

Missouri Work Compensation Case Law Summary

March 2015 to March 2016

By: Chris Archer
Archer, Lassa and McHugh LLC
chris@askarcher.com

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 James Edward Welsh, Judge

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 under section 287.020.5 (RsMo 2005) which states as follows; “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 Industrial Commission’s award of compensation. They otherwise rejected as well the defense asserted that the claimant was “equally exposed” to the risk of snow and ice.

A claimant’s attorney can not obtain a 25% attorney’s fee on paid medical expenses.

Landon Sterling v Mid- America Car
WD 77809 Joseph M. Ellis, Judge

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 reduce 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).

The SIF has broad liability for medical combination permanent totals for primary injuries before January 2014.

Patterson v Central Freight Lines,
ED 101451 Clifford H. Ahrens, Judge

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 Claimant continued to experience pain, incontinence, erectile dysfunction, and difficulty walking. Despite these ongoing symptoms, Claimant was deemed at maximum medical improvement (MMI) in January 2010.

Although the Claimant 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)."

"Last accident" can be the second to last one causing liability to attach to an Employer for permanent total disability.

Archer v City of Cameron and Midwest Public Risk
WD 77320, 77321, 77322 Anthony Rex Gabbert, Judge

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, Claimant was diagnosed 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 January 2008 accident 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.

The court deferred to the Commission and affirmed the liability: "Employer's claim that the Commission misapplied the law because the law does not allow for a finding of permanent total disability if a worker continues to work after an injury is unsupported by precedent. Employer's dispute is not a question of law but a question of whether the Commission's determination that Archer was permanently and totally disabled by the 2008 accident, in light of Archer's continued employment after the accident, was supported by sufficient competent and substantial evidence. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222-223 (Mo. banc 2003)."

No statutory employer defense is available if you failed to insure your worker's compensation liability.

Steve Harman v Manheim Remarketing Inc
SD 33414 Gary W. Lynch, Judge

Harman (Claimant) slipped and fell on black ice on the premises of Manheim (Defendant). He was working for his direct employer who was a security company in contract with the Defendant. He settled his worker's compensation claim with his direct employer and sued Defendant civilly for the personal injuries he sustained. The Defendant moved for summary judgement arguing that they were the Claimant's "statutory employer" under section 287.120 RsMo and they were therefore afforded the protection of exclusive jurisdiction.

The court reversed the granting of summary judgement in favor of the Defendant based upon the

finding that the Defendant themselves had failed to produce evidence of having complied with section 287.280.1 which required them to have insured their liability under the Worker's Compensation Act. The summary judgment motion was silent on this requirement that the court found was necessary to have been shown to have successfully availed on their motion for summary judgement.

An unexplained fall can still be found compensable.

Gleason v Treasurer of the State of Missouri - Custodian of the Second Injury Fund
WD 77607 Cynthia L. Martin, Judge

Claimant was walking atop one of the railcars conducting an inspection when he fell approximately 20 feet to the ground. He sustained injuries to his head, neck, right shoulder, clavicle, and ribs. He had no memory of the circumstances leading up to the fall, the fall itself, or the three days after the fall while he was hospitalized. Accordingly, Claimant could not explain why he fell. No one testified to having seen the fall.

The Commission denied the claim. The Commission concluded that because the Claimant was unable to explain why he fell, Claimant had not met his burden to prove that "his injury did not come from a hazard or risk unrelated to his employment to which workers would be equally exposed outside of and unrelated to employment in their normal nonemployment lives." Section 287.020.3(2) RsMO

The court reversed and found that the Claimant sustained a compensable accident. It found that that the statute requires a claimant to show that the "risk source" of an accident was related to work. Under the facts of this case, that burden was satisfied as the Claimant fell from a 20 foot height from atop a railway car. "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 non-employment life."

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 Karen King Mitchell, Judge

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 there 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.

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

James Edward Welsh, Presiding Judge

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 of res judicata. They agreed that the issue of whether the claimant sustained a repetitive trauma/occupational disease was not 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).”

An award of multiplicity can be provided by the Commission.

Kolar v First Student

ED 102450

Robert G.Dowd, Presiding Judge

Claimant slipped and fell sustaining a fracture to his right leg in a compensable accident. He weighed close to 400 pounds. Due to the right leg injury, he developed left knee symptoms requiring treatment as well including the suggestion of the potential need for total knee replacement. The Claimant returned to work as a bus driver for two years before other health issues related to his obesity forced him to retire.

The commission affirmed the award solely of permanent partial disability for the right leg

fracture and for left knee injury. They denied the claim for open medical for a left knee replacement but otherwise affirmed the open medical award for the retained hardware in the Claimant's right leg. They denied the claim of permanent total disability against the Employer or the Second Injury Fund.

The court affirmed the award as provided also finding as a matter of law that the commission is free to award "multiplicity" for the opposing injuries the Claimant was found to have suffered:

"However, we note neither the original nor the amended version of the Workers' Compensation Act mentions the use of a multiplicity factor. Instead, that mechanism was developed by case law. We find allowing multiplicity factors to continue to be used is not inconsistent with the strict construction of the Workers' Compensation Act. Had the legislature intended to discontinue their use, it could have done so explicitly in the amended statute. Because it did not do so, we presume it did not intend to prohibit their use."

The extension of premise doctrine is extended to reserved parking spots and an accident on the lot is automatically "in the course of" a claimant's employment.

Missouri Department of Social Services v Beem
WD 78159 Victor C. Howard, Judge

At the time of the claimant's injury her employer allowed, but did not require, its employees to take a fifteen-minute paid break in the morning and afternoon, during which employees were allowed to leave the premises. The claimant took a break around 10:00 a.m. to go home and let her dog out. She exited the building and walked across the parking lot toward her car. The parking lot had been plowed and the snow was piled on the sidewalks. Snow from a pile on the sidewalk had melted and refrozen on the parking lot. The claimant slipped on this ice on the way to her car, suffered a broken ankle, and required surgery to repair the ankle.

The property owner, under the lease with the employer, had agreed to provide 23 parking spots. Based upon this provision, the commission and the court found enough "control" by the employer over the lot to extend the liability for this parking lot slip and fall under the "retained" extension of premises doctrine. Not apparently argued or simply not analyzed was an argument that the accident did not occur in the course and scope of the claimant's employment. She was not leaving work at the end of the day - she was on a clear deviation from her employment traveling to let her dog out to pee.

The personal comfort doctrine is alive and well for lunchtime accidents on premises.

David Wright v SIF
ED 102892 Gary M. Gaertner, Jr., Judge

Claimant was sitting on a chair in Employer's lunchroom, eating his lunch, when the chair collapsed under him. The claimant fell to the floor and injured his low back and filed a claim for workers' compensation, including a claim against the SIF. The claimant reached a settlement

with his employer. After a hearing before the ALJ, the ALJ determined that claimant had met his burden under Section 287.020.3(2)1 to show that the accident was the prevailing factor in causing claimant's injury and that it did not come from a hazard or risk unrelated to the employment to which he would have been equally exposed to outside of and unrelated to the employment in normal nonemployment life. The ALJ also found claimant to be permanently and totally disabled, and that he was entitled to benefits from the SIF for his lifetime.

The SIF appealed, and the commission affirmed with a supplemental opinion. The commission identified the risk source that caused claimant's injury as the collapse of the particular chair belonging to employer. The commission determined that claimant was not equally exposed to the risk of that particular chair collapsing in his normal nonemployment life, and thus the commission found claimant's injury was causally connected to claimant's work activity.

“The Commission also concluded that Claimant did not have to prove he was working at the time of his accident, based on the legislature's preservation of a limited extension of the premises doctrine, which permits recovery in limited circumstances when an employee is going to and from work. The Commission reasoned that to allow recovery where an employee is injured on the employer's property while going to and from lunch, but to disallow it when the employee is injured on the employer's property during lunch would be to ‘carve out artificial islands of non-compensability at the workplace, which islands have indistinct geographic and temporal boundaries.’”

The court affirmed the decision of the commission.

The three year SOL applies if an out of state Employer fails to file timely a Missouri report of injury.

Daniel Small v Red Simpson
WD 78289 Thomas H. Newton, Judge

Claimant accepted a Texas job offer by phone from his home in Missouri securing Missouri jurisdiction over his subsequent compensable accident that occurred at the Texas job site. Benefits were paid according to Texas worker's compensation. More than two years but less than three years after the last payments were made under Texas law for benefits; a Missouri claim for compensation was filed.

The court held that despite the fact that employer had no contacts with Missouri; it was still obligated to file a Missouri report of injury to preserve for itself a two year statute of limitations under section 287.430 RsMo.

The duty to supplement discovery extends to require disclosure of surveillance that was performed following a custodian deposition.

Burlison v Department of Public Safety
SD 33809 Victor C. Howard, Judge

Claimant sustained compensable left shoulder injury that lead to a claim for permanent total disability. Claimant sought discovery consistent with Rule 56/.01 for the production of any surveillance activities of the claimant. Following that discovery deposition, surveillance was conducted and recorded. The ALJ and the Commission refused the submission of the video at the hearing of the matter, finding that the Employer failed in their duty to supplement the deposition and supply the video to the Claimant's counsel. The ALJ and Commission awarded the Claimant permanent and total disability against the Employer.

The court affirmed the award of the commission and the commission's exclusion of the surveillance.