

Case Law Update –January 2008-March 2008

Jurisdiction of Commission

Lois Nolan v. Degussa Admixtures, Inc., Case No. SD28647 (Mo. App. S.D. 2008).

FACTS: Timothy Nolan was involved in a car accident in July 2005 while driving a company pick up truck for his employer. A clinical drug test was performed immediately after the accident, which revealed that Mr. Nolan tested positive for methamphetamine. Mr. Nolan lived for approximately three months after the accident, but ultimately passed away as a result of the injuries that he sustained. Subsequently, the employer denied benefits and the employee's surviving spouse filed a claim with the Division of Workers' Compensation.

At an October 2006 hearing, the ALJ found the employer's denial of benefits unreasonable and ordered costs to the claimant's attorney in the amount of \$10,684.80. The employer sought review by the Commission, but did not specifically challenge the ALJ's award of costs. The Commission reversed the ALJ's award of costs, and from that, the claimant challenges the Commission's jurisdiction on appeal.

If a party defends a case without reasonable grounds it may be assessed the whole cost of that litigation. The Court of Appeals noted that the employer never challenged the ALJ's reasons for awarding costs in this case. The court discussed its recent decision in *Stonecipher v. Poplar Bluff R1 School District*, 205 S. W. 3rd 326, 332 (Mo. App. 2006), where it held that if a Commission considered non-appealed matters it must do so with adequate notice to the parties.

HOLDING: The Court of Appeals held that the record was insufficient to determine if the parties had adequate notice before the Commission reversed the award of costs. Since the court was unable to tell whether due process was met, it remanded the case to the Commission to address the notice and due process issues.

Daniel Mell v. Biebel Brothers, Inc., Case No. ED89404 (Mo. App. E.D. 2008).

FACTS: The claimant, Daniel Mell, sustained three work related back injuries and subsequently underwent surgery for each injury. At a hearing before an ALJ, the claimant's request for future medical benefits with respect to each prior injury was denied. The claimant filed an Application for Review with the Commission, which did not raise the issue of future medical benefits. The Commission reversed the ALJ's ruling and granted the claimant future medical benefits.

HOLDING: The Court of Appeals held that the Commission denied the employer its right to due process by deciding the non-appealed issue of future medical benefits without first providing notice to the parties.

Calculation of Average Weekly Wage

David Murphy v. Barbeque Wood Flavors, Inc., and the Treasurer of the State of Missouri, Custodian, Second Injury Fund, Case No. SD28466 (Mo. App. S.D. 2008)

FACTS: David Murphy was hired to perform maintenance on machinery used in the employer's manufacturing plant at a rate of \$9.00 per hour. The claimant did not have a set work schedule, rather he was on call seven days a week. During his second day of work, the claimant suffered injuries when he tripped and fell.

In a Division hearing before an administrative law judge, the claimant testified that his employer agreed to discuss a bigger money if the company was satisfied with the claimant's job performance after the first week. Since the claimant only worked two days, the ALJ determined the claimant's average weekly wage based upon RSMo 287.250.1 (4), which states that if the employee's wages are fixed by day or hour then the average weekly wage is computed by dividing the amount earned each week by the number of weeks the employee was employed.

Based upon the evidence that the claimant was receiving \$9.00 per hour, the ALJ decided that it was reasonable to assume a 40 hour work week; therefore the two numbers were multiplied and the average weekly wage was determined to be \$360.00. The ALJ subsequently ordered the Second Injury Fund (Fund) to pay permanent total disability benefits in the amount of \$240.00 per week for the claimant's lifetime.

The Fund appealed to the Commission and argued that RSMo 287.250.1(5) should have been applied.

The Commission disagreed and reasoned that RSMo 287.250.1(5) applies only if the employer and employee fail to establish a fixed hourly wage. The Commission concluded that the parties had agreed to a fixed hourly wage of \$9.00; therefore, RSMo 287.25.1(5) was inapplicable.

The claimant's appeal argues that the Commission erred in not applying RSMo 287.250.1(5) to determine the correct rate of pay for the purposes of calculating the claimant's average weekly wage.

HOLDING: The Court of Appeals held that RSMo 287.250.1(5) does not apply to determine the claimant's average weekly wage, because the employer had agreed to a certain hourly wage. The Court found that the Commission's determination was supported by competent and substantial evidence. The Commission's Decision was affirmed.

Award of Future Medical Benefits

Linda Stevens v. Citizens Memorial Healthcare Foundation, Case No. SD28457 (Mo. App. S.D. 2008).

FACTS: The claimant injured her left knee while working as a certified nurse's aid for Citizens Memorial Healthcare Foundation. As a result of her injury, the claimant underwent arthroscopic surgery on her left knee and a total knee replacement. The claimant's doctor opined that the life expectancy of the knee prosthetic was approximately 20 years and if the claimant lived beyond that point there was a good chance that she would need another knee replacement in the future.

At a hearing before an Administrative Law Judge, the claimant was awarded future medical care. The Commission adopted and affirmed the ALJ's Award.

The employer appealed the Commission's decision arguing that there was not sufficient evidence to support the Award of future medical treatment.

The Court of Appeals noted that the claimant is not required to prove a conclusive evidence of a need for future medical treatment, but that the claimant need only show a reasonable probability that future medical treatment is necessary.

HOLDING: The Court of Appeals held that the claimant presented sufficient and competent evidence upon which the Commission could base their award of future medical treatment by presenting her treating physician's deposition testimony. Therefore, the Court of Appeals denied the claimant's Appeal.

Application of Drug Penalty

Lois Nolan v. Degussa Admixtures, Inc., Case No. SD28647 (Mo. App. S.D. 2008).

FACTS: Timothy Nolan was involved in a car accident in July 2005 while driving a company pick up truck for his employer. A clinical drug test was performed immediately after the accident, which revealed that Mr. Nolan was positive for methamphetamine. Mr. Nolan lived for approximately three months after the accident, but ultimately passed away as a result of the injuries that he sustained. Subsequently, the employer denied benefits and the employee's surviving spouse filed a claim with the Division of Workers' Compensation.

At an October 2006 hearing, an administrative law judge reduced the claimant's death and disability benefits by 15% as a penalty for the drug violation. The claimant sought review, but the Commission upheld the ALJ's award.

The claimant appealed the Commission's decision and challenges the following four points on appeal: (1) that the Commission erred as a matter of law ... because forensic drug test and

forensic chain of custody are required as a matter of law of admissibility; (2) that a positive drug test by itself did not prove a violation of the employer's drug policy; (3) the evidence was insufficient to prove that the employee was injured in conjunction with drug use; and (4) it is against public policy to reduce Missouri Workers' Compensation benefits.

HOLDING: The Court of Appeals affirmed the Commission's decision and discussed each of the claimant's four points on appeal. The Court rejected the claimant's first argument that forensic test and forensic legal chain of custody requirements must be met before drug test results are admissible before the Workers' Compensation Division. The Court reasoned that chain of custody requirement in a civil matter is no different than a criminal case, and noted in criminal matters the court is free to use discretion to determine if a reasonable assurance was met with regard to chain of custody.

The Court then rejected the claimant's second argument that a positive drug test did not indicate that the claimant violated his employer's drug policy. The Court noted that the evidence presented at the hearing showed the claimant was under the influence of methamphetamine, and that the claimant's argument ignores those findings.

The Claimant's third argument suggested that the evidence was insufficient to prove that the claimant was injured in conjunction with drug use. With regard to that argument, the Court noted that RSMo 287.120.6(1), which provides for the application of a drug penalty, did not specifically define the term in conjunction. The Court consulted a standard dictionary and concluded that the term in conjunction meant to co-exist in time and place. Therefore, it rejected the claimant's argument since the evidence presented at the Division hearing showed that the claimant was positive for drugs at that time he was injured in an accident.

Lastly, the Court rejected the claimant's final argument that a drug penalty reduction in Workers' Compensation benefits has a chilling effect on medical care and treatment, because the claimant failed to support authority for her argument and the Court noted that the issue is a matter of public policy that is better addressed by the General Assembly.

Credibility of Witnesses

Debra K. Highley v. Von Weise Gear, Case No. ED90160 (Mo. App. E.D. 2008).

FACTS: Debra Highley performed various hand intensive jobs while she was employed with Von Weise Gear (VWG). Ultimately, she was diagnosed with carpal tunnel syndrome and from 1994 to 1996 she underwent seven corrective surgeries. After her surgeries, Highley continued to work with VWG, until 2003 when she was diagnosed with carpal tunnel, tarsal tunnel and multiple sclerosis.

The claim against the employer was settled and a hearing was against the Second Injury Fund

with regard to the claimant's allegations of permanent total disability. The claimant produced the deposition of Mr. Robert Margolis, a neurologist, at the hearing. Dr. Margolis ultimately opined that based on the claimant's medical injuries he considered her permanently and totally disabled.

Dr. Margolis further stated that the pre-existing conditions combined with her primary work related injury to create a greater overall disability.

The deposition of Mr. James England, Jr., a rehabilitation counselor, was also produced at the hearing. Mr. England testified that he reviewed the claimant's deposition testimony, prior work history, and medical history before he opined that the claimant was A totally disabled from a vocational standpoint.@ Both experts' opinions were unimpeached and uncontradicted during the hearing.

The ALJ determined that the claimant's two expert witnesses did not consider the claimant's entire work history and concluded that their opinions were flawed. The ALJ found that the claimant was not permanently and totally disabled; thus, it rendered the issue of the applicable rate of permanent and total disability moot.

The Commission adopted and affirmed the ALJ's Award. In the claimant's appeal, she argues that the Commission's decision was not supported by substantial and competent evidence.

HOLDING: The Court of Appeals held that the Commission's decision was not supported by substantial and competent evidence; therefore, the decision was reversed and remanded with directions to enter a new award that found the claimants permanently and totally disabled.

The Court noted that there are two separate standards regarding a reviewing court's deference to a prior court's witness credibility determination. The Court stated that in general, the Commission is free to disbelieve uncontradicted or unimpeached evidence. The Court discussed *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993), which held that a prior court's decision was free to reject the testimony of a particular witness, but that the court's record must specifically state that its decision was based upon the conclusion that it found in favor of differing testimony.

The Appeals Court further noted that a different standard applied when the Commission's decision fails to state that it is based upon the belief or disbelief of the testimony of the witnesses. In *Corp v. Joplin Cement Co.*, 337 S.W.2d 252 (Mo. Banc 1996), the court held that when the record is silent with regard to the court's determination of witnesses' credibility then the Commission is not free to reject unimpeached and uncontradicted testimony.

To reach its conclusion in *Highley's* case, the Court of Appeals noted that the Commission's reasoning did not conclude that it disbelieved the testimony or credibility of either expert. Instead, the Commission merely stated that the experts' opinions were A flawed@ and completely rejected the witnesses testimony altogether. The Appeals Court applied the Corp standard and reasoned that the Commission was not free to reject the testimony of unimpeached and uncontradicted witnesses; therefore, the evidence presented was sufficient to find that the claimant was permanently and totally disabled.

Extent of Claimant's Disability

Daniel Mell v. Biebel Brothers, Inc., Case No. ED89404 (Mo. App. E.D. 2008)

FACTS: The claimant, Daniel Mell, worked for Biebel Brothers (BB) as a roofer. In June 1999 the claimant injured his back and subsequently filed a claim, which was settled for 20% PPD of the body as a whole related to the back.

On July 27, 2001, the claimant sustained another back injury for which he filed a second claim for compensation. On January 9, 2002 the claimant sustained a third back injury and filed a third claim for compensation as a result of that injury.

At a hearing before an administrative law judge, the claimant produced expert testimony from Drs. Petkovich and Dr. Volarich. Dr. Petkovich opined that the claimant had a 10% PPD of the body as a whole with regard to his first claim, and a 10% PPD of the body as a whole with regard to his second claim, and a 23% PPD of the body as a whole with regard to his third claim. Dr. Volarich did not assess a PPD rate with regard to the claimant's first claim, but assessed a 30% PPD of the body as a whole related to the second claim and a 45% PPD of the body as a whole related to the third claim.

The claimant then produced testimony of Mr. James England, a rehabilitation counselor, who opined that based upon Dr. Petkovich's medical restrictions the claimant would be capable of performing limited assembly or packing positions. However, Mr. England ultimately determined that the claimant was unemployable due to the combination of his learning disability, his pre-existing conditions, and the third back injury that occurred on January 9, 2002.

With respect to the second claim, the ALJ assessed 45% PPD of the body as a whole, related to the low back. The ALJ broke this amount down, and assessed 20% PPD with regard to the claimant's first back claim, and for the second claim assessed 20% PPD to the employer and 5% PPD to the Second Injury Fund (Fund).

With regard to the claimant's third claim, the ALJ found a 82.5% PPD of the body as a whole, related to the low back. The ALJ took a 45% PPD credit from the claimant's second claim and assessed 27.5% PPD to the employer and 10% PPD to the Fund for the third claim.

The claimant requested review of the ALJ's decision regarding the extent of the claimant's disability. The Commission affirmed the ALJ's decision. Subsequently, the claimant filed an appeal with the Court of Appeals arguing that there was substantial evidence to show that he was permanently and totally disabled and that the percentages of disability were incorrect.

HOLDING: The Court of Appeals affirmed the Commission's decision that the claimant was not permanently and totally disabled.

The Court reasoned that, the claimant's experts gave varying opinions that the Commission weighed to reach its decision. The Court noted that Dr. Petkovich testified that the claimant could return to light duty work, with certain restrictions; however, Dr. Volarich merely deferred his opinion to the vocational expert, Mr. England. And, Mr. England opined that based upon Dr. Petkovich's medical restrictions the claimant would be capable of performing limited assembly or packing positions.

The Court of Appeals noted that the claimant bears the burden of establishing permanent and total disability. And in this case, the claimant's two medical experts failed to specifically opine that claimant was totally disabled; therefore, it is within the Commission's discretion to weigh the differing witnesses' opinions and make a decision.

The Court noted that it is within the Commission's discretion to determine the credibility of each expert witness's opinion and to weigh that opinion accordingly. The Court found that there was substantial and competent evidence for the Commission to determine that Dr. Petkovich's opinion was more credible and that the claimant was not permanently or totally disabled.

Commission Trends

Over the last three months, the Commission has ruled on 47 cases and reversed or modified only seven of those cases. Of those, six were changed regarding liability against the employer and insurer.

In Clifford L. Conrad v. Jack Cooper Transport, Liberty Mutual Insurance Co., and Treasurer of Missouri, as Custodian of the Second Injury Fund, Inj. No. 04-061506, the Commission determined that the ALJ's award of future medical care and treatment was not supported by the evidence, because the medical testimony clearly established that the claimant's ongoing need for medical care was the direct result of a pre-existing degenerative condition and not the claimant's work-related injury.

In Richard A. Jones v. GST Steel Company, GS Technologies Operating Company, Inj. No. 01-168328, the Commission reversed the decision of the ALJ and determined that the employer is not liable to pay benefits as the employee did not file a proof of claim with the bankruptcy court as required under section 287.865.5 in the Missouri Revised Statutes.

In William Kempker v. ABBT & D, Self-Insured c/o Gallagher Bassett, and Treasurer of Missouri, as Custodian of the Second Injury Fund, Inj. No. 01-014020, the Commission issued a new award, in accord with the Missouri Court of Appeals Western District Opinion, that the employer is responsible for payment of future medical benefits to cure employee from the effects of his injury.

In Georgia Ratchford v. Price Chopper, American & Foreign Insurance Company, and Treasurer of Missouri, as Custodian of the Second Injury Fund, Inj. No. 02-146112, the Commission determined that the award should not have been a final award, but rather a temporary or partial

award, because all of the issues had not been resolved.

In *Rusty Sprouse v. Superior Asphalt Company, ACIG Insurance Company*, Inj. No. 04-105870, the Commission determined that the employer had reasonable grounds to defend the claim since the employee's testimony and the medical records differed with regard to when the work accident occurred. Therefore, the Commission reversed the ALJ's decision to award costs and attorney's fees to the claimant's attorney.

In *Ricky Tharp v. Pepsi Bottling Group Inc, Old Republic Insurance Company, and Treasurer of Missouri, as Custodian of the Second Injury Fund*, Inj. No. 04-141812, the Commission determined that the employee did not present sufficient evidence to prove that there was an injury that occurred while at work. Therefore, the employee was not entitled to compensation.