2015 Missouri Worker's Compensation Case Law Review

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I Procedure and Jurisdiction

The "law of the case" doctrine dictates the scope of issues to be decided by the Industrial Commission after a general remand.

Larry Abt v Mississippi Lime Company, 420 S.W.3d 689 (Mo. Ct. App. E.D. 2014)

Claimant sustained a compensable injury in 2001 involving a de-gloving injury to his left leg. He continued to work until 2005 when he developed cellulitis in his left leg which the commission found was related to a pre-exiting venous deficiency problem (well documented in prior medical records), and that the cellulitis was a subsequent deterioration of a pre-existing medical condition. The commission awarded PPD against the Employer and PPD against the SIF, finding that the Claimant was permanently totally disabled from the subsequent deterioration of his pre-existing medical condition.

In previous litigation between the parties (*"Abt 1"*) [420 S.W.3d 689 (Mo. Ct. App. E.D. 2014)] the court of appeals remanded the case to the commission due to a lack of evidence that the Claimant's permanent total disability came from the subsequent deterioration of the pre-existing medical condition. On remand from *Abt 1*, the commission affirmed.

In this appeal the court found that there was no appeal or challenge of the factual finding the Claimant was permanently totally disabled, which thus became the "law of the case". In the absence of additional evidence submitted to the commission addressing the cause of the Claimant's permanent total disability, and since the commission had already decided that the "last accident alone" did not render the Claimant totally disabled, the SIF was found liable for the Claimant's permanent total disability.

The alleged failure of an Employer/Insurer to comply with an award of compensation cannot form the basis for a tort action for damages in Missouri.

Stacey Deane v Missouri Employer's Mutual, 437 S.W.3d 321 (Mo. Ct. App. W.D. 2014).

Claimant filed a tort action claim against a workers' compensation carrier for failing to comply with the terms of a worker's compensation award that had previously been entered as a judgment in Cole County. The award had provided for permanent total disability and future medical services including the cost of home modifications, a home cleaning service, and a modified van, since the Claimant had been rendered paraplegic by a compensable injury.

A petition was filed alleging that the carrier had "negligently and with conscious disregard failed to comply with the terms of the commission's award" in failing to provide a modified van, as well as shoulder surgery. The petition sought pain and suffering damages as well as punitive damages. The carrier's motion to dismiss was granted by the circuit court, which concluded that the entry of a judgment pursuant to section 287.500 RsMo did not create a duty of care that would give rise to a tort based cause of action.

The court of appeals refused to recognize this new cause of action, and suggested that the Claimant should seek enforcement of the judgment thru the civil contempt process.

The statute of limitation to file a claim for compensation is not extended by payment of compensation outside of benefits under the Act.

Dungan v Fuqua Homes, Inc. 437 S.W.3d 807 (Mo. Ct. App. W.D. 2014).

Claimant sustained a compensable accident on December 18, 2008. A report of injury was timely filed by the Employer and the Claimant received some authorized medical care. The last payment "made under this chapter on account of the injury…" by the Employer's workers' compensation carrier was made on February 19, 2009. Claimant filed a formal claim for compensation on October 31, 2011.

The commission found that the statute of limitations under section 287.430 RsMo had expired prior to the filing of the claim. The Claimant argued that he had received additional medical treatment and "payment made on account of the injury" had been made by his group health carrier which tolled or extended his time to file a formal claim for compensation.

The court disagreed and affirmed the denial of the claim. The court stated the clause "made under this chapter" as contained in section 287.430 requires payments sufficient to toll the statute of limitations to have been made "under this chapter." The court distinguished prior cases and declined to strictly construe the section.

Res judicata applies to bar a claim for compensation that alleges a repetitive trauma theory of recovery if that theory was not raised in a prior claim.

Johnson Controls, Inc. v David Trimmer WD 77948

Claimant alleged in his original claim for compensation he had injured his shoulder when he "slipped on small rocks from skids that were shipped in from another plant while stacking batteries." The claim was subsequently amended to state simply that the injury to his left shoulder occurred when the employee "fell." There was medical evidence that the claimant performed repetitive lifting of batteries over an extended period of time which played a role in the tear in his shoulder that was subsequently repaired. That claim was denied and the commission affirmed that denial on appeal

After failing to secure compensation in the first claim, the claimant filed a second claim alleging a repetitive trauma occupational disease. The court barred the claim based upon application res judicata. They agreed that the issue of whether the claimant sustained an repetitive trauma/occupational disease was made an issue in the original hearing. Regardless of this fact however they found claimant's occupational disease claim was still "barred by the doctrine of res judicata because that doctrine precludes a litigant from later bringing a claim that should have been brought in the first lawsuit. Kesterson, 242 S.W.3d at 715. Res judicata applies "to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." King, 821 S.W.2d at 501 (emphasis added)."

A civil suit filed against a co-employee, for an accident that occurred between 2005 and the statutory changes made in 2012 may survive a motion to dismiss even in light of Hansen v Ritter, 375 S.W 3d 201 (Mo. App. WD 2012)

Leeper v Andy Asmus, 440 S.W.3d 478 (Mo. Ct. App. W.D. 2014).

A petition was filed against a co-employee alleging that the co-employee breached a "personal duty of care" owed to the Claimant when he failed to perform his job duties in the safe manner he had been directed, which resulted in Claimant's injuries. The circuit court dismissed the suit.

The court of appeal reviewed its prior rulings in *Robinson v Hooker*, 323 S.W.3d 418 (Mo App WD 2010) and *Hansen v Ritter*, 375 S.W 3d 201 (Mo. App. WD 2012), and reversed the dismissal of the petition against the co-employee, finding that as the petition claimed a breach of a personal duty of care and not a breach of any non-delegable duty of the Claimant's employer.

"We were not required in Hansen to definitively determine whether a co-employee's common law duty of care is the functional equivalent of "something more", a test announced *in State ex rel Badami v Gaertner*, 630 S.W.2d 175,180 (Mo. App E.D 1982), and later refined to afford co-employees workers' compensation exclusivity protection unless they engage in purposeful, affirmative acts directed as another employee…

"We conclude that the refined 'something more' test does not align with the common law of co-employee negligence. At common law, a co-employee violates a personal duty of care when the employer has performed its continuing non-delegable duties, and an otherwise safe work place, work instrumentality, or work method, is rendered unsafe due solely to the co-employee's negligent act or omission, a determination that does not equate with purposeful, affirmative acts directed at another employee."

The court recognized that this interpretation is limited in its scope to accidents that occurred between 2005 and statutory amendments enacted in 2012 to abrogate the effects of its prior decisions. It also recognized that it was declining to follow two Eastern District decisions in *Amesquita v. Gilster-Mary Lee Corp*., 408 S.W3d 293, (Mo. App E.D. 2013) and *Carman v. Weiland*, 406 S.W.3d 70 (Mo. App E.D 2013): "The inquiry in *Amesquita* should have been

whether the co-employee's performance of, or failure to perform, a job duty was attributable to the employer's failure to perform one or more of its no delegable duties."

Being ordered to drive in inclement weather can constitute co-employee negligence, not necessarily shielded by exclusive jurisdiction.

McComb v Gregory Norfus and David Cheese WD 77761

Claimant died as the result of a single-car accident after his vehicle slid off an icy road while he was driving as part of his job duties as a courier for St. Mary's Health Center. Respondents were Claimant's supervisors at the time of his death. Claimant's wife brought a wrongful death suit against the supervisors.

Summary judgment for the supervisors was granted and Claimant's wife appeals and argued that summary judgement was improper because there exists a genuine dispute of material fact as to whether Respondents were simply carrying out their employer's non-delegable duty to maintain a safe work environment, or whether they breached a personal duty of care owed to the Claimant, when they directed him to drive his route in bad weather conditions.

The court agreed and reversed the granting of summary judgment. They found that their existed an "unresolved dispute as to the material facts of whether St. Mary's had applicable rules or regulations in effect "that would identify if the direction provided by the supervisor to drive in the inclement weather was the subject of an Employer policy

Section 287.140.8 RsMo providing for the reactivation of a settled claim for purposes of prosthetic or life-threatening treatment, bars a contract action in civil court for the enforcement of the terms of the settlement agreement or an action for equitable relief.

Frank Pierce v Zurich American, 441 S.W.3d 208 (Mo. Ct. App. W.D. 2014).

Claimant sustained a compensable injury to his knee require two surgeries in 2009. In 2010, the authorized surgeon determined that Claimant would ultimately need a total knee replacement due to pre-existing arthritis. The orthopedic surgeon retained by Claimant to conduct an IME determined that the need for the total knee replacement was the 2009 work related injury.

In May, 2012, the claim was settled for 26% permanent partial disability to the knee with handwritten provision added to the stipulation form that "medical remains open for 1 (one) year from the date of this stip." The preprinted reference to section 287.140.8, RSMo, on the stipulation was not crossed out on the stipulation.

One month later, in June 2012, Claimant demanded further treatment; that the total knee replacement be provided. Employer sent Claimant back to the treating physician, whose opinion that the need for the total knee replacement is pre-existing arthritis remained unchanged. Claimant filed and action requesting a declaratory judgment and to order the Employer to

provide the total knee replacement. The suit was dismissed based upon Employer's contention that the DWC maintained jurisdiction over the case pursuant to section 287.140.8. Section 287.140.8 provides for the reactivation of a settled claim:

> "The claim shall be reactivated only after the Claimant can show good cause for the reactivation of this claim and the claim shall be made only for the payment of medical procedures involving life-threatening surgical procedures or if the Claimant requires the use of a new, or the modification, alteration or exchange of an existing, prosthetic device. For the purpose of this subsection, "life threatening" shall mean a situation or condition which, if not treated immediately, will likely result in the death of the injured worker."

The court affirmed the dismissal of the petition, but the dismissal was not based upon subject matter jurisdiction, and instead was based upon the trial court's lack of the statutory authority to resolve the issue in light of 287.140.8.

II Arising Out Of and in the Course of Employment

The direction to an employee of where to park in a designated parking lot can be sufficient evidence demonstrating "control" under section 287.020.5 for worker's compensation liability to attach to an accident that occurs on the lot when a Claimant slips and falls leaving from work.

Scholastic Inc., v David Viley, WD 77546

Claimant was leaving work when he slipped and fell on ice on a parking lot. Under the terms of the lease that his Employer had with the property owner, the employer had the right to "exclusive use" and had exhibited control when demanding repairs and maintenance. Both of these provisions in the lease and the corresponding testimony was evidence of control pursuant to Section 287.020.5 (RsMo 2005): "The extension of premises doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted usual or accepted routes used by the employee to get to and from their place of employment"

The court affirmed the Commission's award of compensation and rejected the assertion that the Claimant was "equally exposed" to the risk of snow and ice.

An unexplained fall can be compensable based upon reasonable inferences from credible evidence.

Linda Dorris v Stoddard County 436 S.W.3d 586 (Mo. Ct. App. S.D. 2014).

Claimant was walking with her direct supervisor, crossing a public street to review some new construction of a building built by the Employer. The street they walked across had cracks in it and was busy. Claimant was watching for traffic and was not looking down at the pavement.

As they crossed the street, Claimant tripped and fell sustaining injuries to her shoulder. The ALJ found the accident compensable and the commission affirmed.

On appeal, the Employer argued that there was no direct testimony as to how the accident happened. Alternatively, it argued that Claimant was equally exposed to the risk of her accident in her normal, non-employment life.

The court of appeals affirmed the commission's award. "Contrary to the implicit assumption in Employer's argument, nothing in the worker's compensation law requires the Claimant to testify to the exact cause of the accident. Rather, the commission is entitled to consider the evidence as a whole and rely on reasonable inferences." The court also rejected the "equally exposure" argument.

The Western District adopts "risk cause" analysis to determine whether an unexplained accident arises out of employment.

Gleason v SIF (March 2015) WD77607

Claimant was walking on top of a railcar, conducting an inspection, when he fell approximately 20 to 25 feet to the ground, sustaining injuries to his head, neck, right shoulder, clavicle, and ribs. Claimant has no memory of the circumstances leading up to the fall, or the fall itself, and, thus, cannot explain why he fell. No one testified to having seen the fall.

Both the ALJ and the commission denied the claim. The commission found that Claimant did not prove the second factor required by section 287.020.3(2)(b), RsMo: "(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life." The commission concluded that because Claimant could not explain why he fell, ". . . we do not know what hazards or risks gave rise to employee's fall, [so that] we cannot determine if those hazards or risks are related or unrelated to employment and we cannot determine if workers are equally exposed to those hazards or risks outside of and unrelated to employment in their normal nonemployment lives."

The court of appeals reversed and found the fall to be compensable:

"The "causal connection" standard announced in *Miller* and further addressed in *Johme* thus first requires identification of the risk source of a Claimant's injury, that is, identification of the *activity that caused the injury*, and then requires a comparison of that risk source or activity to normal nonemployment life…. The Commission expressly found that Gleason's fall from this height caused Gleason's injuries. Plainly, the "risk source," that is the activity which caused Gleason's injuries, was falling from a railcar 20 to 25 feet above the ground. This is not a risk source to which Gleason would have been exposed in his "normal nonemployment life."

The court used the term "risk source" to describe its analysis. "It was not necessary for Gleason to establish ***why*** he fell because he had already established that he '***was exposed to an unusual***

risk of injury that was not shared by the general public.' *Porter*, 402 S.W.3d at 174." (emphasis added by Archer.)

Section 287.020.10 RsMo defining "accident" is not to be redefined after strict construction.

<u>Young v. Boone Electric Cooperative</u> WD76756 (April 14, 2015)

Claimant suffered two injuries: a 2008 knee injury when he stepped on a frozen dirt clod and his left knee buckled, and a 2009 right shoulder injury, from using handles on the Employer's truck to hoist himself onto a raised platform, after which he felt a pop internally in his shoulder.

Employer argued that the claimant was equally exposed to the risk of stepping on frozen dirt clods in normal nonemployment life and that the act of pulling himself up was not an unusual strain or accident as contemplated under section 287.020.10 RsMo as it should be interpreted after 2005 and the mandate of strict construction.

The court, acting en banc, declined to consider precedent prior to the 2005 enactment of that provision defining the term accident (as advocated in a lengthy dissent), turning instead to dictionary definitions of the language used to define the term "accident" in RSMo 287.020.2.

Strictly construing those provisions, the court determined that the Claimant's act of using handles on the Employer's truck to hoist himself onto a raised platform constituted an "unusual strain", "since it consisted of an unordinary act of excessive physical tension (as evidenced by the "pop" felt by the Claimant), even though it was a routine procedure that Claimant had repeated many times, and there was no evidence that the Claimant suffered any externally-generated trauma, duress or other force during the incident."

The Claimant's act of grabbing the Employer's truck's handles to hoist himself up and thereafter feeling a "pop" in his shoulder constituted a sufficiently specific event to satisfy the requirements of The Law. The purpose of the statutory requirement that the Claimant's injury be caused by a specific event is to clarify that the event must happen during a single work shift, and not from repetitive motion or an occupational disease.

III Benefits

A Claimant's attorney cannot obtain a 25% attorney's fee on paid medical expenses.

<u>Landon Sterling v Mid- America Car</u> WD 77809

Claimant sustained a work related compensable accident and injury that became the subject of a claim for compensation filed by Claimant's attorney. Initially the claim was denied but ultimately the Employer accepted the injury and paid the submitted $38,462.07 in original medical expenses, paying a reduced negotiated amount of $18,953.16.

The indemnity portion of the claim was stipulated and the case was submitted solely on the issue whether the Claimant's attorney should receive a 25% fee on the medical bills already paid by the Employer either on the original billed amount or the amount paid.

The Commission affirmed the attorney's fees provided by the ALJ solely on the indemnity portion of the award but refused to provide a 25% fee on the paid bills. The court affirmed the commission finding that they would defer to the finding of the commission on the issue of the attorney's fee to be provided under the guidelines provided in section 287.260.1 RsMo 2005 and 8 C.S.R. Section 50-2.010(15).

IV Permanent Total Disability and Second Injury Fund

Section 287.220.1 RsMo does not require a threshold level of disability related to the primary claim be established for Second Injury Fund liability. If there exists a prior threshold disability of 50 weeks or 15% ppd of major extremity, then all prior permanent partial disabilities are to be considered in calculating the liability of the SIF.

Treasurer of the State of Missouri-Custodian of The Second Injury Fund, Appellant vs. James Witte, Respondent. et all vs. Treasurer of Missouri as Custodian of Second Injury Fund, Appellant.

SC92834, SC92842, SC92850 and SC92867
414 S.W. 3d 455

In a consolidated opinion addressing the liability of Second Injury Fund, the Missouri Supreme Court interpreted section 287.220.1 to provide for the following:

"This Court finds there must be a single preexisting permanent partial disability that meets the thresholds to trigger the fund's liability and there is no threshold requirement for the last injury." They rejected any argument that a Claimant can "stack" prior disabilities from separate injuries to secure the necessary pre-existing threshold disability required.

After finding the required pre-existing disability from a single injury, the court found that "all preexisting injuries must be considered in calculating the amount of compensation for which the fund is liable." On the important issue as to the requirement of the primary claim constituting a threshold of disability, the court refused that interpretation of the statutory language. "Unlike with preexisting permanent partial disabilities, however, section 287.220.1 does not require permanent partial disabilities from the last injury to meet a numerical threshold. In referring to the last injury, section 287.220.1 states:

'If any employee . . . receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater . . . .'

That language imposes the 50-week or 15 percent permanent partial disability thresholds on the combined disability, not a disability resulting from the last injury."

The subsequent deterioration of a pre-existing medical condition does not relieve the SIF from liability if the Claimant is permanently totally rather than permanently partially disabled.

<u>Sylvester Lewis v Treasurer of the State of Missouri,</u> ED 100657 435 S.W. 3d 144

Claimant sustained a compensable injury involving his right thumb which he settled against his Employer. After this primary injury, the Claimant received treatment for his left shoulder including surgery which stemmed from a pre-exiting accident.

The ALJ and the commission found the Claimant permanently totally disabled as against the SIF.

The SIF appealed arguing that the *Hoven v Treasurer*, 414 S.W. 3d 676 (Mo. App. E.D. 2013) requires that a Claimant be at maximum medical improvement at the time of the primary accident from a pre-existing injury for the same to be considered in assessing the liability for benefits from the SIF.

The court disagreed, distinguishing *Hoven* and similar precedent stating those cases involved a claim against the Employer or the SIF for permanent partial disability. "Thus, Section 287.220 and precedent on calculating PTD benefits indicate that the specific percentages of PPD of the preexisting disabilities present at the time of the primary injury are irrelevant to the determination of the Fund liability for PTD."

A finding that a Claimant was permanently totally disabled before the primary accident can relieve the SIF from liability.

<u>Hembree v Treasurer of the State of Missouri,</u> SD 32982
435 S.W. 3d 165

The Claimant sustained a series of work related injury the most severe of which was one in 2006 that resulted in a settlement of 50% PPD against his employer with evidence including a vocational expert that the Claimant was totally disabled due to the disability related to this accident. He had limited use of his left hand.

The Claimant returned to work however after the 2006 accident and worked in a modified, accommodated position but nevertheless developed a cyst in his left hand due to repetitive trauma. The Claimant settled this claim against his employer. Left open were three separate claims against the SIF.

The ALJ found that the Claimant was totally disabled as the result of the 2008 injury combining with the pre-existing disabilities. The SIF appealed the 2008 award. The Claimant did not appeal the other two awards as against the SIF. The commission reversed the award as against the SIF for permanent total disability associated with the 2008 primary claim. They found that the evidence supported the contention that the Claimant was totally disabled prior to any 2008 injury.

The court affirmed the commission's denial of benefits. "The Commission's finding that Claimant was permanently totally disabled prior to the 2008 Injury is affirmed."

Archer v City of Cameron and Midwest Public Risk, WD 77320, 77321, 77322

On January 16, 2008, Claimant struck a manhole while driving a skid loader. The impact caused the skid loader to stop abruptly and caused the Claimant to hit the windshield and lose consciousness. Immediately after regaining consciousness, the Claimant felt neck, thoracic, and low back pain. The Claimant underwent care for cervical thoracic and cervical strains. He received a myriad of prescription medication, physical therapy and epidural injections without relief. In March of 2008, Dr. Daniel Bruning assessed the Claimant with low back pain, lumbar disk displacement, thoracic spine pain with spondylosis and trigger points at T6-T7 cervicalgia with bursitis, and rotary cuff syndrome AC joint of the left shoulder.

On July 7, 2009, Dr. Terrance Pratt performed an independent medical examination and found the 2008 injury as the prevailing factor of cervicothoracic syndrome, cervical spondylolisthesis, low back pain, L5-S1 disk herniation, lumbar spondylolisthesis, chronic thoracic discomfort with radicular-type symptoms and left shoulder syndrome. Several doctors issued permanent restrictions and ratings as a result of the 2008 accident.

The Claimant continued to work for the Employer, with accommodations, from the fall of 2008 until September 16, 2010. During that time, the Claimant received assistance from coworkers if he was unable to perform work tasks. He did not perform repetitive heaving lifting as he had done prior to the accident. He took frequent breaks where he sat in his truck throughout the workday in an effort to alleviate his pain. Sometimes the Claimant's coworkers would assist him in sitting down and he frequently missed work due to pain and sometimes had to leave work early.

On September 1, 2010, the Claimant sustained another injury while bending over to shape a newly formed curb of concrete. The Claimant's foot slipped, causing a twisting and jarring sensation to his mid to low back. He was diagnosed with chronic and acute thoracic strain, myofascial syndrome, chronic lumbar strain and muscle spasms.

The Claimant's medical expert found that the Claimant had no PPD from the 2010 accident and that the Claimant was totally disabled from the 2008 accident. The Commission agreed finding that the Claimant was totally disabled from the 2008 case.

A finding that a Claimant was permanently totally disabled before the primary accident does not always relieve the SIF from liability

Brashers v Treasurer of State SD 32872

In 1992, Claimant received Social Security benefits based upon disability associated with "Moyamoya" -- a condition which caused strokes, followed by seizures and balance problems. Before the work injury, Claimant had undergone various surgeries, including: a neck surgery and fusion, bilateral carpal tunnel releases, a right rotator cuff repair, arthroscopic surgeries on both knees, and one knee replacement. Claimant described various medical conditions that she had in addition to Moyamoya, including depression, bilateral ulnar neuropathy, osteoarthritis, and fibromyalgia.

Before going to work for the Employer in March 2007, Claimant was "limited in . . . repetitive upper extremity activities" and in pinching and grasping; she had difficulty with crawling and squatting; she could kneel only with a cushion beneath her knees; and she had difficulty climbing stairs. Because of these limitations, and the fact that she could not tolerate prolonged standing and walking, Claimant was "limited to a sedentary type job."

As a bus monitor, Claimant rode with special needs children and assisted them while they were on the bus. Bus monitors where given a choice as to the number of routes that they wished to work. Between March 2007 and May 2007, she worked about six-and-a-half hours per day, and she had breaks between the morning, noon, and afternoon routes. Claimant testified that during summer school in 2007, she worked four hours a day. In August 2007, she eliminated her noon route because it was "too hard" on her, and this change left her working approximately 4-5 hours per day on the morning and afternoon bus routes.

Claimant said the work injury occurred when she was walking toward a student and "tripped over an uneven sidewalk, and . . . went down face first." The fall left her with a broken nose and tooth, and it also hurt her low back. As a result of the work injury, Claimant "cannot sit for very long periods of time, and [she has] trouble walking." The trouble "starts in [her] lower back, [her] sciatic, and it goes down both [of her] legs, and [her] legs and feet get numb." Claimant did not have the pain running from her low back to her feet or the numbness in her feet before the work injury.

In February 2009, Claimant returned to work at SPS on "light duty" in the office, and she returned to her work on a bus the following month, working about five hours a day. Claimant did not work that summer because she "was starting to hurt." She also had another knee replacement that summer. Claimant returned to work six weeks after the knee replacement. Claimant recalled that when she went back for the 2009-2010 school year, she "was hurting a lot more than what [she] had before[,]" and she was "having trouble getting on and off the bus[.]" Claimant "was really having trouble sitting on the bus, and whenever [she would] take steps down to get off the bus . . . [she felt] like [her legs] were going to go out from underneath [her]." She had pain that started in her low back and went down both hips to both feet. Her legs and feet would "go numb with the pain." Claimant said she "was starting to hurt very, very bad with fibromyalgia and degenerative bones in [her] back, [and] in [her] hips. It was just getting harder and harder for [her] to do" her job.

The primary claim settled with the Employer and the case proceeded against the SIF. The ALJ and Commission provided permanent total disability. The court agreed and affirmed. The SIF argued that the Claimant was totally disabled before the primary case. Alternatively, they argued the fact that the Claimant was not totally disabled at all as she had returned to work and did so for a year after the primary accident.

The court disagreed deferring to the factual determinations made by the Commission. The stated the fact that she obtained the job on the open labor market was certainly proof of her ability to compete for a job. The fact she struggled to work for a year after the accident did not preclude the factual finding that she was otherwise rendered permanently totally disabled due to a combination of her disabilities form the primary and pre-existing medical conditions.

For primary injuries before January 2014, the Second Injury Fund liability for permanent total disability for "medical combinations" is broad.

Premium Standard v Treasurer of SIF, WD 76766

430 S.W.3d 351

In a contested exposure case involving an allegation of the contracture of Legionnaire's Disease, a type of pneumonia, the Claimant was awarded benefits against the Employer but was found to be totally disabled with that liability being against the SIF for pre-existing COPD condition.

What makes the case noteworthy is the fact that the Claimant and her husband both testified that: **"prior to her bout with pneumonia in 2002, she had no pulmonary symptoms or difficulties."**

The court affirmed the Commission finding permanent total disability against the SIF based upon the medical evidence that the Claimant had a pre-existing undiagnosed COPD condition that combined with her "work-related injury," citing prior case law that established these "medical combo totals."

Patterson v Central Freight Lines, ED 101451

The Claimant was employed as a truck driver for Central Freight Lines when, in November 2008, he slipped and fell and injured his lumbar spine while cleaning an oil spill in his Employer's warehouse. In March 2009, Claimant underwent an L3-4 decompressive laminectomy and discectomy. The procedure was successful, but Patterson continued to experience pain, incontinence, erectile dysfunction, and difficulty walking. Despite these ongoing symptoms, Patterson was deemed at maximum medical improvement (MMI) in January 2010.

Although Patterson had not previously been diagnosed with any psychological conditions, he had a difficult history: an absent alcoholic father, academic and behavioral problems, years in foster care and juvenile detention, a felony conviction, seven years in prison, and strained familial relationships. As a result of his injury, surgery, and persisting symptoms, he became depressed and was referred to a psychiatrist in August 2009.

The medical experts agreed to a level of pre-existing permanent partial psychiatric disability and the vocational evidence found the Claimant to be totally disabled "due to a combination". The Commission found the SIF liable for permanent total disability quoting *Knisely*: "The focus of the inquiry is not on the extent to which the condition caused difficulty in the past but on the potential that it could combine with a work injury to cause a greater degree of disability than would have resulted without it. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. E.D. 2007)."

What is the significance of "maximum medical improvement?"

Carl Greer v Sysco Food Services and Treasurer of Missouri, ED 101389 (Transferred to Missouri Supreme Court)

Claimant was injured while working for Employer as a forklift operator. The accident occurred on February 23, 2006, when Claimant was trying to scan a pallet while standing on a forklift in Employer's warehouse. As Claimant leaned forward to scan a pallet, his left leg extended outside the running lines of the forklift, at which point, a co-employee was driving another forklift, which grabbed Claimant's left foot and crushed it between the two forklifts.

Claimant was diagnosed with a crush injury to Claimant's left ankle. The Claimant was treated conservatively and was released to full duty on March 19, 2007 and on April 23, 2007 was placed at maximum medical improvement.

Claimant voluntarily resigned from his job with Employer on November 7, 2007, due to pain in his left foot and ankle. When Claimant continued to experience pain he sought treatment on his own from pain management specialist. On December 4, 2009, Claimant consulted with an orthopedic surgeon, about the pain in his left foot and ankle. Who diagnosed a fixed deformity in his left foot, which caused his foot to turn inward, and opined that Claimant could have tarsal tunnel syndrome and an intraneural tibial injury. On June 22, 2010, Claimant underwent a tarsal tunnel release, tendon lengthening, removal of cutaneous neuromas, and internal neurolysis for the purpose of reducing Claimant's pain and correcting his deformity.

The ALJ awarded the medical bills for the surgery, allowed a 25% reduction for the Claimant's violation of safety policy concerning keeping your feet within the forklift, did not award any TTD but allowed for future medical. The Commission awarded TTD from the date of the surgery until the Claimant was released from care, but disallowed the safety penalty based upon the Claimant's lack of the knowledge of the rule being applicable when the forklift is not moving, but otherwise affirmed the award. Claimant appeals the denial of permanent total disability as against the Employer or the SIF. Employer appealed the award of TTD, the denial of the penalty and the award of future medical.

The Eastern District opinion, now made moot, had denied the TTD based upon no testimony or evidence that the claimant had not reached "maximum medical improvement" when he was released from the conservative treatment the Employer authorized. They had overturned the

Commission and thereby allowing the safety penalty. Oral arguments by the Missouri Supreme Court are scheduled.