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MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

October 2015 – December 2015

Claim for Occupational Disease Denied After Claimant Settled an Earlier Claim for the Same Injury

Brown v. Wal-Mart Associates, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 13-077896

The claimant fell from a loading dock in 2003 and sustained a complete rotator cuff tear to the left shoulder. The employer provided medical care, including two left shoulder surgeries. He was placed at MMI in 2004, at which time the treating doctor assessed 33% PPD of the left shoulder and discussed with him the likelihood that he would require ongoing medication and possibly future surgery. However, the claimant settled his worker's compensation case in 2005 with the employer, specifically waiving his right to future medical treatment.

The claimant returned to work with restrictions. He continued working for the employer, and over the next three years he experienced increasing shoulder symptoms and sought additional treatment before filing a Claim for Compensation in 2013. In his 2013 Claim, he alleged injury to his left shoulder due to occupational disease from repetitive trauma associated with his work for the employer and sought referral to an orthopedic surgeon, which was denied.

The ALJ found the claimant's testimony and his expert Dr. Paul unpersuasive and denied his claim. The ALJ held that his job duties did not involve repetitive motion and accepted the employer's expert Dr. Lennard's medical opinion that his shoulder pain stemmed from his 2003 shoulder surgeries and underlying degenerative joint disease.

On appeal, the Commission affirmed the ALJ's Award with a supplemental opinion. It accepted the claimant's description of his work as repetitive. However, it agreed that Dr. Lennard's medical opinion was more persuasive and credible than Dr. Paul's testimony, which failed to differentiate his current complaints from the symptoms he experienced after his 2003 work injury. The claimant was precluded from seeking additional medical treatment for his 2003

injury under the terms of his Settlement Agreement, and he failed to establish a separate work injury or occupational disease. Therefore, the ALJ's Award denying treatment was affirmed.

Claim for PTD for Occupational Disease Caused by Exposure to Pigeon Droppings Compensable

Lankford v. Newton County and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 07-131974

The claimant was employed by employer for 10 years, during which time he took as many as 10 smoke breaks per day on the employer's roof while often discussing work with co-workers. He was exposed to large numbers of pigeons and pigeon droppings while on the roof. In 2007, the claimant underwent a lobectomy and suffered a stroke during his recovery that rendered him permanently and totally disabled before his death. His death certificate states that he died of pneumonia and COPD. The claimant's wife, substituted as a party to the Claim as his sole dependent, alleged that the cause of his PTD was complications from a surgery that was necessitated by an occupational disease caused by his exposure to dried pigeon droppings on the employer's roof.

The ALJ heard testimony from 3 medical experts. Dr. Parmet testified that the claimant required surgery because of an MAI bacterial infection caused by exposure to pigeon droppings on the employer's roof. Dr. Jost testified that MAI could have been contracted anywhere in non-employment life. Dr. Hofmann agreed with Dr. Jost and added that the claimant's cigarette smoking was the primary cause of his pulmonary conditions, including contraction of MAI. The ALJ found Dr. Parmet's opinion the most persuasive and awarded all accrued PTD benefits to the claimant's wife.

On appeal, the Commission declined to use the ALJ's "unequal exposure" standard and instead only required the claimant to establish that the disease was not an ordinary disease of life to which the general public is exposed. Since all 3 doctors agreed that the infection was extremely rare and at least possible to contract from the employer's roof, the Commission found that the claimant met his burden to establish occupational disease. The Claim was therefore compensable.

Claimant with back injury received additional TTD, past medical, and future medical after MMI

Valdez v. Glister Mary Lee Corp., Injury No. 11-049336

The claimant sustained an injury on June 21, 2011 when he reached to grab a heavy bag and twisted his upper body, causing immediate low back pain. He was initially diagnosed with a back strain, and he treated with Dr. Womack who prescribed pain medication and light duty.

On July 1, 2011, he reported that his low back pain was resolved and was released to work without restrictions. He returned to his regular job, but his symptoms worsened considerably until he requested additional treatment on August 15, 2011, which was denied. The claimant continued to seek medical treatment on his own. In September 2011, the claimant was evaluated by Dr. Chabot on behalf of the employer, who opined that his present complaints were not causally related to his alleged work injury. He then received a letter from the employer formally denying his claim.

The claimant treated on his own, and on December 27, 2011, Dr. Fonn performed an L3-4, L4-5, and L5-S1 bilateral laminotomy, decompression, partial facetectomy, foraminotomy, excision of herniated intervertebral disc, arthrodesis, autograft of bone, and application of intervertebral bio-mechanical device with interbody spacers and posterior fixation.

At a hearing in December 2014, the claimant sought payment for prior unauthorized treatment, future medical, TTD, and PPD. The employer's expert Dr. Chabot testified that the claimant's condition was primarily degenerative and not caused by his alleged work injury. Dr. Poetz testified on behalf of the claimant that the June 21, 2011 injury was the prevailing factor causing his condition and assigned 45% PPD to the body, referable to the back. The ALJ found that the claimant sustained a work-related accident. However, she found the employer's expert's testimony regarding causation more credible and held that the claimant failed to show that his medical condition and surgery were medically caused by his accident. The ALJ awarded the claimant 7.5% PPD of the body but denied medical treatment and TTD.

On appeal, the Commission modified the ALJ's Award because it found Dr. Poetz's opinion more credible and saw no clear evidence of changed symptoms, a prior medical condition, or a subsequent injury that would explain the need for additional treatment. Therefore, the Commission awarded 40% PPD of the body referable to the back, past and future medical, and TTD for December 23, 2011 - February 13, 2012.

Claimant's Injury From Fall on Icy Parking Lot Compensable

Missouri Department of Social Services v. Beem, Case No. WD78159 (Mo. App. 2015)

FACTS: The claimant slipped and fell on an icy parking lot outside her work during a break, sustaining an injury. The Commission ruled that the extension of premises doctrine applied, because the employer controlled the parking lot, which was a customary and accepted means for workers to get to and from work. The employer appealed.

HOLDING: The Court of Appeals agreed that the extension of premises doctrine applied, finding that the employer exercised sufficient control over the parking lot by arranging to have the snow and ice cleared in the past. The Court also found that the claimant was not equally exposed to the risk of injury outside of her employment because the risk arose from slipping on

ice on *that particular parking lot*, to which the claimant was only exposed when going to and from work each day.

Claimant's Fall From Chair While Eating Lunch on Employer's Premises Compensable

Wright v. Treasurer of Missouri as Custodian of Second Injury Fund, Case No. ED102892 (Mo. App. 2015)

FACTS: The claimant sustained an injury when his chair collapsed while he was eating lunch in the employer's lunch room. The ALJ found the injury compensable. On appeal, the Commission affirmed, stating that the claimant's injury arose out of and in the course of employment because the source of risk that caused the injury was the collapse of *that particular chair*, which belonged to the employer, and to which the claimant was not equally exposed outside of his employment. It also found the claim compensable, even though the claimant was eating lunch at the time, because finding otherwise would be inconsistent with the limited extension of premises liability that protects employees while going to and from lunch on the employer's premises. The SIF appealed, arguing that the injury did not arise out of and in the course of employment.

HOLDING: The Court disagreed, noting that although the claimant was eating lunch at the time instead of performing his job duties, the personal comfort doctrine provides compensation when an employee sustains an injury on the employer's premises while attending to personal comfort (eating lunch). The Court also agreed that it made no sense to protect employees *going to and from* lunch under extended premises liability while not protecting employees on the employer's premises *during* lunch. Second, the Court focused on the source of the risk of injury, the particular chair, to find that the claimant was not equally exposed to the risk of injury outside of his employment. Since the claimant only sat in that chair while at work, he was injured *because* he was at work, not simply *while* he was at work. Therefore, the injury arose out of and in the course of employment, and the Court affirmed the Commission's decision.

The Commission's Factual Finding That a Medical Opinion Was Not Credible Was Supported by Sufficient Competent Evidence

Rasa v. Treasurer of the State of Missouri - Custodian of the Second Injury Fund, Case No. WD78562 (Mo. App. 2015)

FACTS: The claimant suffered injuries to her lower back and right knee during a work-related accident in June 2008 and filed a Claim against the Second Injury Fund due to multiple pre-existing medical conditions, including chronic neck pain, mid-back pain, and headaches resulting from a motor vehicle accident in 1988, incontinence, diabetes, and peripheral neuropathy. At a hearing, she presented her own testimony and Dr. Stuckmeyer's medical opinion that the combined effects of her primary injury and pre-existing conditions left her PTD.

The ALJ awarded PPD but found that the claimant failed to establish she was PTD, because Dr. Stuckmeyer's report was internally inconsistent and contrary to testimony from the claimant's prior treating physicians that her pre-existing medical conditions were insignificant.

Although the Commission found the claimant's testimony credible, it agreed that Dr. Stuckmeyer's testimony was unpersuasive. Before making that determination, the Commission thoroughly reviewed his testimony and reports as well as medical records from other treating physicians. The Commission gave the claimant's testimony little weight, because it was unsupported by credible medical evidence, and adopted the ALJ's award. The claimant appealed.

HOLDING: The Court of Appeals affirmed the Commission's decision, noting that the credibility of a medical expert's testimony, like any other testimony, is a question of fact which will be upheld if reasonably supported by the evidence. Here, the Commission's decision to discredit Dr. Stuckmeyer's testimony was reasonably supported by other evidence on the record. Therefore, it did not err by denying PTD benefits.

The Court Defers to Factual Determinations Made by the Commission that are Supported by Competent and Substantial Evidence, and the Commission May Apply a Multiplicity Factor

Kolar v. First Student, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Case No. ED102450 (Mo. App. 2015)

FACTS: The claimant, a bus driver, was performing a pre-trip bus inspection when he fell and injured his right leg, requiring surgery. During rehab, he was not allowed to bear weight on his right leg for an extended period of time and began complaining of pain in his left knee. Dr. Volarich believed the work accident was the prevailing factor causing the claimant's left knee pain and assigned 45% PPD to the right leg, 35% PPD to the left knee, and 35% PPD to the pre-existing body. Dr. Medler, the treating physician, testified that the claimant's left leg pain was unrelated to the work accident and assigned 5% PPD to the right leg. The ALJ found Dr. Volarich's testimony more persuasive and awarded 35% PPD of the right leg and 15% PPD of the left knee and a multiplicity factor of 12.5% and ordered the employer to provide future medical to remove hardware from the claimant's right leg should it become necessary. The Commission affirmed and adopted the ALJ's findings. The employer appealed.

HOLDING: The Court of Appeals declined to overturn the Commission's factual findings. It noted that the fact-finder has particular authority to determine witness credibility and assign weight to the evidence, and the Commission's factual findings were supported by competent and substantial evidence. The employer also argued that assigning a multiplicity factor violates strict construction as the statute does not include language regarding multiplicity. However, the Court disagreed, finding that the 2005 Amendments to The Workers' Compensation Act did not

eliminate the Commission's discretion to assign multiplicity factors. The Commission's decision was affirmed.

The Commission May Believe or Disbelieve a Party's Testimony, Even If There Is No Contradicting Testimony

Harrington v. Employer Solutions Staffing, Case No. SD34016 (Mo. App. 2015)

FACTS: The claimant was hired by an employer in Missouri for a job to be completed in Texas, where he was injured in a work accident. Notice of a Hardship Hearing was sent to both the claimant and employer. When only the claimant appeared, the ALJ granted a Temporary Award. Notice of a Final Hearing was also sent to both the claimant and employer. When the employer failed to appear, the ALJ awarded benefits and imposed a penalty on the employer for failure to comply with the Temporary Award.

The employer filed a Motion to Set Aside the Awards and to File an Answer to Claim for Compensation Out of Time. In its Motion, the employer admitted it received notice of the hearings and a copy of the Temporary Award, but it argued that it was not at fault because it reasonably believed they related to a pending Texas claim being handled by Texas Mutual. The ALJ denied the Motion, finding "no good cause to set aside either Award."

The Commission modified the ALJ's Award to give the employer credit for benefits paid in Texas for TTD and reduce the penalty for non-compliance with the Temporary Award because some payments had been made under Texas law. The Commission also rejected the employer's Motion, concluding that it was unreasonable to fail to properly read the notice of hearing and also unreasonable to "fail to defend this claim on the basis of its alleged mistaken belief." On appeal, the employer claimed that its Motion was sufficient as a matter of law since its affidavit was uncontradicted.

HOLDING: The Court of Appeals disagreed. It held that the trier of fact has the power to believe or disbelieve testimony given by a party bearing the burden of proof on the issue, even when that testimony is uncontradicted. When the Commission expressly rejects a party's testimony as not credible, the Court will accept it as a finding of fact. Here, the Commission expressly rejected the employer's affidavit, which it had authority to do. The Commission's decision was affirmed.

Claim for Psychiatric Injury After Co-Worker Assault Denied Because Claimant's Testimony was Inconsistent and Expert Medical Opinion was Not Credible

Bowman v. Central Missouri Aviation, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 07-128481

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

On appeal, the Commission found the claimant's expert's reports admissible but still affirmed the ALJ's Award on other grounds. Dr. Daniel found the claimant's results on the only psychological test administered to be invalid. Since no other psychological testing was performed, his opinion was based entirely on the claimant's subjective complaints and symptoms. Also, material inconsistencies between the claimant's testimony and his statements to other physicians made the claimant an inconsistent and unreliable witness. The Commission found Dr. Daniel's causation opinions not credible, because they were largely based on the claimant's subjective complaints. Therefore, the claim that the 2007 work accident was the prevailing factor causing the claimant's psychiatric condition was not supported by substantial competent medical evidence and was not compensable.

Due to Void Marriage, Woman Not Entitled to Benefits as a Dependent

Ard v. Jim Plunkett, Inc., Injury No. 10-085096

The claimant sustained multiple fractures in 2010 when he was crushed by a falling crate. He passed away from unrelated causes after the Division hearing but before an Award. Ms. Ard was married to a Mr. Pflugradt in 1992. She then attempted to marry the claimant in 2001 without dissolving or nullifying her marriage to Mr. Pflugradt. After the claimant's death in 2013, Ms. Ard annulled her marriage to Mr. Pflugradt in circuit court. Since the claimant's estate was not notified of the proceeding, it later filed a Motion to Intervene and Set Aside the Default Judgment. The court then denied Ms. Ard's petition for annulment at a second hearing in 2015.

At a hearing, the ALJ awarded 65% PPD to the body as a whole and held that Victoria Ard was the claimant's dependent, because her first marriage to Mr. Pflugradt was void. The claimant's estate appealed that Ms. Ard was *not* the claimant's dependent.

The Commission modified the Award by holding that Ms. Ard was not the claimant's dependent. Since Ms. Ard's marriage to Mr. Pflugradt was not annulled, her attempted marriage to the claimant was invalid. Therefore, she was not the claimant's dependent and was not entitled to any benefits. Instead, the personal representative of the claimant's estate was entitled to all accrued and unpaid compensation due to the claimant under the Workers' Compensation Law.

PTD Claim for Left Shoulder Crush Injury Compensable

Palmer v. City of Columbia and Second Injury Fund, Injury No. 11-041865

The claimant worked as a trash collector before his left shoulder was crushed in 2011 when a trash truck pinned it against a pole, requiring surgery. Evidence showed that the claimant was a 61 year old man with a low IQ who received a high school diploma before working as a trash collector for 38 years. The claimant filed a claim for PTD against the employer and the Second Injury Fund (SIF).

The treating physician released the claimant from care in August 2011, noting that he could perform a sedentary job with restrictions. At the employer's request, the claimant was evaluated by Dr. Komes, who placed him at MMI with 70% PPD of the left shoulder and recommended that he use his left arm only for activities of daily living. Dr. Volarich then evaluated the claimant at his attorney's request and provided an 80% PPD rating of the left arm with PTD based on the left shoulder injury alone. The employer requested a separate evaluation by Dr. Cantrell, who believed the claimant could work at a sedentary to light demand level. Dr. Cantrell did not agree that he was at MMI and suggested further diagnostic testing. The claimant then was examined by Dr. Nogalski at the employer's request, who placed the claimant at MMI with 30% PPD to the left shoulder and permanent restrictions, but did not feel the claimant was PTD. Dr. Weimholt performed a vocational assessment on behalf of the claimant and opined that his left shoulder restrictions, work history, limited reading and math skills, and lack of transferable job skills resulted in PTD. The employer's vocational expert Mr. England disagreed.

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

Claimant Awarded Additional TTD for Treatment Received After Being Placed At MMI

Greer v. Sysco Food Services and Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. SC94724 (Mo. S. Ct. 2015)

FACTS: In 2006, the claimant sustained a crush injury to his left foot while standing on a stationary fork lift. He received treatment and was placed at MMI on April 23, 2007. However, he had continued symptoms and was diagnosed with tarsal tunnel syndrome, for which he underwent an unauthorized left tarsal tunnel release in 2010. The surgery was unsuccessful, and the claimant's condition worsened. He filed a claim against his employer and the Second

Injury Fund (SIF), claiming to be PTD and seeking additional TTD and medical benefits for the treatment he underwent after being placed at MMI in April 2007.

The ALJ awarded past medical expenses and 27.5% PPD of the left ankle. However, the ALJ held the claimant was not PTD and denied TTD benefits after April 23, 2007. The Commission modified the ALJ's Award to include additional TTD benefits and medical expenses for treatment the claimant underwent after he was placed at MMI in April 2007. Both the claimant and the employer appealed. After the Court of Appeals issued an opinion, this matter was transferred to the Supreme Court of Missouri.

HOLDING: The Supreme Court deferred to the Commission's credibility determinations and factual findings regarding PTD benefits and future medical care. With regard to TTD benefits, the Court found that whether any further medical progress can be reached is a factual determination to be made by the Commission. As long as a claimant is engaged in the "rehabilitative process," she is entitled to TTD benefits under the plain language of the statute. Although MMI will normally signal the end of the rehabilitative process, that will not always be the case. Instead, the Commission must weigh any evidence that the claimant is seeking additional treatment as part of the rehabilitative process before awarding additional TTD, and MMI is merely a factor which helps the Commission make that determination. Finally, the Court stated that medical treatment need not be successful to be part of the rehabilitative process, because TTD is not pre-conditioned on a successful outcome. The Commission's Award was affirmed.

Claim for Bilateral Plantar Fasciitis as an Occupational Disease Found Compensable, But Employer Not Responsible for Past Treatment

Reisa v. Kellogg Company and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 10-112950

The claimant worked for the employer for 10 years as a territory sales manager, working around 50 - 60 hours/week with approximately 85% of that time stocking shelves, pulling pallets, walking on concrete, climbing ladders, and standing on her tip toes. She did not remember telling the employer that her foot condition was related to work or ever asking the employer to provide medical treatment, and she paid all medical bills through her personal health insurance.

The claimant sought treatment with Dr. Needleman on April 22, 2010, at which time she complained of bilateral foot pain right worse than left, which had been present and becoming progressively worse for five months. She underwent a plantar fascial release with excision of infracalcaneal exostosis of the left foot in May 2011. She later sustained a minimally displaced fracture of the calcaneus in her left heel that may or may not have been related to her foot surgery. She was released from medical care on September 19, 2011 without restrictions. In a letter to the claimant's attorney dated January 5, 2012, Dr. Needleman expressed his opinion that

the claimant's medical condition was job related. Dr. Woiteshek testified that her condition was medically causally related to her work and assigned 35% PPD of the left heel for the surgically treated plantar fasciitis and calcaneal fracture and 15% of the right heel for plantar fasciitis referable to the April 22, 2010 work injury.

The Commission found the testimony and medical opinions of Dr. Needleman and Dr. Woiteshek to be more credible than the employer's expert. It held that the claimant sustained an occupational disease that was medically causally related to her employment with the employer, which was the primary factor in causing her medical condition. Therefore, the Commission affirmed the ALJ's Award of TTD and PPD equaling 1% of the right foot and 20% of the left foot. However, the employer was not responsible for the medical bills referable to treatment because the claimant never notified the employer of her condition or asked for medical treatment.

Second Claim for Compensation Barred by Claim Preclusion

Johnson Controls, Inc. v. Trimmer, Case No. WD77948 (Mo. App. 2015)

FACTS: The claimant sustained a shoulder injury while working on a production line, which involved lifting batteries that weighed eighty-five pounds. However, the claimant's statements to his doctors were inconsistent as to causation, and the employer denied liability on that ground.

The claimant filed a Claim that alleged an injury sustained in a specific work accident. At a Hearing, the ALJ was asked to determine whether or not the injury sustained was due to an accident or occupational disease arising out of and in the course of his employment. The claim was denied, though the ALJ noted that the injury would have been compensable had the claimant alleged an occupational disease rather than an accident in his Claim. The Commission confirmed the Award. No further appeal was filed.

The claimant later filed a second Claim, alleging an injury to the same shoulder caused by occupational disease that manifested itself on the same day as the original Claim. The employer argued that the second Claim was barred by claim preclusion, because it had already been adjudicated when the ALJ denied the claimant's first Claim. The ALJ issued a final Award allowing compensation, which the Commission adopted. The employer appealed on the issue of claim preclusion.

HOLDING: The Court of Appeals held that the second Claim was barred on three grounds: (1) the claimant presented evidence of both an occupational disease and an accidental injury at the initial hearing and was denied on both theories; (2) the second Claim should have been brought in the first lawsuit but was not; and (3) the second Claim arose out of the same "operative facts" as his initial Claim because it involved the same injury, reported on the same day, and requiring

the same treatment. Therefore, the claimant's second Claim was barred by claim preclusion and should have been dismissed by the Commission.

Claimant's Appeal Denied When She Failed to Challenge Each of the Commission's Reasons for Denying Her Claim

Knigh t v. Con-Agra Foods, Inc. and Treasurer of the State of Missouri-Custodian of the Second Injury Fund, Case No. WD78591 (Mo. App. 2015)

FACTS: On January 13, 2009, the claimant sustained a concussion after she fell and hit her head at work. The employer authorized her emergency room visit, but it made no other payments referable to the injury. When her request for additional medical treatment was denied, the claimant sought unauthorized treatment, paid for by her personal health insurance through work.

She filed a Claim for Compensation on August 21, 2013, which was denied by the Commission as untimely on two separate grounds. First, there was no medical evidence showing that the medical treatment the claimant received in November 2011 was rendered on account of the work-related injury she sustained in 2009. Second, payments made by the claimant's health insurance through the employer do not constitute "payments under this chapter" and do not extend the statute of limitations. Each ground was independently sufficient to deny her Claim. On appeal, the claimant challenged only one of these two grounds for dismissal by arguing that the Blue Cross/Blue Shield payments for her November 2011 medical care constituted payments "made under this chapter."

HOLDING: The Court of Appeals held that it had no choice but to affirm the Commission's decision. Even if the claimant successfully challenged one ground for dismissal, the other ground for dismissal would still stand, since it was not challenged on appeal. Therefore, the Commission's Award was affirmed.

Claimant Failed to Produce Sufficient Evidence of a "Synergistic Effect" to Trigger Second Injury Fund Liability.

Winingear v. Treasurer of the State of Missouri-Custodian of the Second Injury Fund, Case No. WD78398 (Mo. App. 2015)

FACTS: The claimant sustained a work related injury to his neck in 2011 and was diagnosed with a neck strain. He received treatment and settled with his employer for 4% PPD of the body, referable to the neck. He then filed a Claim against the Second Injury Fund (SIF), complaining of stiffness and limited ROM in his neck as well as symptoms from prior injuries to his left shoulder, chest, and ribs that resulted from a work-related accident in 2010. The claimant settled a Claim for his prior injuries for 20% PPD of the left shoulder and 3% PPD of the body, referable to the chest.

At a hearing for the 2011 injury, the claimant submitted Dr. Cohen's report, which concluded that his pre-existing conditions combined with his primary injury to create a greater overall disability than their simple sum. Dr. Cohen assigned a 15% load factor.

The ALJ found the claimant's testimony and Dr. Cohen's report unpersuasive and denied the Claim for failure to establish a "synergistic effect" between the primary injury and pre-existing conditions. Since the SIF is only liable for the amount attributable to the synergistic combination of disabilities, the claimant failed to establish SIF liability. The Commission adopted the ALJ's findings.

HOLDING: The Court of Appeals deferred to the Commission's factual determination that the claimant's testimony and Dr. Cohen's report were not credible, holding that the Commission is free to reject even uncontradicted and unimpeached testimony if the Award shows that the Commission's disbelief was the basis for the award. Since the Award was not against the overwhelming weight of the evidence, the Commission's decision was affirmed.

Claim Against the Second Injury Fund Denied Because The Claimant Was PTD as a Result of the Last Injury Alone

Phillips v. S & H Transportation and Treasurer of Missouri as Custodian of the Second Injury Fund, Injury No. 08-010379

On February 13, 2008, the claimant, a truck driver, slipped and fell, sustaining an injury to his right shoulder which required 3 surgeries, the last being a right shoulder reverse total arthroplasty in 2010. The claimant had pre-existing injuries, including a crush injury to his left knee in 1989 which was re-injured in a fall in 1994 and required a left knee arthroscopy, partial left medial meniscectomy, partial chondroplasty of the left patella and arthroscopy debridement of the left anterior cruciate ligament in 2011, after the primary injury. The claimant also had a pre-existing cervical spine injury from 1996 that he testified gradually became worse after he stopped working and a pre-existing injury to his ribs from a motor vehicle accident in 1998. After the primary injury, the claimant overcompensated with his left shoulder and received treatment for symptoms of pain and weakness from 2009 - 2013.

Dr. Yamaguchi placed the claimant at MMI in September 2010 with restrictions and rated the right shoulder at 70% PPD. Dr. Poetz performed an IME in 2011 and testified that he would impose the same restrictions on the claimant for his primary injury alone, regardless of any pre-existing injuries or conditions. Mr. England, the claimant's expert, testified that the claimant was precluded from even sedentary employment due to his primary injury regardless of any pre-existing injuries. Ms. Gonzalez performed a vocational evaluation on behalf of the employer and disagreed, testifying that the claimant was permanently and totally disabled due to a combination of all of the claimant's medical conditions, including injury to his shoulder, knee,

neck and chest. She also testified that she primarily relied on the restrictions placed on the claimant by Dr. Poetz and Dr. Yamaguchi. Based on this testimony, the ALJ found the claimant to be PTD from the last injury alone and imposed no liability on the Second Injury Fund.

On appeal, the Commission agreed and affirmed the ALJ's Award. It found the testimony of the claimant, Dr. Poetz, Dr. Yamaguchi, and Mr. England credible and the testimony of Ms. Gonzalez not credible because she failed to adequately support her opinion. Therefore, the employer must pay PTD benefits.

Where Claims are Filed and Settled, a Settlement Agreement Does Not Constitute a Second Claim That Extends the Statute of Limitations

Treasurer of the State of Missouri-Custodian of the Second Injury Fund v. Couch, Case No. WD78312 (Mo. App. 2015)

FACTS: The claimant was initially injured and filed a Claim for Compensation against both the employer and the Second Injury Fund (SIF) in 2010. She was injured again in 2011 and filed a Claim against both the employer and the SIF in 2011 and an Amended Claim in 2012. Both Claims were settled with the employer and dismissed against the SIF in March 2013. In December of 2013, the claimant filed a new Claim for both injuries against the SIF.

The SIF argued that the new Claim was time-barred because it was not filed within 2 years after either injury or within 1 year after filing a Claim against the employer. The ALJ issued an Award to the claimant, finding that her Claim was not time-barred because her settlement with the employer in 2013 constituted a "claim" that pushed back the statute of limitations. The Commission affirmed, and the employer appealed.

HOLDING: The Court of Appeals disagreed, holding that the Claim was not timely filed against the SIF and reversing the Commission's Award. Where claims are filed and then settled, a settlement agreement does not constitute a second claim that perpetually extends the statute of limitations.

The Statute of Limitation to File a Claim Was Extended to 3 Years When an Out-of-State Employer Failed to File a Report of Injury

Small v. Red Simpson, Inc., Case No. WD78289 (Mo. App. 2015)

FACTS: The claimant was a Missouri resident when he accepted a job offer by telephone from an out-of-state employer. He moved to Texas and began working, but he sustained a work-related injury in 1995 and returned to Missouri. The claimant filed a Claim for Compensation in Texas and received payments through June 2009. He then filed a Missouri

workers' compensation claim against the employer in September 2009, which was denied by both the ALJ and Commission as time barred.

The issue on appeal was whether out-of-state employers are required to file a Report of Injury within 30 days so the statute of limitations is not extended from 2 to 3 years. Interestingly, the answer would not have affected the outcome of this claim, as it was filed only months after the last payment was made on the Claim.

HOLDING: The Court of Appeals held that the claimant's injury was covered by The Missouri Workers' Compensation Law, because it was a contract for employment entered into in Missouri. Therefore, payments made by the employer from 1995-2009 were payments made "under this chapter," because they were required under The Missouri Workers' Compensation Law. The Court did not limit the obligation to file a Report of Injury to in-state employers. Since the employer failed to file a Report of Injury and continued to make payments through June 2009, the September 2009 claim was timely. The Commission's decision was reversed and remanded.

Claimant's Notice of Appeal Was Not Timely Received by the Commission, because Mailed without Correct Postage

Marciante v. The Treasurer of Missouri as Custodian of the Second Injury Fund, Case No. ED102994 (Mo. App. 2015)

FACTS: The Commission awarded PPD for work-related injuries the claimant sustained in 2009. However, the claimant wanted to appeal denial of PTD benefits, and Notice of Appeal was due by May 1, 2015. The claimant mailed the Notice to the Commission on April 30, 2015, but it was returned undelivered because he placed inadequate postage on the envelope. On May 14, 2015, the claimant placed the original envelope in a new envelope with correct postage and mailed it to the Commission. This time it was received by the Commission. However, since the envelope was postmarked May 14, 2015, the Commission concluded that the Notice was untimely and dismissed the appeal.

HOLDING: The Court of Appeals considered whether the Notice was timely filed under the circumstances, since the original envelope was mailed before the May 1, 2015 deadline. It noted that a filing received after the deadline is only considered timely if it was mailed by the claimant within the filing period, endorsed by the U.S. Postal Service, and delivered to the Commission. Mail is presumed delivered under Missouri law if it was placed in an envelope with sufficient postage, correctly addressed, and placed in the mail. The Court concluded that since the envelope mailed on April 30, 2015 did not include sufficient postage, there was no statutory presumption of delivery. The Notice was therefore untimely, and the appeal was dismissed.