

MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

October 2019 – December 2019

Claimant's Injury after Fall in Employer's Hallway Compensable

Adkison vs. Argosy Riverside Casino, Injury No. 09-103074

The claimant worked for the employer as a table games dealer. On December 31, 2009, she walked over ice, snow, and salt on the parking lot to get to the only employee entrance when she slipped and fell on the floor. She fractured her left arm, which required surgery.

The ALJ found the claimant fell in an unsafe location due to her employment and awarded benefits. The ALJ noted that the claimant's injury did not occur merely because she was walking or "just fell", rather she slipped on the slippery, smooth, highly polished, concrete floor because her shoes were wet after walking through snow and ice, and the slip caused her to fall. The ALJ found that the claimant's injury was a rational consequence of some hazard connected with the employment, the hazard being the snow and ice outside the only employee entrance that caused her shoes to be wet and slippery, which caused her to fall on employer's floor that had no traction skids, mats, or rugs. Therefore, claimant fell in an unsafe location due to her employment.

On appeal, the Commission affirmed the ALJ's decision and Award with a supplemental opinion wherein the Commission found that the combination of employee's wet shoes on the slippery, smooth, highly polished, concrete floor in the employee-only hallway was a hazard or risk directly related to her employment to which she would not have been equally exposed to outside of and was unrelated to her employment in her nonemployment life. As the ALJ found, the employee's injury was a rational consequence of some hazard connected with employment. Therefore, the Commission found the claimant was in the course and scope of her employment when she sustained her injury, and she was awarded benefits.

Injury Sustained in Motor Vehicle Accident While Claimant Eating Breakfast Sandwich Not in the Course and Scope of Employment

Boothe vs. DISH Network, Inc., Injury No. 17-053996

On the morning of July 23, 2017, the claimant was operating the employer's van as a technician. He left his house and started his route, determined by his employer. He stopped at a convenience store to purchase a breakfast sandwich. On the way to his first customer, he choked on his sandwich, blacked out, and was in a one-vehicle accident. The employer argued that the

claimant was not in the course and scope of his employment when the motor vehicle accident occurred.

At a Hearing, the ALJ found that the injury occurred in the course and scope of his employment because the risk source was having to travel on a rural highway on a strict timeline in the employer's van, which was something the claimant was not equally exposed to outside of his nonemployment life. The ALJ noted that the claimant was not on a distinct personal errand and was in the course and scope of his employment as he had been driving to his first scheduled customer stop, not to the employer's principal place of business. Therefore, the ALJ awarded benefits.

On appeal, the Commission reversed the ALJ's decision and Award holding that the claimant's injury did not arise out of and in the course of his employment because an injury only occurs within the course and scope of employment if the claimant is able to show a causal connection to the employment other than the fact the injury just occurred at work. Here, the Commission reasoned there was no aspect of the claimant's work that required him to eat breakfast while driving. In fact, the employer prohibited the employee from eating and drinking while driving. Further, the particular circumstances of this case show that the claimant had the ability to eat his breakfast prior to his first shift instead of waiting until after he clocked in and started driving. Therefore, the Commission found there was no causal connection to his employment other than the fact the claimant had already clocked in. The claimant argued that the personal comfort doctrine applied, but the Commission did not agree because there was no benefit to the employer for the claimant to stop a few minutes into his first shift of the week to pick up a breakfast sandwich to eat while driving. Therefore, the claimant did not establish that his injury occurred in the course and scope of his employment, and the Commission denied benefits.

Claim Denied as Claimant's Condition was Due to Degenerative Condition, Not His Job Duties

Sample v. Drivers Management LLC/Werner Enterprises, Inc. and Ace American Insurance c/o ESIS, Injury No. 17-006709

The claimant began working as a truck driver in November of 2016. His job duties involved picking up his preloaded trailer, performing a safety inspection, driving to 3 to 5 retail stores as scheduled by the employer, and dropping off loaded totes or "rolltainers" from his trailer at each store. The claimant's job duties did not involve stocking the rolltainers or loading the rolltainers in the trailer. Delivery at each store required the claimant to offload 10 to 24 rolltainers from his trailer, which he pushed or pulled into the store. The claimant testified these could weigh between 200 and 1,000 pounds.

The claimant testified that after Christmas 2016 he experienced general muscle soreness in both shoulders and arms while performing his job duties. He reported that it came on gradually and he did not have a specific work accident, event or trauma. Sometime before January 17, 2017,

after an ice storm kept him home over the weekend, the claimant notified his fleet manager of his complaints. He testified that he did not have previous neck or arm complaints or treatment for neck or arm symptoms.

The employer sent the claimant to Fulton Clinic at which time he was diagnosed with right shoulder pain, right neck pain radiating into the right arm and muscle spasms. Thereafter, the claimant sought treatment on his own with his personal physician who did not document any specific work event or discrete work injury. He also treated with a chiropractor and a pain management physician who provided him an injection.

The employer had the claimant evaluated by Dr. Cantrell who found that the claimant had radiographic evidence of disc pathology at the C5-6 level, resulting in spinal cord compression. However, he opined that the claimant's job duties were not the prevailing factor in causing the radiographic abnormalities shown on the MRI. Dr. Cantrell released the claimant at MMI. Dr. Chabot evaluated the claimant and reviewed the previous cervical spine MRI which showed evidence of disc desiccation at C3-4, C4-5, C5-6, and C6-7 and a large extruded disc herniation at C5-6 on the right, which extended into the posterolateral region on the right, and significantly narrowed the right neuroforamina. Dr. Chabot noted the claimant's condition occurred over a matter of years rather than weeks or months and was not a result of the claimant's job duties.

Dr. Lee evaluated the claimant at the request of the claimant's attorney and he opined that the claimant's job duties were the prevailing factor in causing the acute, large, right sided disc herniation of C5-6. The onset of his symptoms coincided with his strenuous work activities for the employer and there was no other event to explain the onset. Dr. Lee believed surgery was necessary to cure and relieve the effects of the work injury.

The ALJ found that the claimant's job duties were not the prevailing factor in causing the claimant's condition. The claimant then appealed to the Commission who found that the claimant's neck condition was pre-existing and degenerative in nature which was shown by the objective medical evidence including the MRI which revealed disc desiccation at C3-4, C4-5, C5-6, and C6-7. The Commission found that the claimant's testimony was not particularly credible as the claimant was inconsistent and evasive in his testimony. Therefore, the Commission found that the claimant did not sustain an occupational disease arising out of and in the course of his employment. Further, they found that his employment was not the prevailing factor causing his neck condition and the pathology set forth in the MRI.

Fund Not Responsible for Benefits Because Claimant PTD Before Primary Injury

Wurth v. The Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. ED107335 (Mo. App. 2019)

FACTS: On November 4, 2008 the claimant sustained a low back disc injury while carrying a heavy cable box and underwent a discectomy. He settled for 25% of the body and proceeded to

a hearing against the Fund alleging permanent total disability. Prior to his November 2008 injury, the claimant sustained previous work-related injuries and has a history of three prior low back surgeries. At the Hearing, Dr. Volarich testified on behalf of the claimant and was the only medical expert to testify. Dr. Volarich conducted evaluations of the claimant in February 2000, December 2001, January 2008 and September 2009. Dr. Volarich testified that after every injury, the claimant's spine worsened. When he was evaluated in January of 2008, Dr. Volarich believed that the claimant could maintain his job as a manufacturing manager but needed to be in a sedentary to light duty capacity. He also opined that if the claimant lost his job at that time, it would be difficult for him to find employment in the open labor market. Dr. Volarich further explained that the employer allowed the claimant to lie down in an office during the day when he needed to take a break and he could come and go as he pleased which he noted is not typical in the open labor market by any stretch.

Mr. England evaluated the claimant and he opined that the employer provided him with quite a bit of accommodation prior to his injury in November 2008 and he had been more and more accommodated after the 2008 injury.

The ALJ denied compensation opining he was permanently and totally disabled prior to the November 2008 accident. The claimant appealed to the Commission which affirmed. The claimant then again appealed.

HOLDING: On appeal, the Court of Appeals affirmed the Commission's decision. The Court held that the Commission's determination that the claimant was PTD prior to his employment with the employer is supported by substantial and competent evidence. Specifically, the claimant argued the evidence presented before the ALJ supported a conclusion that prior to his 2008 work-related injury he was not severely limited or highly accommodated because he worked a full-time job for years. However, the Court was not persuaded. The Court noted that although the claimant's testimony disputed that he was accommodated to the extent he could lie down, the Commission attributed more weight to the testimony of Dr. Volarich which was consistent with his records at the time of his evaluation. Therefore, the Court affirmed that decision of the Commission.

Claimant PTD Due to Primary Knee Injury and Pre-existing Conditions

Nivens v. Interstate Brands Corporation and the Second Injury Fund, Case No. WD82132 consolidated with WD82136 (Mo. App. 2019)

FACTS: On February 7, 2008, the claimant injured his right knee while pushing a full load of transport rack and underwent surgery. He was released back to work. However, he required assistance to complete his job duties. The employer provided him with an assistant. However, in the fall of 2008, the employer informed the claimant that he was going to have to complete his job without an assistant, and therefore he retired. The claimant does have pre-existing conditions including low back injuries, a right knee injury, a cardiac condition and a 2007 wrist injury

which required surgery.

At a hearing, the ALJ found that the claimant was PTD as a result of the right knee injury and his pre-existing conditions. The Fund appealed and the Commission affirmed the Award. The Fund again appealed alleging that the finding that the claimant was PTD was against the overwhelming weight of the evidence.

HOLDING: It was noted that the claimant went to the hearing with respect to the 2007 wrist injury and on appeal the Commission determined that the claimant was not PTD as a result of the 2007 wrist injury and his pre-existing condition. Therefore, the Fund argued that the Commission's decision was inconsistent with the 2007 opinion wherein it found the claimant was not PTD. The Court was not persuaded and noted that it was not inconsistent for the Commission to find that the claimant's pre-existing conditions especially the back injury became a hindrance or obstacle when combined with his primary knee injury to make the claimant PTD after the primary injury even if he was not PTD after the prior wrist injury.

Therefore, the Court found that the Commission did not error in entering its final Award finding the Fund liable for PTD benefits.

Claimant Not PTD as Claimant Did Not Meet Her Burden of Proof Based on Her Self-Reported Limitations and Her Expert Evaluation

Williams vs. Gate Gourmet, Inc., Injury No. 08-108467

On November 30, 2008, the claimant sustained injury to her neck while unloading a cabinet from a compartment on an airplane. She was seen by Dr. Lange and underwent a fusion at C6-C7. Subsequently, in light of her continuing complaints, she was referred to Dr. Coyle and underwent a second procedure at the same level. Claimant did have a history of a prior neck injury, which resulted in a previous surgery at C4-C5 and C5-C6.

The claimant settled her case against the employer for 45% of the body and proceeded to a Hearing against the Fund for permanent total disability benefits. Prior to the Hearing, the claimant's attorney obtained a report from Dr. Berkin who assessed disability and provided the claimant restrictions. However, he did not specifically say the claimant was permanently and totally disabled. The claimant's attorney also obtained a report from Mr. Dolan, a vocational rehabilitation counselor, who found the claimant was permanently and totally disabled based on the restrictions of Dr. Berkin.

At the Hearing, the ALJ found that, in light of the fact that Dr. Berkin did not state that the claimant was permanently and totally disabled, based on strict construction, the claimant did not meet her burden of proving that she was permanently and totally disabled.

On appeal, the Commission agreed that the claimant was not permanently and totally disabled

but noted that a medical expert need not use “magic words” that the claimant is permanently and totally disabled. The Commission found that the record in this case lacked significant competent and substantial evidence to support the conclusion that the claimant was permanently and totally disabled. The Commission noted that Dr. Berkin, the claimant’s only medical expert, explicitly avoided finding the claimant permanently and totally disabled and rather assessed permanent partial disability only. While the Commission noted that a medical expert does not have to state that a claimant is permanently and totally disabled, in this particular instance, since a doctor did not state the claimant was permanently and totally disabled, the Commission did not believe there was enough evidence in this case to find the claimant permanently and totally disabled. The Commission did believe that the claimant was entitled to compensation from the Fund for permanent partial disability.

Court Overturned Commission’s Decision that Claimant Not PTD Because Award Not Supported by Sufficient Competent Evidence

Hazeltine vs. State of Missouri, Second Injury Fund, Case No. ED107630 (Mo. App. 2019)

FACTS: On June 15, 2012, the claimant sustained an injury when she was hit in the head by a tool rack suspended from the ceiling. She was diagnosed with a head injury, a head laceration, left shoulder strain and neck pain. She returned to work after her injury, had difficulty performing her job and was terminated shortly after her return. She did not return to the work force after she was terminated. She settled her claim against the employer for 20% of the body referable to the head, psychiatric disability and left shoulder. She then proceeded to a hearing against the Fund for perm total benefits. With respect to her pre-existing condition, she had prior psychiatric traumas including being raped in 1970s and her daughter was raped and murdered in 1995. Thereafter she left the work force and did not return to the workforce until 2012.

Dr. Volarich testified on behalf of the claimant and assessed disability referable to the head injury and left shoulder. He deferred to a psychiatrist for any psychiatric evaluation and diagnosis. Dr. Sky also testified on the claimant’s behalf and opined that the claimant had 25% disability pre-existing the accident and that the claimant’s pre-existing psychiatric disability was exacerbated another 75% by the accident. Dr. Liss also testified on the claimant’s behalf and diagnosed her with anxiety and depression along with PTSD both as a result of the work injury and as a pre-existing condition. He assessed 50% disability referable to the pre-existing condition and 50% disability as result of the work injury. Both Dr. Sky and Dr. Liss opined she was PTD as a combination of the work injury and her pre-existing condition.

The ALJ denied the claimant perm total benefits opining that she did not meet her burden of proving the nature and extent of any alleged pre-existing psychological disability by a reasonable degree of certainty. The ALJ found that other than testifying briefly about leaving her job after her daughter’s death, going to see a therapist twice and receiving medication from her primary care physician, she did not testify about any actual symptoms prior to her work accident. He did not find her testimony persuasive. He also did not find the testimony of Dr. Liss and Dr. Sky

persuasive. The claimant appealed and the Commission affirmed noting that the Award was supported by sufficient competent evidence. The claimant again appealed.

HOLDING: The claimant argued that the Commission erred in finding that she did not have pre-existing permanent disabilities that were a hinderance or obstacle to the employment. The Court noted that when determining whether the claimant has satisfied the hinderance or obstacle requirement, the proper focus is not on the extent to which the condition has caused difficulty in the past but on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than what has resulted in the absence of the condition. The Court noted that the claimant testified that she left her employment after her daughter's death and moved away from the area. Also, she testified that her daughter's death was the reason she stayed out of the work force from 1995 until 2012. Also, she treated with her primary care physician and was prescribed medications. Furthermore, the claimant abused alcohol following her daughter's death and had DWI convictions. The Court found that this evidence relates to whether her pre-existing disabilities constituted a hinderance or obstacle to employment.

The Court went on to note that acceptance or rejection of evidence is usually an issue for the Commission to determine. When the Commission reaches its decision by expressly making credibility findings, it may disbelieve uncontradicted and unimpeached testimony. However, where the record is wholly silent concerning the Commission's weighing of credibility and neither the claimant nor the experts testifying on his or her behalf are contradicted or impeached, the Commission may not arbitrarily disregard and ignore competent, substantial and undisputed evidence. The Court went on to note that the Commission did not conclude that they disbelieved the claimant's testimony and in fact found that she was a very sympathetic witness. Since the claimant's testimony was not expressly disbelieved, contradicted or impeached the Court found the Commission erred in disregarding it.

The Court also noted that the Commission was not free to arbitrarily disregard and ignore the testimony of Dr. Liss and Dr. Sky regarding the claimant's pre-existing disabilities and base its finding upon conjecture or its own mere personal opinion unsupported by sufficient competent evidence. The Court noted the claimant's expert psychiatric testimony sufficiently established the nature and extent of her pre-existing permanent psychiatric disabilities and the Commission's conclusion to the contrary appears to reflect its personal opinion that something other than the pre-existing disabilities caused the claimant to leave the work force.

The Court concluded that the Commission arbitrarily disregarded and ignored the substantial and undisputed evidence offered by the claimant and its denial of the claimant's claim against the Fund was an error. The case was remanded with instructions for the Commission to enter an Award consistent with the findings of this opinion.

Fund Liable for PPD Benefits Even Though Occupational Disease Claim Filed in 2016 Because "Injury" was Prior to January 1, 2014

Krysl v. Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. ED107591 (Mo. App. 2019)

FACTS: In 1994, the claimant was employed as a sculptor for the Veil Prophets of St. Louis, carving large characters for parade floats. In 2013, he began to experience numbness and tingling in his right hand while sculpting and was ultimately diagnosed with severe right carpal tunnel syndrome. The parties stipulated that January 1, 2013 was the correct date of injury referable to the claimant's occupational disease. He settled his primary claim against his employer and proceeded to a hearing against the Fund. The ALJ awarded the claimant PPD. The Fund appealed arguing the claimant was not entitled to PPD due to the new law that went into effect stating that the Fund is no longer responsible for PPD benefits for any claims filed after January 1, 2014.

HOLDING: The claimant argued the plain language in Section 287.220 applies to all injuries occurring prior to January 1, 2014, despite the fact that he filed his claim after that date on July 5, 2016. The Court agreed and concluded that although the claimant filed his claim for injury due to occupational disease after January 1, 2014, he sustained a compensable injury prior to this date resulting in his PPD. Therefore, his claim was not precluded by the new statute that went into effect January 1, 2014 and was entitled to benefits.

Claimant Awarded Compensation for Wife's Nursing Care After Employer Denied Necessary Nursing Care Services

Reynolds v. Wilcox Truck Line, Inc., Case No. WD81969 (Mo. App. 2019)

FACTS: On July 17, 2007, the claimant was driving his regular route as an over-the-road trucker and was in a one car motor vehicle accident. He was diagnosed with PTSD, was seen by a social worker and then began treating with a psychiatrist. Dr. Halfaker, a neuropsychologist testified on behalf of the employer and assessed 10% disability. Dr. Lynch also evaluated the claimant at the request of the employer and found no evidence of progressive cognitive decline but recognized that the claimant was clearly suffering from impaired cognition and symptoms consistent with PTSD and depression. The claimant's attorney had Dr. Butts testify who also diagnosed PTSD and believed that he was permanently and totally disabled. Mr. Wiemholt also testified on behalf of the claimant and believed that he was PTD due to his PTSD. After the work injury, the claimant returned to full duty work briefly in 2008 and then retired. The claimant did have a farm wherein he raised cattle. The claimant requested nursing services related to his injuries, but the employer refused to provide the services. Based on the claimant's declining condition, his wife eventually abandoned her outside employment entirely to care for him. A nurse care consultant concluded that the claimant needed sixteen to twenty hours of daily home care.

The ALJ opined that the claimant was PTD and the employer was responsible for benefits. The

ALJ did not believe the claimant was entitled to compensation for his wife's in-home nursing. Both parties appealed. The Commission affirmed the ALJ's Award of perm total disability but reversed the decision in part regarding compensation for the claimant's prior nursing services. The employer appealed.

HOLDING: With respect to the claimant's perm total allegation, the Court noted that the mere fact that the claimant returned to work for a trial period does not prevent a finding that the claimant is PTD. The employer also argued that the claimant was not perm total because he engaged in cattle raising. However, the Court stated that a claimant need not be completely inactive to be found to be PTD.

The employer additionally argued that the Commission erred in awarding the claimant compensation for past nursing services related to tasks completed by his wife. However, the Court stated that after the employer denied the claimant's request for nursing care, it became necessary for the wife to reduce and eventually abandon her outside employment to provide the services necessary to care for the claimant. The Court further stated that the wife's services met the nursing definition of a person skilled in caring for and waiting on the infirm, the injured or the sick. Additionally, the Court found that the wife's services were reasonably required to cure and relieve the effects of the claimant's work injury. The Court further stated that the Commission was careful to distinguish between the hours the wife committed to compensable services and those dedicated to normal spouse activities. Therefore, the Court affirmed the Commission's Award.

Court Increased Commission's Award of 5% PPD to 20% Due to Objective Testing and Findings

Harris v. Ralls County, Missouri, Case No. ED107606 (Mo. App. 2019)

FACTS: On March 9, 2009 the claimant and a co-worker were told to change a 350-pound tire and the claimant sustained an injury to his back. He was referred to Dr. Coyle who reviewed the MRI and diagnosed disc herniations. The claimant underwent injections. Thereafter, Dr. Coyle noted that the claimant did not receive any relief from the injections and advised against surgery and referred him to Dr. Cantrell. After review of the MRI he recommended an FCE which showed inconsistent effort and symptom magnification on the part of the claimant. Eventually Dr. Cantrell placed the claimant at MMI and assessed 8% disability, half attributable to the work injury and the other half to pre-existing degenerative and congenital abnormalities unrelated to his work injury. Dr. Bernardi also testified on behalf of the employer and believed the claimant's work accident may have caused a low back sprain/strain but those symptoms should have resolved in 4-6 weeks. Dr. Bernardi believed the claimant did have a pre-existing condition. He did not have an explanation for the claimant's symptoms but did assess 2% disability referable to the sprain/strain type injury. Mr. England testified on behalf of the employer and found that the claimant was employable.

The claimant's attorney obtained a report from Dr. Musich who determined that the claimant sustained 65% disability to the body due to the work-related injury and residual bilateral lower extremity radiculopathy. Mr. Weimholt testified on behalf of the claimant opining that he is permanently and totally disabled.

The ALJ concluded that the claimant sustained a work-related accident, his low back injury was medically causally related to the 2009 work accident, he was PTD and the employer was responsible for benefits. The employer appealed.

The Commission concluded that the claimant sustained a work-related accident on March 9, 2009 that arose out of and in the course of his employment because he suffered an "unusual strain" producing objective symptoms of an injury during his shift at work. The Commission further concluded that because only "some of the symptoms" the claimant experienced were the result of the 2009 work accident, the 2009 work accident was the prevailing factor causing the claimant to suffer only a chronic back sprain or strain and awarded 5% PPD.

HOLDING: The Court found the Commission's Award determining medical causation and concluding the claimant suffered only 5% permanent partial disability was not supported by sufficient and competent evidence. Therefore, the Award was affirmed in part and reversed and modified in part.

The Court found that the Commission's determination that the claimant had not proven PTD was supported by sufficient and competent evidence and affirmed that part of the decision. The Court further noted that the Commission's finding that the objective evidence failed to show the claimant suffered radiculopathy and an acute injury because of the 2009 work accident and therefore the claimant was only entitled to 5% PPD was against the overwhelming weight of the evidence. The Court stated that the electrodiagnostic and radiographic findings from March 11, 2009 made it clear the claimant suffered radiculopathy and an acute post-traumatic injury stemming from the 2009 work accident. The Court further noted that although the experts never used the precise term "acute" to describe the claimant's injury that did not convince the Court otherwise and therefore the Court believed that 20% was reasonable and modified this part of the Commission's decision.