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

**October 2016 - December 2016**

### **Insurer to Pay Medical Fee Because Evidence Showed Medical Device Was Authorized and Medically Necessary**

#### **Crain vs. U.S. Engineering, Inc., Injury No. 12-008230, Medical Fee Dispute No. 12-01430**

The claimant underwent surgery and received a cold therapy machine from Mr. Curran (the Provider) as part of his post-operative treatment. The Insurer paid \$15,540.00 in medical fees for the cold therapy pump from December 14, 2012 - September 18, 2013. The Provider also billed \$5,600.00 for use of the medical device from November 13, 2012 - January 31, 2013, which the Insurer denied, claiming it was "an unlisted procedure" or "improper coding." The Provider submitted an Application for Direct Payment.

At a Hearing, the ALJ found that the medical device was both medically necessary and authorized in advance, even though the Provider did not speak directly to the Employer/Insurer regarding prior authorization. The ALJ reasoned that the medical device was authorized just one day prior to the dates of service in dispute, because the Insurer paid for the device from April 6, 2012 - November 12, 2012 and testimony established that the Insurer would not make payments toward equipment unless it was authorized. The ALJ also held that in this case, the Provider was not required to receive direct prior authorization from the Employer/Insurer in order for the medical treatment to be authorized in advance. Therefore, the employer/insurer were ordered to pay \$5,600.00 to the Provider for use of the medical device during the disputed dates of service. On appeal, the Commission affirmed the ALJ's Award.

### **Claimant Entitled to Past Medical Expenses But Not PPD Because Injury Caused a Temporary Increase in Pre-Existing Neck Complaints But Did Not Result In Permanent Disability**

#### **Stevenson vs. Laclede Gas Company and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 06-078015**

On August 15, 2006, the claimant was changing out a gas propane valve when she felt a pop in

her neck and experienced shooting pain. She also had a history of neck complaints beginning in 2000, which worsened over time. Seven months prior to the work injury, on January 13, 2006, Dr. Stewart performed a multi-level cervical fusion.

With respect to the August 15, 2006 work injury, the claimant was initially seen at Concentra and then transported by ambulance to Barnes Jewish Hospital, where she received intravenous pain medication. Three days later, on August 18, 2006, she was seen Dr. Samson, at which time she reported that her increased neck pain had resolved in the three days following her work injury. The doctor diagnosed a neck strain, which he opined had spontaneously resolved and did not require further treatment, as well as pre-existing non-work related cervical spondylosis, stenosis, and myelopathy secondary to a degenerative congenital neck condition. The claimant did not receive any additional treatment with respect to her August 15, 2006 injury.

At a Hearing, the ALJ found that the claimant sustained a work place accident that resulted in temporary disability referable to a temporary neck strain and increased neck pain as diagnosed by Dr. Samson. Pursuant to Dr. Samson's report, the ALJ found that the neck strain resolved spontaneously with pain medication and did not result in permanent disability. Therefore, the employer was responsible for the claimant's medical expenses following the work accident, but not responsible for any PPD benefits because the claimant's August 15, 2006 injury did not result in a permanent disability. On appeal, the Commission affirmed the ALJ's Award and decision.

**Claimant's Left Knee Injury Compensable Despite Pre-Existing Left Knee Condition, Because Increase/Change in Job Duties Caused an Increase in His Complaints**

**Clawson vs. Cassens Transport Company, Injury No. 10-114126**

The claimant worked as a union car hauler and was required to climb ladders, squat, kneel, and walk up ramps. In 2014, his work load doubled, and he began working 6-7 days per week rather than 5 days per week. The claimant had a pre-existing left knee condition after a work accident on December 7, 2010, where he slipped on a ramp and twisted his left knee. An MRI of the left knee showed a mild sprain but no tear. He was released from care and worked full duty for another 3 ½ years without additional medical treatment.

After the change in job duties in 2014, the claimant's left knee complaints worsened and in February 2015, he reported his complaints to the Employer. The employer denied his claim and declined to provide medical treatment. Therefore, the claimant treated on his own with Dr. Parmar and Dr. Rasmussen. He underwent another MRI of the left knee on February 15, 2016, which showed free edge tearing of the body of the lateral meniscus of the left knee. Dr. Parmar recommended surgical intervention and opined that the tear and the increase in his complaints were casually related to the increase in his job duties.

At a Hearing, an ALJ found that although the claimant had a prior left knee injury from 2010, the prevailing factor in causing his worsening left knee complaints was the change/increase in his job duties. The ALJ considered the change in MRI findings between 2010 and 2016, the latter of

which showed new tearing that was not present in the first MRI. The ALJ also reasoned that the claimant worked full duty for 3 ½ years without additional treatment after he was released from care for his 2010 injury. Therefore, the claimant's left knee injury was found compensable, and the Employer was ordered to pay medical treatment and TTD benefits. On appeal, the Commission affirmed the ALJ's decision and Award.

### **Employer Not Entitled to Reduction in Benefits Due to Safety Violation**

#### **Hadley vs. Beco Concrete Products, Inc., Case No. SD34191 (Mo. App. 2016)**

**FACTS:** The claimant was killed in a motor vehicle accident on July 25, 2012. The employer argued they were entitled to a reduction in benefits due to a safety violation. The employer alleged that it adopted a reasonable rule that its employees must obey all of the rules of the road and the claimant did not obey that rule by driving at an excessive speed for conditions, driving in a careless and prudent manner, and failing to obey traffic control devices. Basically, the employer argued that they were entitled to a reduction because the claimant was speeding. The Commission determined that the employer was not entitled to a reduction for a safety violation.

**HOLDING:** The Court also held that the employer was not entitled to a reduction as the Court agreed with the Commission's finding that the employer failed to prove that it had a valid safety rule. The Court noted that the employer offered no evidence that it had a written rule advising employees that they had to obey all federal, state, statutory, and administrative laws. Also the Court noted that the employer's representative was deposed and did not provide any testimony or documentary evidence of this rule. Thus the employer's claim that it had a specific safety rule to obey the rules of the road was rejected by the Commission. Also, the Court noted that the Commission also stated that under the employer's rationale, so long as an employer generically admonishes its workers to obey a law, every motor vehicle accident caused in part by a workers' error or negligence would be subject to the so called safety penalty. The Commission determined that if the legislator intended to systematically halve the compensation available to imperfect drivers it would have said so. Therefore, the Commission's decision was affirmed.

### **Claimant's Widow Not Entitled to Continuing PTD Benefits because No Evidence of Dependency was Presented at the Hearing**

#### **Carter vs. Treasurer of State of Missouri as Custodian of the Second Injury Fund., Case No. WD9437 (Mo. App. 2016)**

**FACTS:** On January 25, 2005, the claimant sustained a work related injury. In 2009, the claimant was awarded PTD benefits from the Fund. In 2014, the claimant died of causes unrelated to his work injury. Therefore, the Fund stopped paying benefits. The claimant's widow filed a Motion with the Commission to substitute herself as a party in the claimant's workers' compensation case. The Commission denied her Motion and she filed an Appeal.

**HOLDING:** The claimant's wife argued that *Schoemehl* applies to her case, and therefore since

the claimant died of causes unrelated to the work injury she is entitled to continuing benefits. The Court did note that despite the fact that *Schoemehl* has been abrogated, courts have continued to rule that *Schoemehl* does continue to apply to claims for PTD benefits that were pending between January 9, 2007, the date the Supreme Court issued *Schoemehl* and June 26, 2008 the effective date of the 2008 amendments. However, the Court noted that the issue in this case is that at the Hearing there was no testimony with respect to dependency and since it was not made an issue at that level, the Commission cannot make any findings regarding the same. Therefore, the Court confirmed the Commission's decision in dismissing her Motion.

**Employer Prevailed in Civil Case Where Claimant Alleged Retaliatory Discrimination  
Lambrich vs. Kay, et al., Case No. ED103128 (Mo. App. 2016)**

**FACTS:** The claimant and his wife filed a Petition against Cassens Transport Company along with some of their employees alleging retaliatory discrimination after he filed a workers' compensation claim. The claimant sustained a compensable injury to his shoulder and was released from care with restrictions which the employer determined they could meet. The claimant was told to contact the employer about returning to work as his TTD benefits would be ending. However, he did not return to work because he believed that he could not work. He then obtained a slip from Dr. Cohen excusing him from work. Thereafter he was placed on ISL, indefinite sick leave, as this was protocol at the insured when an employee had a claim and there were conflicting medical opinions as to whether the claimant could return to work. The claimant remained off work and on ISL without pay. The claimant then brought this retaliation suit and the trial court found for the employer and the claimant appealed.

**HOLDING:** The Court of Appeals affirmed the decision of the trial court. It noted that the trial court heard testimony from five different employees all of whom testified that they would never punish or discriminate against an employee for filing a workers' compensation claim and the trial court found their testimony credible and also found that there was no evidence of animus or intent to discriminate or retaliate against the claimant at all. The Court noted that to prevail on his claim he must establish that he was discharged or discriminated against for exercising his rights under the workers' compensation law. The Court noted that placement on ISL was not tantamount to a discharge and the employer testified that the claimant could return to work when able.

The Court of Appeals did recognize that the standard for retaliatory discrimination has changed to "a contributory factor" from "the exclusive clause" it noted that the trial court determined that under either standard the claimant failed to establish his burden of proof and therefore the employer prevailed.

**Employer Responsible for Medical Bills from Unauthorized Treatment as Claimant Testified She did not Know if Insurance Company Would Try to Recoup Money**

**Cook vs. Missouri Highway and Transportation Commission, Case Nos. SD34290 & SD34291 (Mo. App. 2016)**

**FACTS:** The claimant, a 55 year old woman, worked at the employer since August 1997 as a secretary. She spent 85 - 90% of her time at the computer performing data entry work. She initially sought treatment in 2005 and underwent an EMG/NCS which was normal and she was not diagnosed with carpal tunnel syndrome. She next treated in 2007 and again was not diagnosed with carpal tunnel. In late 2010 and early 2011 she began to again notice symptoms and told the employer about them and she was evaluated by Dr. Crandall who diagnosed carpal tunnel but didn't believe her symptoms were work related. The claimant filed claims on January 10, 2012 and underwent treatment on her own. At a Hearing the ALJ determined that the claimant's condition was work related and awarded benefits. The employer appealed.

**HOLDING:** The employer first argued that the claimant's claim was barred by the statute of limitations arguing that her injury became reasonably discoverable and apparent as early as 2005 and 2007. However, the Commission did not agree since the EMG/NCS was normal and she was not diagnosed with the condition.

The employer also argued that the Commission erred in finding that the employer was responsible for the claimant's past medical treatment. The employer argued that even the claimant testified that her insurance through the employer paid for all of her medical expenses and to her knowledge those bills were completely satisfied. She also testified that she was unaware of whether she would be asked for reimbursement of those charges in the event that the case was deemed compensable. In light of this the Commission found that since she was not aware as to whether the insurance company could ask for reimbursement, the employer was responsible for the bills. The employer also argued that because of being self insured for workers' compensation purposes any payment by the claimant's health insurance through the employer must be deemed a payment directly from the employer. The Court did not agree and the Commission's Decision was upheld.

### **Firefighter Who Had Knee Replacement Found PTD as Result of Last Injury Alone Despite Prior Arthroscopy on Opposite Knee**

#### **Palmer vs. South Metro Fire District and Treasurer of Missouri as Custodian of the Second Injury Fund, Injury No. 11-077076**

The claimant, a 59 year old long term firefighter/EMT, was walking out of a fire and his foot caught on debris causing him to fall on his left knee. He underwent an arthroscopy and ultimately underwent a total knee replacement on November 8, 2011. When he was placed at MMI by the authorized treating physician he was given multiple restrictions which caused him not to be able to return to work as a firefighter. At a Hearing the claimant also testified that as a result of his injury he was having problems with his right knee and back due to gait issues. The claimant did have a prior right knee injury in 2007 for which he underwent an arthroscopy and received a settlement for 15% disability to the knee. After this injury he was released to return to work with no restrictions.

The claimant's expert, Dr. Koprivica, believed that if the claimant was PTD it was due to his

injury and his pre-existing condition. Dr. Stuckmeyer, presumably the Fund's expert, believed that the claimant was PTD as a result of the last injury alone.

The ALJ found that the claimant was PTD based on the last injury alone opining that the claimant's prior injury did not result in any restrictions. Also as a result of the last injury he developed additional pain in his right knee along with low back pain. The Commission affirmed the Award of the ALJ.

### **Claimant Entitled to TTD After Being Placed At MMI Because Continued to Be Engaged in "Rehabilitative Process"**

#### **Jefferson City Country Club vs. Pace and Treasurer of the State of Missouri Custodian of the Second Injury Fund, Case No. WD79405 (Mo. App. 2016)**

**FACTS:** On October 4, 2002, the claimant was breaking down tables when 5-6 table toppers fell on her and she sustained an injury to her neck and right shoulder. In August 2004, Dr. Graven performed surgery on her neck. Thereafter, Dr. Rummel performed surgery on her right shoulder. She was placed at MMI on November 17, 2005. Thereafter, she continued to have complaints and was diagnosed with depression. She sought treatment on her own and went to a Temporary Hearing and thereafter she underwent a second surgery on her neck which was performed by Dr. Chabot.

A Final Hearing was held at which time the parties stipulated that the claimant reached MMI on August 25, 2011. A Final Award was issued by the ALJ and it was appealed to the Commission who determined that the claimant sustained a work related injury; she is PTD as a result of her neck and right shoulder injuries coupled with her depressive symptoms; she failed to prove Fund liability as there was no evidence of disability before her work injury; she is entitled to past temporary disability benefits from November 7, 2005 - August 24, 2011 and she is entitled to future medical treatment. The employer appealed.

**HOLDING:** The employer argued that the Commission used the wrong legal standard for the causation requirement as it assumed that proof of depressive symptoms alone constituted proof of causation. The Court noted that the employer's argument had no merit as the Commission explicitly accepted the claimant's expert medical testimony as credible and persuasive.

The employer also argued that the Commission erred in finding that the claimant was engaged in the "rehabilitative process" between November 17, 2005 - January 2, 2011 because the finding was contrary to the overwhelming weight of the evidence. The Court noted that pursuant to the statute partial disability benefits are to be paid "throughout the rehabilitative process." Whether a treatment is a part of the rehabilitative process is a question of fact for the Commission. The Commission found that the claimant persuasively testified that she continually sought help for her condition after she was released by Dr. Rummel on November 17, 2005.

The Court looked to *Greer* and noted that in that case the Supreme Court found that the fact that the treatment the claimant underwent after she was placed at MMI was intended to restore Greer

to a condition of health or normal activity by a process of medical rehabilitation. The Court further noted that whether the treatment is successful is immaterial to the determination of whether treatment is part of the rehabilitative process. The Court noted that like Greer, the claimant continued to seek treatment for pain related to her work related injury despite the fact that multiple doctors had found that she had reached MMI. Therefore, the Court found that the claimant was entitled to TTD during this time. Therefore, the Commission's decision was upheld.