheduled examination. The Commission denied both parties' Motions and stated that the employer/insurer is not authorized to suspend benefits based on alleged failure to attend a reasonable medical examination and found the claimant was still entitled to benefits. The employer appealed.

HOLDING: On Appeal, the Court noted that Statute does state that if the employee refuses to submit to an examination, compensation shall be forfeited. However, the Court also noted that

the Statute states that the Commission has the authority to modify an Award due to a change in the condition of the injured worker. Ultimately, the Court believed that the employer cannot unilaterally decide the claimant is no longer entitled to benefits, regardless of whether they refuse to submit to an examination, as that decision must be made by the Commission. Notably, the Court did state that the injury occurred in 2001, and therefore, the mandate passed in 2005 that the workers' compensation Statute be strictly construed did not apply in this case.

Claim Not Compensable Because Accident Only a Precipitating Factor in Causing the Claimant's Hypertensive Crisis

In **Malam v. State of Missouri/Department of Corrections, Injury No. 11-062949**, the claimant was employed as a prison guard. On August 12, 2011 the claimant, along with two co-employees, subdued a prisoner, taking the prisoner to the ground and then handcuffing him. Immediately thereafter, the claimant was walking the prisoner back to a housing unit when he began to notice shortness of breath and felt like his lungs were filling up. The claimant's co-employee testified that he did not notice anything wrong with the claimant at the time of the altercation or while walking with the 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. However, the claimant testified that no one landed on his chest at any point during the altercation.

The employer/insurer's expert, Dr. Puricelli, opined that the claimant's condition was not related to the work event, but rather, to his underlying hypertension. Conversely, the claimant's expert, Dr. Koprivica, believed that the work incident was the prevailing factor in precipitating his hypertensive crisis, as he felt that in the absence of the work incident, it would be impossible to predict that the claimant would have developed the hypertensive crisis. An ALJ believed Dr. Puricelli more persuasive and found in favor of the employer/insurer stating that an unexpected traumatic event or unusual strain occurring at a specific time and place is not alone sufficient to satisfy the definition of an "accident." The ALJ also found that the claimant's work was merely a triggering or precipitating factor.

On Appeal, the Commission affirmed the ALJ's holding but disagreed with the ALJ's reasoning. Specifically, the Commission stated that pursuant to Statute an unexpected traumatic event or unusual strain occurring at a specific time and place is sufficient to satisfy the definition of "accident." Therefore, the claimant did sustain an accident. However, an injury is not compensable because work was a mere triggering or precipitating factor. The Commission noted that Dr. Koprivica opined that the altercation was the prevailing factor in *precipitating* the claimant's hypertensive crisis. While the Commission did believe that the claimant sustained an accident, the pertinent inquiry is whether he sustained a compensable injury. In other words, they denied compensability because his *accident*, the altercation with the prisoner, was merely a precipitating factor of his *injury*, his hypertensive crisis.

Unexplained Fall Found not Compensable

In **Scott v. Bellefontaine Gardens Nursing & Rehab Center, Injury No. 11-099793**, the claimant was walking on December 3, 2011, when she fell injuring her right leg. She testified that she does not know how or why she fell. The claimant was taken to Touchette Hospital and reported to the emergency room doctors that she did not know how she fell. One of those emergency room doctors stated that the claimant's knee "gave out" and that the claimant denied any trauma. Thereafter, the claimant treated at Concentra on December 16, 2011, and reported that on her date of injury she was directing an aide to assist a resident when she turned and suddenly fell down, although she again reported she did not know why she fell. Additionally, the claimant stated that she did not trip on anything or slip. At a Hearing, the ALJ noted that the claimant was simply unable to describe how she fell, and there was no indication that she tripped on anything, was performing a work activity when she fell, or that there was anything on the floor that caused her to fall. Therefore, it was determined that the claimant's injury did not arise out of her employment, and was not compensable. On Appeal, the Commission affirmed.

ALJ Can Not Award PPD if Claimant Not at MMI; Occupational Disease Found Not Compensable Because No Symptoms Prior to Alleged Date of Injury

In **White v. Ameren UE, Injury No. 05-089838**, the claimant alleged injuries to his bilateral wrists and shoulders as a result of his repetitive job duties using an injury date of August 16, 2005. The claimant had chronic problems with this right shoulder since an injury in the mid 1990s, when he sustained a rotator cuff tear which was treated surgically. The claimant did not suffer from left shoulder symptoms until February 20, 2009. Thereafter, the claimant treated on his own with Dr. Schaberg for both shoulders. He was diagnosed with bilateral carpal tunnel syndrome; and bilateral shoulder impingement syndrome and rotator cuff tendinitis. He underwent a right carpal tunnel release and both the claimant's and employer/insurer's experts recommended a left carpal tunnel release which the claimant had not yet undergone at the time of the hearing.

Dr. Rotman, the employer/insurer's expert, opined that the claimant's current right shoulder symptoms were not the result of his job duties, but rather referable to his mid 1990s injury. Conversely, Dr. Schlafly, the claimant's attorney, did believe his job duties were the prevailing factor in his bilateral shoulder symptoms. At a Hearing, an ALJ found that the claimant's shoulders were not compensable, but did Award 20% PPD of each wrist referable to bilateral carpal tunnel syndrome and ordered the employer/insurer to provide treatment for the claimant's left carpal tunnel syndrome.

On Appeal, the Commission modified the ALJ's Award. Regarding the claimant's left wrist, the Commission agreed that his carpal tunnel syndrome was compensable. However, it noted that the ALJ's Award of both PPD referable to the left wrist and future medical treatment for the left wrist were incompatible, in light of the fact that PPD cannot be assessed until the claimant reaches MMI. Based on the experts' opinions, the Commission found the claimant had not yet reached MMI and was not entitled to any PPD for the left wrist.

Regarding the claimant's left shoulder, the Commission noted that the Claim for Compensation alleged a date of injury of August 16, 2005, and there was no indication in the records that the claimant reported left shoulder symptoms until February 22, 2009. Additionally, Dr. Schlafly, the claimant's expert, provided a report that did not specifically state that the claimant's occupational disease occurred on or before August 16, 2005. Therefore, they denied the claimant's left shoulder as there was no proof or evidence that he sustained any left shoulder occupational disease as of August 16, 2005.

Regarding his right shoulder, the Commission overturned the ALJ's decision, and did find that injury compensable. Specifically, the Commission found that Dr. Rotman's testimony was not persuasive because he stated that impingement syndrome or rotator cuff tendinitis could never constitute a compensable occupational disease unless one's job requires repetitive overhead work for at least four hours a day. The Commission noted that Dr. Rotman did not refer to any medical literature or scientific study to report this hypothesis. Therefore, they did not believe that Dr. Rotman's opinion could be given any weight and consequently sided with Dr. Schlafly, who did believe that the claimant's right shoulder condition was the result of his job duties.

For Occupational Diseases, the Statute of Limitations Begins to Run When a Diagnostician Connects the Condition to Work – Claimant's Personal Belief That Condition is Work-Related Has No Effect

In **Clevenger v. Ford Motor Company, Injury No. 10-019275**, the claimant worked for his employer for over 30 years and eventually developed tinnitus, which he alleged was due to repeated exposure to loud noises at work. The employer conducted annual hearing tests, which as early as 1990 showed that the claimant was developing hearing loss and tinnitus. The employer's doctors told him that his hearing loss and tinnitus were the result of aging, and advised him to see his personal physician. The claimant retired on September 3, 2006. He did not see his personal physician until March 2010, who at that time connected the claimant's hearing conditions to his work activities. Two weeks after this visit with his personal physician, the claimant filed his Claim for Compensation. At a Hearing, the claimant testified that while still employed with Ford Motor Company, he told people at his employer that his hearing loss and tinnitus were work-related. The ALJ ruled that the Claim was barred by the Statute of Limitations because it became reasonably discoverable while the claimant was still employed that his hearing conditions were caused by his work activities. Therefore, the claimant failed to file his Claim for Compensation within two years from the date that it became reasonably discoverable that his conditions were caused by work activities. The claimant appealed.

On appeal, the Commission stated that the claimant was neither a doctor or audiologist, and considering that the employer's doctors continually assured him that his hearing loss and tinnitus were the effects of aging, it was not apparent or reasonably discoverable that he had suffered a work injury until his March 2010 visit with his personal physician. Therefore, the Commission reversed the ALJ's finding that the Claim was barred by the Statute of Limitations, and awarded

the claimant 15% PPD of the body as a whole referable to his tinnitus. They did not address or award any disability with respect to his hearing loss.

Employer/Insurer Responsible for Modifications to Vehicle and for Difference in Cost of Average Automobile and the Van Purchased

In **Noland v. Marsh Field Rural Fire Association, Inc., Injury No. 11-104962**, the claimant lost motion of the left side of his body after being struck in the head by a falling tree while at work. The employer/insurer conceded that PTD benefits were owed and the sole issue was whether the claimant was entitled to reimbursement for purchasing a van he needed to implement modifications. Prior to the injury, the claimant normally purchased an Impala every 5 - 6 years. Following the injury, he purchased a van for a net price of $29,635.00. The employer/insurer paid for accommodations to the van but refused to pay for any of the purchase price of the van. At a Hearing, an ALJ noted that when a modified vehicle is required due to the claimant's injuries, the claimant is entitled to the difference in the cost of an average, mid-priced automobile of the same year as the purchased van less the cost of the converted van. Thereafter, the claimant is responsible for the cost of maintenance of the van.

The ALJ found that in this instance the only evidence presented as to the cost of a mid-sized vehicle was given by the claimant's wife regarding a 2013 Impala, which was valued at an estimated $17,900.00. No evidence was presented by the employer/insurer with respect to the cost of another mid-sized vehicle. Therefore, an ALJ awarded the difference between the van and the 2013 Impala estimate, for a total of $11,735.00. Additionally, the ALJ found that the employer/insurer would be liable for modifications to additional vehicles in the future when the claimant's current van needed to be replaced. On Appeal, the Commission summarily affirmed.

Employer/Insurer May be Responsible for Past Medical Expenses Even if Claimant Treated on Her Own

In **Quast v. RPCS, Inc., Injury No. 11-104621**, the claimant began working for the employer in 2006 as a cashier. Her duties required her to utilize a belt scanner to process purchases. In 2007 her job duties were expanded to include that of a bookkeeper, which involved making up the cash register tills, counting money, checking the cash register tills and record bookkeeping entries on a computer. In October 2009 she was promoted to guest relations manager, and her duties were expanded to include supervising and assisting the cashiers, assisting and directing customers, answering the phones and working the service desk handling returns and other orders. The claimant alleged occupational diseases to both her upper and lower extremities as a result of her work.

Specifically, the claimant asserted that she had developed tenosynovitis of the left foot and ankle because she was required to be on her feet through her entire work day. She also alleged bilateral carpal tunnel syndrome. When the claimant began to notice her symptoms she treated with a few physicians, who did diagnose carpal tunnel syndrome, but did not connect that condition to work. It was not until after the claimant had received some treatment that she informed her employer

that she believed this condition was work-related. Following notice of the same, the employer did provide authorized treatment.

Dr. Koprivica, the claimant's expert believed that the claimant's left foot and ankle symptoms were the result of her constantly being on her feet while at work, and also related her bilateral carpal tunnel syndrome to her repetitive work duties. Conversely, Dr. Corsolini, the employer/insurer's expert, did not believe that any of the claimant's conditions were referable to her work but rather due to her age and weight.

At a Hearing, an ALJ found the claimant's left ankle and foot symptoms and carpal tunnel syndrome compensable. The ALJ denied the employer/insurer's notice defense stating that when the claimant initially began treating and was diagnosed with carpal tunnel syndrome, no physician connected that condition to work. Additionally, the ALJ awarded the claimant past medical expenses for the treatment that she received when she first began treating on her own, because although the claimant treated on her own and her employer, in fact, had no knowledge of any injury at the time that she was treating, the claimant did not realize she was receiving treatment for a work-related condition.

Hernia Pre-Existing the Work Injury Not Compensable

In **Sadic v. SEMCO Plastic Company, Inc., Injury No. 10-096313**, the claimant injured his stomach/groin on September 17, 2010, while working on a machine at his employer's. Specifically, the claimant was attempting to pull a part out of the machine when he felt a strong pain in his groin area and felt something bulging. The claimant alleged that his hernia was as a result of an acute injury or an occupational disease. At a Hearing, an ALJ stated that occupational disease hernia claims are not compensable injuries under the Missouri Workers' Compensation Act, as the Statute specifically requires that there be an "accident." Given that the ALJ noted the claimant could not bring an occupational disease claim for his hernia, he must show that he sustained an accident. The claimant testified that he did not have a prior hernia. However, the medical records showed that the claimant reported a history of left testicle swelling on and off for a year but he was normally able to "reduce the bulge," until his work injury occurred. Additionally, none of the claimant's medical records show that he reported an accident or unusual strain that occurred at work on September 17, 2010. Dr. Musich, the claimant's expert, testified that the claimant sustained a hernia which was caused by his "employment" between late 2009 and September 17, 2010. In order to show that he sustained an accident, the ALJ stated the claimant must show that his hernia did not exist prior to September 7, 2010, which based on the medical records, the claimant failed to do. The ALJ noted that Dr. Musich did not causally connect the hernia to a specific date, event or unusual strain, and therefore, did not establish that the claimant sustained a compensable accident on September 17, 2010.

On Appeal, the Commission affirmed as they believed that the claimant developed a hernia in 2009 which failed to satisfy the statutory requirement that the hernia not pre-exist the accident or unusual strain which allegedly caused the injury. Interestingly, the Commission disagreed with the ALJ that a hernia could never be compensable as an occupational disease.

Seasonal Workers Are Only "Employees" if They Were "Furnished" to the Employer by Third Party

Southerly v. United Fire & Casualty Company, Case No. SD33165 (Mo. App. Ct. 2014)

FACTS: The claimant worked at the employer's cotton gin for the four month ginning seasons in 2007, 2008, and 2009. He sustained a work injury in 2009. He received a $150,000 in benefits from the employer's workers' compensation insurer. He filed a personal injury suit against four co-workers and reached agreements. He obtained a $4 million judgment collectable only from the employer's commercial general liability (CGL) and umbrella insurance policies. The insurer's policies did not cover an injury if the claimant was an "employee." The claimant argued that he was not an employee because he was a temporary worker. The trial court refused to impose judgment on the insurer and the claimant appealed.

HOLDING: The Court stated that the issue was whether the claimant was an "employee" and looked to prior case law. They stated that to determine whether he was an "employee" in this instance, they needed to determine whether his seasonal employment qualified him as a "temporary worker." The Court defined a temporary worker as one who has been furnished to the insured by a third party. The claimant alleged that he was a temporary worker because he was recommended by one of the employer's workers in 2007, when he first began working at the employer. The Court did not find this argument persuasive. The Court deemed each ginning season to be a new hiring, and as such, the claimant had not shown that he had been furnished to the insured by a third party when he was hired in 2009, when he was injured. Since the claimant was not a temporary worker, he was an "employee" as defined in the Workers' Compensation statute and could not recover from the employer's general liability or umbrella policies.

Fund Not Liable if PTD From Last Injury Alone

In **Elder v. Treasurer of Missouri, Injury No. 11-026274**, the claimant sustained a work injury when he was involved in a motor vehicle accident that caused burns over 6% of his body, respiratory insufficiency, a cervical fracture at C2, difficulty with vision due to floaters in the right eye, traumatic left cubital tunnel syndrome, and profound hearing loss on the right side secondary to a traumatic head injury. The claimant had pre-existing conditions of low back complaints, an injury to his forearm, bypass surgery, and a right heel injury. The claimant settled his claim against the employer and went to a hearing against the Fund. Interestingly, at the Hearing, the claimant's own experts testified that he was permanently and totally disabled as a result of the last accident alone. The ALJ agreed the claimant was PTD as a result of his last injury alone, and refused to impose liability on the Fund. The claimant appealed, but the Commission affirmed the ALJ's decision.

Obesity Can Constitute a Pre-Existing Disability

In **Kolar v. First Student Incorporated, Injury No. 09-084011**, the claimant, who was morbidly obese, worked as a driver. While performing his pre-trip inspection, the claimant went

to examine the underside of his vehicle when he lost his balance and sustained an injury to his right knee. In the period that the claimant was recovering from his right knee injury, he began to develop symptoms in the left knee, which he believed were due to being forced to put extra weight on his left knee, since his right knee was not stable. At a Hearing, the ALJ determined that the claimant's left knee condition was a compensable injury because although his left knee was not injured in the actual work accident, those symptoms stemmed from favoring his compromised right knee. Additionally, the ALJ imposed liability on the Fund, finding that the claimant's morbid obesity was a pre-existing permanent disability. On Appeal, the Commission summarily affirmed.