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## **MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE**

**October 2018 – December 2018**

### **Injury Compensable, Despite Pre-Existing Condition and Back Problems, Because Work Accident Caused Condition to Become Symptomatic**

#### **Haag vs. Terry Snelling Construction, Injury No. 17-041850**

The claimant sustained a low back injury while working as a concrete finisher in March 2017. He reported his injury to his supervisor, but no treatment was provided. He initially sought chiropractic treatment on his own, and when his symptoms persisted, he sought medical treatment from the employer. The claimant admitted to treating with a chiropractor in the past due to aches and pains that he related to his labor-intensive work. However, he testified that these symptoms resolved with treatment and did not interfere with his ability to work, and he denied having pain into his right leg prior to his date of injury.

Dr. Hess evaluated the claimant at his attorney's request and diagnosed lumbar radiculopathy secondary to a broad-based disc protrusion at L4-5, a central L5-S1 disc herniation, and a L5-S1 annular tear, and concluded the work accident was the prevailing factor in causing his condition. Dr. Ebelke evaluated the claimant at the employer's request and diagnosed DDD at L4-S1 with facet joint arthritis and other degenerative changes, none of which he believed were the result of a work injury, and he opined that the claimant's strain should have resolved within a few months.

At a Hearing for a temporary Award on the issues of TTD and medical treatment, the ALJ found Dr. Ebelke's opinion unpersuasive and noted that even if the claimant had a pre-existing degenerative condition, it was asymptomatic until the date of injury, and although he had some prior chiropractic treatment, his symptoms resolved with minimal treatment and did not affect his ability to work prior to his date of injury. Therefore, the ALJ found that the claimant's current complaints were related back to the work injury and ordered the employer/insurer to pay TTD and provide medical treatment.

**Injury Sustained in Doctor's Office While Treating for Work Injury Not Compensable Because Not Direct Result of Any Medical Treatment Necessary for Primary Injury**

**Schoen vs. Mid Missouri Mental Health Center and Treasurer of Missouri as Custodian of Second Injury Fund., Injury No. 09-034298**

The claimant initially complained of throat and eye irritation after exposure to Cypermethrin on May 8, 2009, when that substance was sprayed on air conditioning units at work to control for ants. She sought emergency treatment on her own and returned to work immediately without limitations in regards to that exposure. She had continuing complaints and was sent by the employer to Dr. Runde for evaluation on May 22, 2009. While at the doctor's office, a person with a small dog was sitting in the waiting room. While attempting to divert the dog, Dr. Runde accidentally tripped the claimant and caused her to fall to her knees. She alleged injuries to her cervical and lumbar spine, left shoulder, and left knee as a result of her fall.

Dr. Volarich evaluated the claimant at her attorney's request and opined she had 5% PPD of the body due to pulmonary exposure to Cypermethrin. Dr. Runde opined the claimant had no permanent disability relating to her exposure. The treating doctor, Dr. Hyers, diagnosed transient bronchitis and opined the exposure at work was a temporary irritation that would resolve within a matter of days after initial exposure.

At a hearing, the ALJ found that the injuries the claimant sustained when she fell in Dr. Runde's office were compensable injuries because she sustained them while seeking authorized treatment for chemical exposure. The ALJ also found the claimant PTD as a result of her work-related injuries alone, including the injuries sustained at Dr. Runde's office. On appeal, the Commission reversed the ALJ's decision and Award. The Commission found the opinions of Dr. Runde and Dr. Hyers more persuasive than Dr. Volarich with respect to her pulmonary complaints. With respect to the injuries allegedly sustained during the claimant's fall, the Commission disagreed with the ALJ and held that they were not compensable, because even though the claimant was seeking authorized treatment, those injuries were not the direct result of any necessary medical treatment for her primary injury, the Cypermethrin exposure. Therefore, Commission declined to award any PPD benefits and found that the claimant was not PTD.

**No Benefits Awarded Because Claimant was Independent Contractor and Not Statutory Employee**

**Lane vs. Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 09-029009**

The claimant was injured on January 29, 2009 when she was working as a delivery driver and was in a motor vehicle accident. She sustained injuries to her back and neck, which were treated conservatively. The claimant signed an employment contract with Via Bancourier (VB) that acknowledged she was an independent contractor and not an employee. She settled her claim with VB on a compromise basis, and her status as an employee was disputed in the Stipulations.

The claimant then filed a claim against the Fund alleging that she was a statutory employee of VB and was PTD as a result of her primary injury and pre-existing conditions. At a Hearing, she testified that she controlled the means and method of her work and the routes that she delivered. She could choose to work when she wanted and could refuse assignments. She used her own vehicle to make deliveries and was responsible for all maintenance and insurance. She received a 1099 at the end of every year without taxes withheld, and VB gave her the option of obtaining her own workers' compensation coverage, which she declined to do. The ALJ found that the claimant failed to show that she was an employee of VB and declined to award any benefits.

On Appeal, the Commission found that the claimant was performing work under contract with VB that was in the usual course of VB's business. However, it found that she was not injured on or about the premises of VB. The claimant argued that because the general public did not have the right to use her personal vehicle or access the items she delivered, her vehicle should be considered to be VB's premises. The Commission rejected this argument, held that an employer's premises does not include public highways for the purposes of the statutory employment provision, and affirmed the ALJ's Decision and Award denying benefits.

**Claimant Not Employee Under Workers' Compensation Law, and Ginger C Not Employer Under Workers' Compensation Law**

**Hayes vs. Ginger C, LLC and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 13-104894**

Ginger C (GC) worked as a rental business and did not perform construction or have any employees. It did hire three contractors, including the claimant, to repair and remodel buildings as needed. On June 26, 2013, the claimant and two other contractors were performing a concrete job and sustained alkali burns from the concrete. GC did not have workers' compensation insurance. The claimant sought PPD benefits from GC and the Fund.

At a Hearing, the ALJ expressly found the claimant was not a credible witness, because his testimony was exaggerated and inconsistent with his deposition testimony and the testimony of the other two contractors and Mr. Asmar, GC's owner. The ALJ found that credible testimony established that GC did not issue W-2's and instead issued 1099's to each contractor, Mr. Asmar was never present at the job sites and did not control or direct the way that the claimant or other contractors performed their work, the claimant owned and used his own tools, he could choose the hours he worked, and he could turn down maintenance calls if he wanted. Therefore, the ALJ found that the claimant was an independent contractor and not an "employee" under workers' compensation. The ALJ also found that GC was not an "employer" under workers' compensation because GC's regular business was apartment rental, not construction, and it did not have any employees. Therefore, the ALJ denied any benefits. On appeal, the Commission affirmed the ALJ's Decision and Award.

**Employer Responsible for Future Medical, Despite Pre-Existing Chronic Pain and Psychiatric Issues, Because Need for Treatment Flowed from the Work Injury**

**Null vs. Albany Meical Center, a/k/a Northwest Medical Center Association and Treasurer of Missouri as Custodian of the Second Injury Fund, Injury No. 12-100528**

The claimant slipped on ice on December 24, 2012 and sustained compensable injuries to her left lower extremity and right knee. Dr. Trease diagnosed a bimalleolar ankle fracture and performed an ORIF in December 2012. The claimant continued to have significant pain complaints in her left lower extremity, and Dr. Horton subsequently removed the hardware in her ankle, and she had a spinal cord stimulator placed, which did not resolve her complaints. The claimant also alleged psychological injury as a result of her work accident due to chronic pain. She was referred to a psychologist and treated through workers' compensation through July 2016, after which she was also hospitalized in March 2017. Notably, she did take antidepressants prior to her work injury and had prior trauma in her past, including an abduction and assault. She was previously diagnosed with stress, anxiety, and depression as well as fibromyalgia and did have prior issues with chronic pain. However, she testified that her prior psychiatric issues and pain complaints never prevented her from working before the work injury.

Dr. Koprivica evaluated the claimant at her attorney's request, placed her at MMI, and recommended ongoing mental health treatment as a result of her primary injury. Dr. Pronko and Dr. Rosenthal testified on behalf of the employer that the claimant had long-standing pre-existing psychiatric issues and chronic pain and that she did not have any additional permanent chronic pain as a result of this injury. Dr. Rosenthal opined the claimant did not require any additional pain management as a result of this injury. Dr. Pronko opined the claimant would require additional psychiatric treatment for her "lifelong difficulties."

At a hearing, the ALJ found the claimant's testimony credible and held that she did sustain a psychological injury as a result of chronic pain due to the work injury. The ALJ ordered the employer to provide future medical treatment for pain management and psychological care. However, the ALJ found the Fund liable for PTD benefits. On appeal, the employer argued that the ALJ erred by awarding future medical without requiring the claimant to show that the work injury was the "prevailing factor" causing the need for future treatment for her depression, psychological injury, and chronic pain management. The Commission affirmed the ALJ's decision and Award with a supplemental opinion, wherein it noted that it is immaterial that the treatment may be required because the primary injury complicated the claimant's pre-existing conditions, or that the treatment will benefit both the compensable injury and the claimant's pre-existing conditions. The claimant need only show a reasonable probability that future treatment is necessary because of her work injury and that the need for future medical treatment flows from the injury.

## **Employer Responsible for PTD After Claimant Fractured Wrist at Work**

### **Thompson vs. Fulton State Hospital and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 13-087133**

On November 7, 2013, the claimant, a 62-year-old employee with a Masters in Psychology, was participating in self-defense training at work when the trainer hit the defensive bat she was holding, causing her to fall backwards striking her head on the concrete wall. She was diagnosed with a distal radial fracture and underwent an ORIF, followed by a second surgery for hardware removal. Dr. Wall subsequently diagnosed chronic regional pain syndrome and ulnar neuropathy in the left upper extremity. With respect to her head, Dr. Peebles diagnosed a concussion without loss of consciousness and placed her at MMI, although the claimant reported ongoing headaches. A neuropsychological/neurocognitive evaluation showed multiple invalidity indicators and evidence of malingering.

The claimant's attorney had the claimant evaluated by Dr. Volarich, who opined she was PTD as a result of her current wrist injury in combination with prior disabilities, including a prior total knee replacement, and he recommended lifting restrictions of no more than two pounds with her left arm. Ms. Skahan performed a vocational evaluation at the claimant's attorney's request and opined that based on Dr. Volarich's restrictions, the claimant was unemployable as a result of her left upper extremity injury alone. With respect to the claimant's psychiatric disability, the experts disagreed as to whether she was malingering. Dr. Daniel opined the claimant was PTD as a result of her current psychiatric disability in combination with her pre-existing disabilities, but the psychiatrist who evaluated the claimant at the employer's request placed her at MMI and assessed 0% PPD.

At a Hearing, the claimant testified that she had continued problems with her left wrist as well as headaches, depression, and problems with concentration. The ALJ noted the experts' differing opinions regarding the claimant's alleged psychiatric injury and also as to whether she had CRPS in her left upper extremity. Ultimately, the ALJ did find the claimant PTD as a result of her left upper extremity injury alone, with or without a diagnosis of CRPS. The ALJ found Ms. Skahan's opinion that the claimant would be limited to below sedentary work as a result of her left upper extremity injury regardless of whether she was working in an office setting to be persuasive, and the ALJ noted the two-pound lifting restriction from Dr. Volarich and the fact that the claimant was left hand dominant. Therefore, the employer was responsible for PTD benefits and future medical care. On Appeal, the Commission affirmed the ALJ's decision and Award.

## **Claimant Not PTD After Lumbar Fusion Because He Was Walking Five Miles a Day, Had Good Range of Motion, and Not Taking Narcotics**

### **Manshava Johnson vs. Value St. Louis Properties, Inc., Injury No. 07-059414**

The claimant, a 59-year-old maintenance technician, sustained an injury to his low back on June 11, 2017 while lifting a refrigerator at work. The claimant also had prior low back pain in 2007. Dr. Kennedy opined that he could not state with certainty whether the claimant's herniated disc at L5-S1 was related back to the work accident, and Dr. Chabot opined the date of injury was not the prevailing factor in causing the claimant's condition. The claimant proceeded to treat on his own with Dr. Kennedy, who performed a discectomy on April 2, 2008 and subsequently diagnosed post-laminectomy syndrome and recommended a lumbar fusion. The claimant remained off work and was awarded SSD. In a Temporary Award, the employer was ordered to provide medical treatment, and it sent the claimant to Dr. Coyle, who did perform a lumbar fusion in January 2014. The claimant began walking five miles per day, and Dr. Coyle noted he had stopped taking narcotics, placed him at MMI with a permanent 25-pound lifting restriction, and assessed 25% PPD of the body.

Dr. Volarich evaluated the claimant at his attorney's request and also noted that the claimant was not taking any prescription medication, although he opined the claimant had 50% PPD of the body and was PTD as a result of the work injury alone. Vocational expert Stephen Dolan opined the claimant was not employable considering Dr. Coyle's restrictions and the claimant's own description of his limitations. The employer's vocational expert James England opined the claimant had experience in supervisory positions and sales and was a good candidate for vocational rehabilitation. He testified that the claimant did not mention any sleep problems to him.

At a hearing, the claimant testified that he was only sleeping 2-3 hours at night due to pain and had to nap throughout the day due to taking multiple Oxycodone, which made him light-headed and confused. He testified that he could not sit or stand for long periods and was depressed due to his condition. The ALJ noted the claimant was walking five miles per day while treating with Dr. Coyle, and both Dr. Coyle and Dr. Volarich noted he was not taking narcotics when evaluated by them. The ALJ opined that Dr. Coyle's opinion was more persuasive than Dr. Volarich's opinion and found that the claimant sustained 50% PPD of the body, was not PTD, and would not require any additional medical treatment. On Appeal, the Commission affirmed the ALJ's decision and Award.

### **Claimant PTD, Even Though Doctor Did Not Specifically State He Was Unable to Work**

#### **Moss vs. Treasurer of the State of Missouri-Custodian of the Second Injury Fund., Case No. WD81467 (Mo. App. 2018)**

**FACTS:** The claimant, a 61-year-old high school graduate, sustained a right shoulder injury at work in 2012. He underwent a right shoulder arthroscopy followed by a right shoulder replacement and resolved that claim with the employer for 30% PPD of the right shoulder. The claimant had pre-existing conditions including a prior right wrist surgery that affected his grip strength, a prior right elbow injury that affected his ability to lift heavy objects, and a prior lumbar surgery that caused him to need to frequently change positions.

Dr. Hopkins examined the claimant at his attorney's request and opined that he was very limited in his work capabilities and would be limited to a sedentary occupation that requires mostly sitting and the ability to change positions as needed. Dr. Hopkins also provided permanent restrictions of no repetitive use of the right upper extremity, the claimant's dominant arm, but did not specifically state that he was PTD. However, Ms. Skahanevaluated the claimant and opined he was unemployable because his inability to use his rightarm repetitively and the need to change positions frequently excluded him from sedentary work. A vocational expert retained by the employer agreed the claimant was unemployable due to a combination of his pre-existing conditions and primary work injury, his age, education, and lack of transferrable skills.

At a hearing, the ALJ found that the Fund was responsible for PTD benefits. On appeal, the Commission affirmed the ALJ's decision and award and held that Dr. Hopkins did not need to specifically address the question of PTD in his report for the Commission to find that the claimant was, in fact, PTD.

**HOLDING:** The Fund appealed, and the Court affirmed the Commission's decision and Award. The Court held that statute requires that a physician certify the claimant's medical condition and resulting work-related restrictions post injury, which Dr. Hopkins did. With respect to the question of PTD, the Court noted that the Commission may rely on evidence provided by both a physician and other non-medical experts when assessing whether the claimant is employable. Here, the Commission properly relied on expert testimony provided by Dr. Hopkins as well as the testimony of two vocational experts, and the Commission did not error in finding that the claimant is PTD.

**Claimant Not PTD After Lumbar Fusion, Failed Back Syndrome, and Bilateral Carpal Tunnel Releases Because She Had Almost No Permanent Work Restrictions and Was Not Limited in Activities of Daily Living**

**Ford vs. Pauwels Transformers and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 06-061036**

On June 6, 2006, the claimant developed bilateral carpal tunnel syndrome while working for the employer. Dr. Brown diagnosed bilateral carpal tunnel syndrome and performed staged bilateral carpal tunnel releases in 2006. She subsequently developed trigger fingers in both hands and underwent injections in 2007. The claimant settled this claim with the employer for 17% of each wrist and a 10% loading factor plus two weeks of disfigurement.

The claimant also had a prior low back injury that she sustained on May 5, 2005. Dr. Mirkin diagnosed DDD and small disc protrusions and ultimately performed a lumbar fusion on October 20, 2005. The claimant underwent work hardening and an FCE, and Dr. Mirkin placed her at MMI on May 1, 2006 without restrictions except that she was not to push heavy transformers by herself. The claimant complained of ongoing low back pain and sought treatment on her own.

Dr. Taylor diagnosed failed back syndrome and recommended pain management. Dr. Lee diagnosed a non-union at L4-5 and also recommended conservative treatment. The employer sent the claimant to Dr. Coyle in 2009 for an updated evaluation, at which time the doctor recommended a revision surgery. However, the claimant subsequently declined to undergo surgery, and Dr. Coyle provided no additional medical treatment. The low back claim was ultimately resolved with the employer for 35% PPD of the body.

The claimant filed a claim against the Fund for PTD benefits. Dr. Woiteshek evaluated the claimant at her attorney's request and opined she was PTD as a result of a combination of her back injury and subsequent carpal tunnel injury. The claimant's vocational expert also believed she was unemployable due to a combination of those conditions. Mr. Weimholt evaluated the claimant at the employer/insurer's request and opined that she was employable.

At a Hearing, the ALJ noted that the claimant testified her wrist complaints bother her less now and do not wake her up at night, she was uncertain of any changes in her grip strength, and she could not think of any activities she had stopped doing because of problems or issues with her hands. The claimant actually testified that she was PTD as a result of her back injury alone, which the ALJ noted was inconsistent with both vocational experts' opinions. The ALJ also noted that the claimant had taken several trips which involved flying and driving for long periods of time, had no permanent work restrictions except not to push large transformers by herself, and was able to perform activities of daily living without issue or limitation. Although the claimant testified that she had to lie down or recline during the day due to her back condition, the ALJ noted that none of the medical experts had recommended that she do so. Therefore, the ALJ found that the claimant was not PTD. On Appeal, the Commission affirmed the ALJ's decision and Award.

### **No PTD Liability for Fund Because Claimant PTD Prior to Primary Injury**

#### **Wurth vs. Commercial Electronics, Inc and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 08-100667**

The claimant, a 49-year-old manager with a high school degree, sustained a low back injury at work on November 4, 2008. Dr. Lange diagnosed a herniated disc and performed a right-sided laminectomy and discectomy at L5-S1 in 2009. The claimant settled this claim with the employer for 25% PPD of the low back. He was subsequently dismissed from work in 2012, and he testified that he frequently missed work in the months leading up to his termination, had to alternate between sitting and standing throughout the day, could not climb, could not sit for longer than an hour, and could not drive long distances. He subsequently received Social Security Disability benefits and then filed a claim against the Fund for PTD benefits.

The claimant did have significant prior injuries to his low back and neck. He initially injured his low back in 1999, underwent a left L4-5 microdiscectomy, and was given permanent lifting restrictions. The claimant reinjured his low back in January 2001, and he underwent a



microdiscectomy at L4-5 and L5-S1 and a discectomy and fusion at C6-7. When he was released, he could not drive or sleep as well as before, and he was discharged from his job as a machinist at his prior employer. The claimant then began working for his father's company in 2002 or 2003. In 2006, Dr. Coyle diagnosed multi-level DDD in the lumbar spine and performed a revision decompression and fusion at L4-5.

The claimant testified at a hearing that after his 2006 surgery, he had difficulty walking, standing, and lifting. He continued to work 10-hour days, but he would sit in a recliner in his office at times. As a salaried employee and a supervisor, he was allowed to come and go as needed for his low back, neck, and foot pain. Dr. Volarich previously evaluated the claimant in January 2008, before his primary injury, and opined he was unemployable in the open labor market at that time. After the primary injury, Dr. Volarich and Mr. England evaluated the claimant at his attorney's request and opined he was PTD as a result of the combination of his primary injury and prior injuries. Mr. Weimholt evaluated the claimant at the employer/insurer's request and opined that he had been unemployable since December 26, 2001.

At a Hearing, the ALJ found that the claimant was already PTD and unemployable in the open labor market prior to his primary injury in 2008. The ALJ found the claimant's reports to Dr. Volarich in January 2008 to be more credible than his contrary testimony at the hearing several years later and also held that the claimant's position at his father's company prior to the primary work injury was already highly accommodated. Therefore, the Fund was not liable for PTD benefits, because the claimant was already PTD prior to the primary work injury. On appeal, the Commission affirmed the ALJ's decision and Award.