

20TH ANNUAL DIVISION OF WORKERS' COMPENSATION CONFERENCE

MISSOURI CASE LAW UPDATE

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I. Contributing factor for claim of Wrongful Discharge

***John Templemire v. W&M Welding, Inc.*, No. SC93132 (Mo. banc April 14, 2014)**

Templemire was a painter and general laborer employed by the Defendant. About a month after he suffered an injury for which he received workers' compensation benefits, he returned to work with some restrictions. As result, Templemire was placed on "light duty" and was assigned to the tool room as an assistant. Although the two sides disagree as to what happened, on November 29, 2006, Templemire was instructed to wash a railing and paint it before it was to be picked up later in the afternoon. Templemire claims that he was not supposed to wash it until the afternoon, but his boss claims he was supposed to wash it as soon as he knew about it, which was in the morning. Templemire was fired, ostensibly for insubordination. Templemire claimed that he had been fired for filing a workers' compensation claim.

After a trial in which the court refused to give an instruction offered by Templemire, the jury returned a verdict in favor of the Employer. In essence, the trial court instructed the jury that, as required by § 287.780, the employer was only liable for wrongful discharge if the workers' compensation claim of Templemire was the exclusive cause of Templemire's termination.

The sole issue in this case was whether an action for wrongful discharge under § 287.780 can only be maintained if the filing of a workers' compensation action is the exclusive reason for the discharge or whether some lesser standard applies.

The Missouri Supreme Court found that an action for wrongful discharge under § 287.780 only required that retaliation for the filing of a workers' compensation claim be a contributing factor to the discharge, which overturned decisions dating back to the 1970s holding that workers' compensation claim be the exclusive factor. This is a major departure from prior rulings, but does align with how the Court has interpreted employment cases under the Missouri Human Rights Act.

Section 287.780 prohibits an employer from discriminating against an employee in any way for filing a workers' compensation claim. The Court found that under both the liberal construction of chapter 287 prior to 2005 and the strict construction of the chapter since 2005, nothing in § 287.780 requires that the discrimination be the exclusive factor for the discharge or other discriminatory act. The words "exclusively," "solely," and "only" do not exist anywhere in the statute, and using strict construction, no meaning can be added to the words of the statute. The Court found the legislature was clear in that any consideration given to the fact an employee filed a workers' compensation claim in employment decisions was inappropriate.

Although this alters decades of law and makes it easier to find that an employer discriminated against an employee, the true concern is what accommodations the Court would require an employer to provide to a worker. In other arenas of employment law, employers must

provide reasonable accommodations to a disabled employee. After the *Templemire* decision, employers must be concerned with the extent that accommodations for medical issues could reach.

II. Factors for Permanent and Total Disability

***Marlene Stewart v. Zweifel*, 419 S.W.3d 915 (Mo. Ct. App. 2014)**

Marlene Stewart was a middle-aged employee at Subway when she had an accident. Prior to the accident, she stood most of the time, made sandwiches, and filled food containers. In other words, she had no trouble performing her job duties. After her accident, it is undisputed that Stewart became permanently and totally disabled. She did have substantial preexisting injuries, however, and had been receiving Social Security Disability benefits since 1997. Prior to her employment with Subway, Stewart had a history of arthritis, reflex sympathetic dystrophy, degenerative joint and bone disease, carpal tunnel syndrome, and many other issues. She had only worked 29 months out of the previous 11 years before her job with Subway.

The issue in her workers' compensation case was whether Stewart was permanently and totally disabled prior to her most recent injury. The Second Injury Fund argued that she was permanently and totally disabled prior to her injury at subway, and therefore, there was not liability to the SIF for her injuries. The commission found that Stewart only became permanently and totally disabled after her injury at Subway.

The Court agreed that an employee who is already permanently and totally disabled before his/her last workplace injury cannot create liability to the SIF for the most recent workplace injury. The Court, though, found that Stewart's previous injuries did not leave her permanently and totally disabled, and therefore the SIF was liable to her for her most recent injury. The Court determined that Stewart had not received any special accommodations after previous injuries when she secured employment with Subway, where she sustained the most recent injury. Therefore, Stewart was able to compete in the open labor market and was not permanently and totally disabled until her last injury.

The true impact of Stewart, though, is the Court's stated deference to the commission's disability determinations. The Court found that it is the "special province" of the commission to determine if a claimant was permanently and totally disabled either before or after his/her most recent accident. The Examined five cases examining a similar issue and found that in only one instance had a court strayed from the commission's decision on this issue. Therefore, it is safe to say that a commission's determination of when a claimant is permanently and totally disabled is extremely unlikely to be disturbed on appeal.

Gonzales v. Butterball, LLC, 2014 WL 889839, Labor and Industrial Relations Commission 09-059326

Gonzales injured his hand while working for the Butterball evisceration department. He removed the guts, eggs, and hearts of the turkeys. While using a machine to clean and sort the gizzards, Gonzales' hand became trapped. This resulted in his right hand, which is his dominant hand, being severely crushed. Although seen by several doctors who did not all agree in every fashion concerning the extent of his injuries, all the doctors agreed that he only had partial use of his right hand due to the injury.

The commission upheld the findings of the ALJ on all four issues addressed by the ALJ. The ALJ found:

1. Employee was permanently and totally disabled due to the injury that left Employee with only the partial use of his right hand;
2. Because Employee had not strictly followed safety protocol, his award should be reduced by 25%;
3. Employer was entitled to set off for the period of time that Employee attempted to return to work; and
4. Employee was not entitled to compensation for the disfigurement to his hand.

Gonzales is not fluent in English and cannot read or write English. He had worked in physically demanding jobs his entire life. Although the Employer's vocational expert testified that he could perform light duty jobs and only use his left hand, the ALJ found the testimony of Gonzales' expert, stating that he was unable to perform any manual labor jobs with the use of his non-dominant hand, to be more credible.

Ultimately, the ALJ, confirmed by the commission, determined that Gonzales was permanently and totally disabled. Importantly, the ALJ found it appropriate to consider, among other factors, both (1) the inability of the employee to communicate with the English language and (2) the fact the injury was to his dominant hand as factors in determining Gonzales was not able to compete in the open labor market.

The importance of Gonzalez is that the commission affirmed the ALJ's finding that which hand was injured could be an important factor in determining whether a disability is total or partial.

Lester Barker v. Laclede County, 2013 WL 6451796, Labor and Industrial Relations Commission No. 10-026305, December 6, 2013

Barker had worked as a laborer all his life and had almost no education. He could not read or write. He was working as truck driver and backhoe operator, which required all kinds of

heavy manual labor, when he injured his back while lifting a drain pipe that weighed approximately 150 lbs. After treatment, he was placed on strict work restrictions that basically prevented him from being employed in any time of manual labor position.

The issue was whether the ALJ should be allowed to consider Barker's lack of education when determining permanent and total disability.

He could not perform manual labor, but his work restrictions would not have prevented him from taking a sedentary job. The ALJ concluded that it must take the employee as it found him, which included his inability to read and write. Therefore, even after the Employer offered him literacy classes, the ALJ determined that Barker could not compete on the open labor market and was permanently and totally disabled. The commission confirmed this decision.

Wayne Knepper v. Midwest Coating of Mid Missouri, 2013 WL 6163992, Labor and Industrial Relations Commission No. 06-045414, November 21, 2013

He developed dermatitis in his right hand due to his use of a wood stain that Knepper would spray on wood. The stain caused his hand to become infected, to develop MRSA, and eventually to lose sensation.

Knepper was found by the ALJ to be permanently and totally disabled. Because of the loss of sensation in his hand, because of his below normal IQ and limited education, and because of expert testimony, the ALJ found that he could not compete on the open labor market.

The issue before the commission was whether the ALJ's determination was supported by competent and substantial evidence. The commission found that it was.

Knepper also suffered from dizzy spells, emphysema, congestive heart failure, and neuropathy of his lower extremities. The ALJ did not consider these conditions in the ruling, but at least one dissenting commissioner cites these as the only reasons that Knepper was permanently and totally disabled. Because they were unrelated to the work injury to Knepper's hand, the dissenting commissioner would have not found him permanently and totally disabled. However, the ALJ and the rest of the commission did not factor those issues into the decision that Knepper was permanently and totally disabled.

Ketchum v. Missouri Department of Corrections, 2013 WL 6169042, Labor and Industrial Relations Commission No. 07-109955, November 22, 2013

Ketchum was injured while a passenger in a food delivery van which hit a loading dock and caused the Employee to experience whiplash. She sustained over \$100,000 in medical bills, which Employer paid.

The issue really boiled down to which expert the ALJ found credible because the employer's expert and Ketchum's expert disagreed about the ability of Ketchum to compete in the open labor market.

The ALJ found that Ketchum sustained a 50% permanent partial disability of the body as a whole and did not suffer total disability, and it relied mainly on the testimony of the employer's expert. The commission overturned, however, because it found employer's expert made no specific finding that Ketchum was not totally disabled.

Employer's vocational expert, in his report, stated that Ketchum did not suffer a permanent total disability because there were some positions, like cashiering, security, or home health positions, that Ketchum might still be able to perform. Ketchum also submitted a report from a vocational expert, in which the expert determined that Ketchum had in fact suffered a permanent total disability because she was unemployable in the open labor market with her injuries.

The ALJ, while also awarding future medical aid and attorney's fees, found that Ketchum suffered a permanent partial disability of fifty percent (50%). The ALJ made this determination because it found that the reports of the two vocational experts did not actually conflict and that Ketchum's expert did not have the benefit of certain testimony from a doctor that Employer's expert considered.

The commission upheld the ALJ's decision except for the portion concerning permanent partial disability. The commission determined that Employer's expert's opinion was deficient of certain necessary information. The commission found that Employer's expert had not considered, and no other testimony had been offered, concerning:

1. Whether the possible positions Ketchum could perform actually existed in the open labor market, and
2. Whether Ketchum could reasonably compete for those positions if they do exist.

Because of these deficiencies, the commission ruled that the Employer had failed to present sufficient evidence to rebut the opinion of Employee's expert that Ketchum could not compete in an open labor market because of her injuries. Therefore, the commission modified the award of the ALJ to include an award of permanent total disability.

***Howard Turner v. Turnpike Transit, Inc.*, 2013 WL 6451797, Labor and Industrial Relations Commission No. 04-143339, December 6, 2013.**

Turner began suffering both physical and mental pain after a Lisfranc injury to his foot when a dolly ran over his foot while he was working on August 3, 2004. Prior to the injury, Turner had been fully capable of performing his job, but he had been injured in the past. After the injury of August 3, 2004, he was incapable of performing his duties due to continued pain in

his foot, psychological issues such as depression, and pain in his back and neck. He also had to take pain medication and has a frequent need to lie down. All of these make it difficult for him to perform tasks necessary for employment.

The issues were 1) which maladies were related to the work injury of August 3, 2004 and 2) whether the maladies which related to the August 3, 2004 injury caused him to be permanently and totally disabled.

The ALJ determined that although it was proper to consider the severe depression Turner experienced after the injury, the need for pain pills and the need to lie down frequently throughout a day were unrelated to the August 3, 2004 injury. The ALJ relied on the opinions of the experts from both parties to conclude that those two issues were related to an earlier car accident. Because the need to lie down and the need to take pain medication did not arise from a work injury, Turner could not be permanently and totally disabled from his August 3, 2004 injury.

The commission upheld the findings of the ALJ in determining that Turner had suffered a substantial permanent partial disability as a result of a dolly running over the foot of Turner.

III. Objective Medical Opinions

***Ballard v. Woods Supermarkets*, No. SD32590, 2014 WL 324575 (Mo. Ct. App. Jan. 29, 2014).**

Employee was a deli worker in a grocery store. On her way to the turn off a fryer, she slipped on some grease and fell on her back, trapping her arm underneath her and hitting her head on the floor. She was diagnosed with arm fractures, disc herniation, and a strain/sprain of her cervical and thoracic spine. She received treatment for all of her injuries, including surgeries on her arm and back. Even after extensive physical therapy, Employee continued to complain of back pain and pain in her right leg.

The issue presented in *Ballard* was whether the opinion of Ballard's medical expert that Ballard must recline throughout the day was supported by objective medical findings.

An ALJ determined, based on the testimony of the Employee, the Employee's independent medical examiner's testimony, and the testimony of the Employee's vocational expert, that the Employee was permanently and totally disabled. The ALJ found that she was taken out of the open labor market because of her frequent need to recline throughout the day.

Employer appealed to the Missouri Court of Appeals for the Southern District. The Employer argued the doctor's opinion that Employee needed to recline throughout the day was based on subjective findings, which are disfavored by R.S.Mo. § 287.190.6(2). Because the

findings were subjective, argued the Employer, the ALJ misapplied the law in finding that Employee was permanently and totally disabled.

Section 287.190.6(2) states that if medical opinions conflict or are inconsistent, objective medical findings shall prevail over subjective findings. Therefore, if the Court found that Employee's doctor's opinion that Employee needed to recline throughout the day is a subjective opinion, the objective opinion of Employer's doctor's opinion would govern.

The Southern District decided, however, that the Employee's doctor had in fact described what medical findings formed the basis of his opinions. The Employee's doctor stated that he thinks her need to recline throughout the day is consistent with the objective impairment of the Employee's lower back. Based on this opinion, the Southern District upheld the ruling of the ALJ.

IV. Benefits to Dependents

Spradling v. Treasurer of the State of Missouri, 415 S.W.3d 126 (Mo. Ct. App. 2013).

Employee was injured while lifting materials at work. During the course of his workers' compensation action, he passed away from unrelated causes. He left behind three children, and each of the children was a dependent under the age of 18 at the time of the work injury.

The issues were 1) whether the three children were "dependents" under the statute and 2) whether the three children were entitled to the lifetime workers' compensation benefits as the dependents of the injured worker.

The commission had found for the children on both issues, ultimately granting them permanent and total disability benefits for the tenure of their lives.

The Court determined that the children were "dependents" as defined by the workers' compensation statutes. A "dependent" is, in relevant part,

A relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee, and any death benefit shall be payable to them to the exclusion of other total dependents:

(b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years... upon the parent legally liable for the support or with whom he, she, or they are living at the time of the death of the parent... In all other cases questions of total or partial dependency shall be determined

in accordance with the facts at the time of the injury, and in such other cases if there is more than one person wholly dependent the death benefit shall be divided equally among them...

§ 287.240(4); *Spradling v. Treasurer of the State*, 415 S.W.3d 126 (Mo. Ct. App. 2013). The court spent less analysis on finding the children to be dependents. They were minors at the time of the injury, and parents, under the common law, have a duty to support their children. Therefore, the children were dependents under the statute.

The real issue was whether the children were entitled to collect the permanent and total disability benefits for the duration of their lives. The court stated that under *Schoemehl v. State of Missouri*, “when an injured worker dies from causes unrelated to the work injury, the worker’s dependents assume his or her place to become the “employee” for purposes of receiving permanent total disability benefits.” 217 S.W.3d 900, 901-02 (Mo. banc 2007). The court decided that because Employee was entitled to be awarded lifetime benefits for permanent and total disability, and because Employee died of unrelated causes, the dependent children are entitled to that award for the remainder their lifetimes.

There was a concurring opinion to this decision. Judge Lynch opined that although this appears to be the correct decision based on the controlling precedent of *Schoemehl*, it is an unfortunate decision because it has the “unreasonable result of awarding lifetime benefits to surviving dependents where the employee’s death was unrelated to the work injury, when the surviving dependents would have only received benefits during the time of their dependency if the employee’s death would have been *caused* by the work injury.”

***Ash v. Millennium Restoration & Construction*, 408 S.W.3d 257 (Mo. Ct. App. 2013).**

Ash is a widow of an employee of Millennium who was issued an award of weekly death benefits as the dependent of decedent employee. The award also included benefits for her two minor children who were also decedent’s children. A few years after the award of benefits, Ash remarried. The commission modified the award by terminating Ash’s weekly benefit and awarding her a remarriage benefit equal to the entire death benefit due for a period of two years. Millennium argued that the remarriage benefit under § 287.240(4) should be calculated using only the spouse’s portion of the weekly benefit. The commission disagreed with Millennium and allowed Ash to keep the remarriage benefit based on two years’ worth of the entire weekly death benefit.

The issue, then, was whether Spouse was entitled to a remarriage award that was calculated including every dependents award for weekly death benefits or calculated using just the spouse’s share.

The Court found this issue to be a matter of first impression. The court found that because of the 2005 amendment to chapter 287 requiring strict impression, it was bound to

interpret the statute only by the words it used. In the relevant portion of § 287.240(4), the statute states that “a lump sum payment equal in amount to two years shall be paid to the widow...” The court interpreted this language as employing the entire weekly award for the calculation of the lump sum.

Millennium argued that only the spouse’s portion of the weekly award should be used because the next sentence uses the words “the periodic benefits to which such widow or widower would have been entitled.” This, Millennium maintains, should restrict the lump sum award because the two sentences should be read in conjunction. The court, however, found that while the first sentence deals with the lump sum granted through the remarriage award, the second sentence, with the qualifying language, was addressing the periodic weekly death benefit and the circumstances under which it continues to be paid.

Therefore, according to the court, the remarriage benefit calculation should be done using the entire weekly death benefit award, regardless of the existence of other dependents.

***Robert Shelton, deceased, v. Titan Plastics Group*, 2013 WL 5604588, Labor and Industrial Relations Commission No. 03-018920, October 10, 2013**

Robert Shelton suffered a workplace injury and filed an action against his employer for workers’ compensation benefits. A year later, for unrelated reasons, Robert passed away and his wife was substituted into the action. The ALJ found that Robert had been permanently and totally disabled and awarded permanent and total disability benefits to his wife for the remainder of her life unless she remarried, at which point in time she would be entitled to the remarriage benefit under Section 287.240.

In *Shelton*, the question concerned the ALJ’s ruling that the spouse be awarded a remarriage benefit if she would ever remarry.

The commission agreed with the ALJ that Alice Shelton, Robert’s wife, was entitled to Robert’s permanent and total disability benefits as Robert’s dependent for the remainder of her life. As dictated by *Schoemehl v. Treasurer*, 217 S.W.3d 900 (Mo. 2007), the death of Robert did not end the disability, and his dependent was entitled to the award.

What was novel in *Shelton*, though, was that the commission analyzed whether Alice Shelton should receive a lump-sum remarriage award in the event she remarried. Section 287.240 states that a spouse who has been receiving a weekly death benefit from an employer is should be granted two years’ worth of the weekly benefit upon remarriage, which is what the ALJ granted to Alice Shelton. However, the commission ruled that a remarriage benefit is only awarded when the payments to the spouse have been for a death benefit. Here, Alice Shelton was receiving an award of permanent and total disability benefits as the dependent of her spouse at

the time of his injury. This is not a death benefit. Therefore, the periodic permanent and total disability benefits should continue for Alice Shelton's life, but she is not entitled to a lump-sum remarriage award.

V. Maximum Medical Improvement

***Fred Hoven v. Treasurer of the State of Missouri*, 414 S.W.3d 676 (Mo. Ct. App. 2013)**

Hoven sustained an injury in 2004 which was a permanent partial disability that existed at the time he sustained an injury in 2007, which formed the basis of this suit and which Hoven claimed was also a permanent partial disability.

The court addressed two main issues: 1) was a settlement agreement between Hoven and his employer for the 2004 injury conclusive evidence that Hoven sustained a permanent partial disability prior to his 2007 injury, and 2) did the commission err when it combined all of Hoven's prior injuries in determining his benefits.

Employee argued that the settlement with his employer of the 2004 injury established conclusively in his suit against the SIF that his 2004 injury was at maximum medical improvement under § 287.190.6(1). Section 287.190.6(1) requires the percentage of injury stated in a settlement approved by an ALJ or the LIRC be conclusively presumed to "continue undiminished whenever a subsequent injury" resulting in permanent partial disability occurs.

The court found the conclusive presumption under § 287.190.6(1) did not apply to the SIF, however. Missouri law holds that the SIF is not bound by the terms of a settlement to which it was not a party. As stated by the court, the settlement agreement is at most evidence of the percentage of disability in the subsequent action. Regarding the claim against the SIF for the 2007 action, a doctor presented competent evidence that Employee had never reached maximum medical improvement for his 2004 injury. The court therefore upheld the LIRC's decision that the SIF was not liable for permanent partial disability benefits because the 2004 injury was not a permanent partial disability.

The SIF appealed the commission's decision to combine all of Hoven's minor preexisting permanent partial disabilities, no matter how minor, in the calculation of liability to the SIF. The Court, in following the ruling in *Buhlinger v. Treasurer*, found that once liability to the SIF is established, all preexisting disabilities, no matter how minor, should be used to calculate the total liability to the SIF.

VI. Stacking of Preexisting Disabilities

***Treasurer of State v. Witte*, 414 S.W.3d 455 (Mo. 2013)**

The court examined four cases in which the commission had assessed liability, in each individual case, against the Second Injury Fund by combining the preexisting injuries of the employee to make a determination that the SIF was liable to the employee in conjunction with a current injury. The Missouri Supreme Court reviewed the decisions, consolidated into this case, based on the commission's interpretation of § 287.220.1. The SIF argued that the commission had incorrectly interpreted the statute to allow stacking of smaller, prior injuries to meet the standard for liability.

Section 287.220.1 states when the SIF is liable to an injured worker based on his/her past injuries. The Court determined § 287.220.1 did not permit the stacking of prior injuries to determine the liability of the SIF as the commission had done in these four cases. The Court based this opinion on:

- The fact that the statute uses a singular form in describing a previous disability in the third sentence of the section and then uses a plural form in describing disability in the fifth sentence. Because the legislature specifically used the singular form, the legislature clearly meant to impose liability, which is done in the third sentence, only when at least one individual prior injury is of a sufficient magnitude to attach liability to the fund.
- The commission was unable to combine the injuries to reach the required level without converting all the disabilities to a common unit of measurement. This shows the legislature's intent that the statute should not be combined.
- Amendments to the statute in 1993 added numerical thresholds which evidenced an intent by the legislature preexisting conditions needed to be sufficiently serious to trigger liability to the SIF.

The court distinguished the above ruling, however, by finding that once liability was triggered by one sufficiently serious preexisting condition, every preexisting condition should be used in the calculation of the amount of compensation. Section 287.220.1 requires the ALJ to calculate the compensation for preexisting disability by considering "all injuries or conditions existing at the time the last injury was sustained."

In conclusion, the Court found that preexisting disabilities could not be stacked to establish liability for the SIF, but once liability attached to the SIF, every preexisting condition should be consider in the calculation of benefits for preexisting disabilities.

VII. Statutory Employee

***Brito-Pacheco v. Tina's Hair Salon*, 400 S.W.3d 817 (Mo. Ct. App. 2013)**

Mauro Brito-Pacheco worked as a barber at Tina's Hair Salon, which was owned by Augustina Diaz. In addition to being the owner of the salon, Diaz was a hair stylist. Diaz rented

spots to other stylists and claimed to retain no control over them. She merely collected 50% of their fees from clients in exchange for the spot in the salon. Diaz did not tell them when to work, what clients to have, or how much to charge their clients.

On the day giving rise to the workers' compensation claim, Brito-Pacheco was called by a third stylist who asked Brito-Pacheco to cover a shift. While covering for the third stylist, the salon was robbed and Brito-Pacheco was shot and died. His widow sued made a claim for workers' compensation benefits against Diaz.

The question was whether or not Brito-Pacheco was a statutory employee under § 287.040.1. No party disputed that Brito-Pacheco was an independent contractor. He had his own clients, received no benefits or salary from Diaz, and he was free to schedule appointments when he pleased and to take any days off that he pleased. Diaz took 50% of any money that Brito-Pacheco made from his clients.

Under § 287.040.1, a person is a statutory employee if:

1. The work is performed pursuant to a contract
2. The injury occurs on or about the premises of the alleged statutory employee
3. The work is in the usual course of the alleged statutory employer's business.

The court presumed that Brito-Pacheco satisfied elements one and two listed above, but found that Brito-Pacheco's work was not performed in the usual course of Diaz's business. The court stated that "Rather than contracting with Brito-Pacheco to have him perform some portion of the Salon's work, the Salon simply provided Brito-Pacheco with a facility within which he could ply his trade."

This decision is something of Pyrrhic victory for employers. On its face, employers have secured a victory with the courts. However, the decision partially opens the door for employers to face liability for civil suits from independent contractors who should otherwise be statutory employees.

VIII. Credit from Award against Third-Party

***Denmore v. Denmore Enterprises, Inc.*, No. SD32351, 2013 WL 3548319 (Mo. Ct. App. 2013)**

A family member working for a family company was injured in car accident while working for the company. The workers' compensation insurer for the family company refused benefits, but the commission granted an award to Deloris, the family member/employee. She was awarded future medical expenses plus \$90,842.08 in past benefits. Delores had also obtained an \$80,000 settlement from the third-party tortfeasor with whom she had the car accident.

The issue addressed by the Court concerned how an employer should be credited for an award employee wins against a third-party tortfeasor. The Insurer argued the \$80,000 should be a set-off to her past benefits, but Deloris maintained that the Insurer should not be permitted to apply the credit as a set-off to the Insurer's obligation for past benefits.

Analyzing § 287.150, the court found that the settlement with the tortfeasor applied to the future medical benefits. Relying on *McCormack v. Stewart Enterprises*, 916 S.W.2d 219 (Mo. Ct. App. 1995), the court found that the statute required that settlement credits should offset future benefits, not unpaid past benefits.

While looking at a separate issue, the Court also ruled that only the employer has the right to dictate the employee's future medical treatment, not the insurer. Therefore, Delores was to follow the directions of her family company for her future medical treatments, not the Insurer.

***Tonya Huff v. The Jones Financial Companies, LLP*, 2014 WL 764041, Labor and Industrial Relations Commission No. 06-080670, February 26, 2014**

Huff was injured by a third-party tortfeasor. Employer is entitled to recoup a portion of its expenses paid to employee under § 287.150.3. All parties agreed that the ALJ correctly calculated the amount Employer could recoup from the award against the tortfeasor, but Huff argued that the ALJ should not have permitted employer to apply its credit to past due expenses and should have applied the credit to future medical payments for permanent, total disability and medical expenses. The commission, citing *Denmore v. Denmore Enterprises, Inc.*, agreed. An employer can only take its credit from a judgment against a tortfeasor from future medical payments. Therefore, the commission modified the decision of the ALJ to reflect the law stated in *Denmore*.

IX. Exclusivity Provision

***Shaw v. Mega Industries, Corp.*, 406 S.W.3d 466 (Mo. Ct. App. 2013)**

Shaw was working for a subcontractor when injured on the job. He filed for workers' compensation benefits against both the subcontractor and the contractor. Subcontractor had insurance to cover the claim, and it settled with Shaw. Contractor paid no portion of the workers' compensation benefits.

Shaw filed a civil action against Contractor. He argued that because the Contractor had not paid any portion of the workers' compensation claim, the exclusivity provision did not apply to Contractor. More specifically, Shaw argued that old precedent under *Bunner v. Pati*, 121 S.W.2d 153 (Mo. 1938), which held that a more senior contractor was immune from civil liability even if it was not liable to pay the worker's compensation benefits, was now obsolete because of the 2005 amendment requiring strict construction.

Thus, the issue before the Court was whether the exclusivity provision in chapter 287 covered Contractor despite the fact that Contractor had no liability to pay any part of the workers' compensation award. The trial court ruled that the exclusivity provision applied and dismissed the civil suit against the Contractor. The Western District Court of Appeals affirmed.

The last sentence of § 287.040.3 absolves a contractor of liability if the subcontractor has workers' compensation insurance. The Court determined that even if it were to ignore precedent prior to 2005, a contractor in this situation would still be under the exclusive control of the workers' compensation statutes. First, the Court found that precedent established after 2005 took that position. *See State ex rel. MSX Int'l, Inc. v. Dolan*, 38 S.W. 3d 427 (Mo. banc 2011). Second, the Court found, strictly construing the plain language of the statute, that the contractor satisfied the definition of a statutory employer. As the Court said, "actual payment of workers' compensation benefits is not a prerequisite for this immunity from common law actions."

The major impact of *Shaw* is that the court reaffirmed the line of cases stemming from *Bunner* even after the 2005 amendment.

X. Medical decisions with a defunct employer

***Lyman v. Missouri Employers Mut. Ins. Co.*, 407 S.W.3d 130 (Mo. Ct. App. 2013)**

A few years had passed since Lyman was awarded benefits for permanent and total disability from the commission. Lyman had sought treatment for issues stemming from the injury at issue in that workers' compensation claim. In an effort to ensure that his old employer's workers' compensation Insurer would pay these expenses, Lyman filed a declaratory action with the circuit court for a determination of the Insurer's liability to cover expenses for future medical expenses as was ordered in the final award. The Insurer argued that Lyman could not unilaterally seek treatment and that the Insurer had to approve any medical treatment in advance.

The issue before the court was who should determine what medical treatment Lyman should receive, the Insurer or Lyman. The circuit court found for employer and ruled that Lyman's expenses for treatment that was not approved by Insurer was not covered by the workers' compensation award.

As is clear from the § 287.140.10, the employer is the party who gets to direct what medical treatment the employee should receive. The statutes are clear that the insurer cannot direct the treatment. On the other hand, the statutes are equally clear an employee can only choose his/her own treatment when the employee has made a demand for treatment to the employer and the employer refuses or fails to act.

In this instance, Lyman's employer was an LLC that was no longer in business. The real question, then, was who picks the claimants medical providers and treatment when the employer is unable to do so. The Court recognized this as a matter of first impression in Missouri.

The Court refused to provide, however, and remanded the case back to the trial court because no evidence had been entered that the employer was unable to pick providers for Lyman. Lyman and the Insurer both assumed that the employer could not, but they failed to present any proof that it could not.

The impact of this case is that it recognized a gap in the workers' compensation law. The failing of this case is that the Court sidestepped the issue.

XI. Occupational Disease

Stephen Smith v. Capital Region Medical Center, 412 S.W.3d 252 (Mo. Ct. App. 2013)

Smith worked as a laboratory technologist from 1969 until 2006 for Capitol Region, in which position he withdrew blood from patients and daily worked with blood products. Smith was diagnosed with hepatitis C in 1991, and filed a workers' compensation claim based on his contracting hepatitis as an occupational disease. Smith worked for Capitol Region both prior to and after the implementation of certain safety measures that did not become standard in the industry. On numerous occasions, he would get blood on his hands, blood splattered in his face, blood in his mouth, and needle sticks and other cuts. Other than his job, Smith did not engage in any other activities that would have exposed him to blood or other bodily fluids, like tattoos or drugs, except that in 1970 he sustained a gunshot wound while hunting and had a few blood transfusions.

The issue before the Court was whether the claimant had sufficiently established that Smith's occupation caused the disease. The commission determined that because there had been no evidence that any of the blood Smith was exposed to as part of his employment contained hepatitis C, Smith had not present sufficient evidence to establish his disease as an occupational one. The Court of Appeal reversed and remanded.

To establish a disease as an occupational disease, an employee must show that there is a medical link between the disease and the some distinctive feature of the job that is common to all jobs of that sort. The workers' compensation statutes do not require that the claimant establish by a medical certainty that the disease was caused by the job. A claimant just needs to establish that there is a probability that the working conditions caused the disease.

Here, the Commission found that Smith had not satisfied his burden to prove that he probably contracted hepatitis C from his occupation because he could not submit any evidence of a specific exposure to the disease during his employment. However, the Court of Appeals

disagreed. Smith's medical expert stated in his testimony that it is more likely than not that Smith acquired his infection with hepatitis C due to his job with Capitol Region because people who worked jobs like Smith's during the time that Smith worked had a high likelihood of being exposed to hepatitis C. Because Smith's only other known, possible exposure to the disease, the blood transfusion, happened too long before the onset of his symptoms, the medical expert found it probable that Smith contracted hepatitis from his position with Capitol Region.

The Court of Appeals found that this testimony was sufficient to satisfy the requirements for finding that a disease was compensable under the workers' compensation statutes. Therefore, the Court remanded the case to the commission for reconsideration.

***Fidel Amesquita v. Gilster-Mary Lee Corporation*, 408 S.W.3d 293 (Mo. Ct. App. 2013)**

Amesquita was an employee of the popcorn factory run by Gilster-Mary Lee Corporation. He contracted a disease in his lungs from the chemical that was used to produce the butter flavoring in popcorn. Amesquita sued the employer and several co-employees under common law theories. Employer moved to dismiss based on the exclusivity provision of § 287.120.2. The co-employees moved to dismiss because Amesquita did not allege any duty on the part of the co-employees to Amesquita and because Amesquita did not allege sufficient facts to show that the co-employees had done "something more." The circuit court granted all of the motions to dismiss.

The issues before the court, then, were 1) whether the exclusivity provision barred Amesquita's claim for civil damages based on an occupational disease, 2) whether Amesquita had failed to establish that his co-employees owed him a duty beyond the employers duty to provide a safe work environment, and 3) whether the co-employee had done "something more" which established a personal duty of care to Amesquita. The Court of Appeals reversed on the first issue, but affirmed both issues involving the co-employees.

The Court essentially adopted the opinion of the Western District Court of Appeals in *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*. In that case, the Western District found that, due to the 2005 amendment of strict construction, the definition of "accident" in the exclusivity provision did not include occupational diseases. Further, the Court agreed with the Western District as well that the workers' compensation provisions did allow for a remedy against employers for occupational diseases and suggested that an employee could pursue both workers' compensation benefits and common law claims.

As to the co-employees, the Court again agreed with a Western District case that had previously looked at the issue, *Hansen v. Ritter*. As stated by the Western District, the Court held that even though co-employees no longer enjoyed the immunity provided by the exclusivity provision after the 2005 amendment, co-employees still must have some independent duty beyond the employer's duty to provide a safe work-environment. The court found in this case that Amesquita neither alleged that co-employees had an independent duty to him nor did he

allege sufficient information to show that the co-employees had done something more to harm Amesquita beyond the harm sustained by the employer's failure to provide a safe work environment. The co-employees did nothing to increase the levels of the toxic chemical inhaled by Amesquita beyond those levels he was exposed to as a result of his employ by the company.

***Tamara Lynn v. McClelland Marketing, Inc.*, 2013 WL 6728809, Labor and Industrial Relations Commission No. 10-111727, December 19, 2013**

Lynn, who worked as an office assistant and would perform data entry work on a computer for five or six hours a day, was diagnosed with carpal tunnel syndrome in both wrists in February of 2011. She had significant pain as a result of the condition and underwent several surgeries. In May of 2011, she filed a claim for compensation, which acts as notice to the employer, based on her occupational disease of carpal tunnel.

The issue before the Court was whether Lynn had failed to provide timely notice of her occupational disease to her employer such that her claim was barred. The ALJ found that she had not filed a timely claim and denied her benefits. The commission reversed the ALJ's decision.

Generally, under § 287.420 requires that, to make a claim based on an occupational disease, the employee makes have given the employer notice of the claim within thirty days after the diagnosis. Employer argued that because she was diagnosed two months prior to filing her claim, Lynn could not make a claim for compensation.

The commission found that diagnosis for purposes of § 287.420 does not occur until there has been a diagnosis that connects the occupational disease to the work-related activity. Here, a doctor did not establish a causal connection between Lynn's carpal tunnel and her job until August of 2011. Therefore, the commission found that Lynn's claim was timely.

XII. Preemption

***U.S. Dep't of Veteran's Affairs v. Boresi*, 396 S.W.3d 356 (Mo. banc 2013)**

A veteran, Mark Hollis, was sustained a work-related injury. He went for treatment to a VA hospital. It was undisputed that Hollis did not seek the approval of his employer before his treatment at the VA. After Hollis had filed his claim for workers' compensation benefits, the VA filed a motion with the ALJ to intervene in an attempt to recover its expenses in treating Hollis. Section 1729 of the United States Code permits the VA to intervene into any action brought by a veteran against a third party. The two issues were:

1. Does the federal statute giving the VA the ability to intervene in cases to recoup money override the Missouri workers' compensation statutes that do not allow medical providers to intervene?

2. If the federal statute does supersede the Missouri statutes, did the VA have the ability to intervene in this situation when the employer did not have the opportunity to approve of the employee's treatment at a VA hospital?

On the first issue, the Court easily found that the VA had the right to intervene. The federal statute, 38 U.S.C. § 1729, provides that the VA can intervene in any action to obtain payment for the treatment of an injured veteran against any third party the injured veteran could recover against for his/her injuries. Although Missouri chapter 287 does not allow for intervention in workers' compensation proceedings because Missouri rules of civil procedure do not apply to compensation proceedings and because chapter 287 does not have any provisions which establish a right to intervene, the federal statute supersedes the Missouri statute in conflict with it. In fact, § 1729 specifically states that the VA can intervene in workers' compensation actions to recoup its fees. Therefore, the Court determined that the VA is permitted to intervene in workers' compensation proceedings when § 1729 would permit it to so intervene.

Because the Court found the VA could intervene, the Court moved to the second issue. In this instance, because the employer did not approve employee's treatment by the VA, the employee did not have the right to recover his medical payments from his employer in workers' compensation. However, the Court determined that chapter 287 has minimal pleading requirements. The VA's motion to intervene did not allege anything about employee's failure to procure approval for treatment from his employer and merely alleges that employee was treated for his injuries by the VA and that the VA can intervene under § 1729. The Court found this sufficient to satisfy the minimal requirements of chapter 287. Therefore, the Court ruled the VA could intervene.

XIII. Prejudice from late notice of claim

Aramark Educational Services, Inc. v. Leotha Faulkner, 408 S.W.3d 271 (Mo. Ct. App. 2013)

Faulkner was employed as a custodian on the Washington University campus when she was injured by slipping on ice between two buildings on campus. Because she did not believe she was injured, Faulkner did not inform her employer of the incident. About ten days later, she noticed that her right knee, on which she had fallen, was swollen and painful. She went to her primary care physician and then to a surgeon. On March 31, 2010, which was about two months after her incident at work, Faulkner informed her employers about her injury and the treatment she had received, including her upcoming surgery.

Faulkner had not provided written notice until well after thirty days from her injury. However, the commission found that the employer had not suffered prejudice because the parties had stipulated to the time and place of the injury, to the injury being a work place injury, and that the injury caused 20% permanent partial disability. In the eyes of the commission, the employer

was not prejudice by lack of notice because it stipulated to every factual issue that goes to compensability.

The Eastern District Court of Appeals considered the issue of timeliness of the notice of injury to an employer under § 287.420. That provision states that an employee cannot recover benefits for workplace injuries unless written notice is given to the employer within thirty days after the injury unless the employer was not prejudiced by the failure to receive notice.

The Court disagreed and stated that employers admission that claimants injury occurred in the course and scope of employment was not the same as an admission that employer suffered no prejudice. The Court found Faulkner still had a duty to prove that the lack of prejudice from the untimely notice and Faulkner offered no evidence. That burden remains with the claimant and does not shift until evidence of prejudice is offered. It cannot shift merely because an injury is conceded to be a workplace injury. Employer could still be prejudice by the inability to provide timely medical treatment to minimize the disability and be prejudice by the inability to secure the scene of the accident and investigate it.

Therefore the court reversed the decision of the commission and found that Faulkner did not provide reasonable notice and did not prove a lack of prejudice to employer.

XIV. Course and Scope of Employment

Linda Dorris v. Stoddard County, No. SD32830, 2014 WL 350422 (Mo. Ct. App. 2014)

Dorris was injured while crossing the street in between the employer's two office buildings in order for Dorris to inspect new offices in one of the buildings. She tripped and was injured in her fall. Employer argued that Dorris could not recover because:

1. There was insufficient evidence to support that Dorris' injury was caused by her tripping on a crack in the street. Dorris could have tripped on anything.
2. The injury was not in the course and scope of Dorris' employment because she was crossing a public street when she was injured.
3. The injury was not in the course and scope of Dorris' employment because she was Dorris was equally exposed to the risk of tripping in the street in her normal, nonemployment life.

The court rejected employer's contentions and upheld the workers' compensation award in favor of Dorris because:

1. Nothing in the worker's compensation award requires a claimant to testify to the exact cause of the accident, and the commission is able to consider the evidence as a whole and rely on reasonable inferences. There was sufficient evidence in the

record that Dorris tripped while crossing the street, the street had many serious cracks, and she was paying attention to traffic.

2. Despite the fact the accident occurred on a public street, the accident was in the course and scope of Dorris' employment because it occurred while Dorris was crossing the street at the instruction of her employer to inspect offices in a different building. Dorris was "on the clock" and her supervisor requested her to make the trip.
3. The argument that the accident occurred because of a risk to which Dorris was equally exposed while not working fails because it does not satisfy a strict construction of the statute. Section 287.020.3 defines when an injury occurs in the course and scope of employment. Here, because there was an unsafe condition, the cracked street, that Dorris faced because of her employment. Her job required her to be in the unsafe location, and this satisfies the strict construction of course and scope of employment under § 287.020.3.

XV. Safety Violation

Susan Barton v. Green Acres Home of West Plains & Newton Group Home, 2014 WL 935491, Labor and Industrial Relations Commission No. 09-063719, March 7, 2014

Barton worked as a CMT and CAN with special needs adults for employer. The job required her to drive patients for various tasks. While driving one special needs patient, Barton was in a car accident and was injured. She was not wearing her seat belt because she claimed it would not fit her as she was an obese woman.

The commission raised two issues in affirming the decision of the ALJ that Barton had sustained a work place injury leaving her totally and permanently disabled.

First, the employer had requested a reduction in compensation owed based on Barton's safety violations. Namely, employer opined that Barton was not wearing a seat belt and was speeding at the time of the motor vehicle accident. The commission agreed with the ALJ, though, that employer had failed to establish the existence of the requirements for a reduction under § 287.120.5. Specifically, there was no evidence that Barton's injuries were related to her failure to wear a seat belt or her exceeding the speed limit. While the ALJ had also found the employer had not policy related to wearing a seat belt or staying within the speed limit and had found that the admonition from employer to "obey all law" was not a policy, the commission disclaimed those findings because there were unnecessary for a decision.

Second, the commission raised the issue of whether the ALJ should have refused to have considered Barton's morbid obesity as a factor for determining permanent, total disability. The commission commented that although *Loven v. Green County* held morbid obesity could not be

considered, it questioned whether *Loven* should be followed because the commission saw the issue of whether preexisting morbid obesity constitutes a permanent partial disability is a factual issue within the province of the ALJ or commission to decide. However, the employer did not raise this as an issue to examine, and so the commission left the ALJ's determination undisturbed.

XVI. Statute of Limitations

***Mary Compton v. Briggs & Stratton Corporation*, 2013 WL 5921564, Labor and Industrial Relations Commission No. 07-036344, November 1, 2013**

Compton was injured in an accident on April 18, 2007. Employer filed a Report of Injury on April 30, 2007. Employee did not file a claim for compensation until January 27, 2012. Employee was treated in a clinic on Employer's premises in June or July of 2010 for back pain, but the last time Employer paid benefits for workers' compensation was May 11, 2007 because on that day employer decided the injury was not work-related.

The commission addressed a statute of limitations issue. Section 287.430 governs the statute of limitations for workers' compensation claims. It holds that no claim for compensation can be made unless it is filed within two years of the date of injury, death, or last payment made under chapter 287 on account of the death or injury. It also provides that the limitation is one of extinction rather than repose.

Relying heavily upon the statute as one of extinction, the commission upheld the ALJ's finding that the claim for compensation was barred. Compton's spouse claimed that even though the employer last paid benefits for the injury more than two years prior to the filing of the claim, the statute of limitations was tolled because later received treatment at employer's clinic on employer's premises for back pain. However, back pain was not the injury which formed the basis of the claim and Compton knew that employer had decided to stop paying benefits on May 11, 2007, which was two years prior to the filing of the claim. The commission found the attempt to use the clinic to extend the time period was nothing more than employee trying to revive an extinct claim, which is not permitted.

***Robert Dungan v. Fuqua Homes, Inc.*, 2013 WL 5975961, Labor and Industrial Relations Commission No. 08-115832, November 7, 2013**

Dungan was injured in an accident on December 18, 2008. A report of injury was filed with the Division of Workers' Compensation on January 8, 2009. Employer last paid for medical treatment on February 19, 2009. Dungan did not file his claim for compensation until October of 2011. Several years after the accident, in November of 2011, Dungan saw a doctor for the

injuries from his accident, and Dungan or his personal insurance paid for that visit. Dungan claimed that a representative of the Employer told him that Employer would pay for that treatment.

The commission upheld an interpretation of the statute of limitations for workers' compensation claims under § 287.430 despite the fact that it was interpreted prior to the 2005 amendment for strict construction. There is no dispute that the last payment made by employer was more than two years prior to the filing of a claim for compensation, which under § 287.430 would bar Dungan's claim for compensation. Dungan argued, however, that employer had agreed to compensate him for treatment within the time period that he had sought on his own.

The commission determined, though, that it was clear Dungan or Dungan's personal insurance had provided the funds to pay for the most recent treatment. Therefore, the employer's last payment was over two years before the claim for compensation, and the claim was barred.