



# MO Comp News

- Scene from what movie?

**August 2016**

## The Ebbs and Flows of Political Power

We have had three years of this currently constituted Industrial Commission. They have largely affirmed with or without opinion the ALJ's underlying decisions but it is undeniable that the statistics show very rarely will a defense appeal to the commission be successful. The commission is certainly more apt to reverse a denial of benefits than to reverse an award of benefits. This commission will "supplement" an award as well, modifying the award by usually increasing it or in some cases changing the permanent total award to be against the Second Injury Fund, if the claimant was smart enough to "keep them in" or the employer was smart enough to convince them to do so.

The courts of appeal have returned Missouri back to a "positional risk" state eroding completely the 2005 legislative changes. The ends, which is always the awarding of benefits, will usually justify the means, which is the erosion of the legislative changes. The personal comfort doctrine has been readopted as has the judicially created doctrines of mutual benefits and the assault doctrines. The extension of benefits doctrine that largely deals with parking lot accidents has not only been readopted but it has been supercharged. If you hurt yourself in any way, crawl if you can to your Employer's parking lot and your injuries will be deemed in the course and scope of your employment. It is ironic that the court quotes "strict construction" in every liberal decision it makes. You can word search "strict construction" when reading an opinion and if quoted, the employer lost.

We predicted this erosion but there are other forces afoot that got us here. Having been involved in the Legislative process 11 years ago, I can tell you that some lobbying groups really have no interest in truly solving a problem, as they get paid and are only needed when they have one. The best example is the Second Injury Fund (SIF) shortfall. Instead of simply getting rid of permanent partial benefits from the SIF in 2005, the law put a hard cap in place on the funding of the SIF knowing that they would have to come back to this issue in the future due to the shortfall they knew they were creating. They set up the crisis that plagued the system for more than 5 years. The SIF stopped settling cases, and the permanent total awards against the SIF went from a little over 100 claims in 2005 to over 1,000 awards a few years later. Claimants had to wait for their benefits and eventually the 3% surcharge to fund the SIF had to be increased to the current 6% tax. To get rid of 25% of the total benefits the SIF paid out yearly in 2005 in the form of permanent partial benefits, ultimately the pie had to double. The lobbyists got paid to address the crisis they created.

Defense firms are not immune from their role or blame with our current system. There are many cases dealing with horrible injuries or death, where the defense tries to defend the case with very little chance of success and the result makes bad case law. In a recent case, the claimant developed post traumatic stress disorder from her work cleaning up auto accident scenes. All the doctors agreed that she had the condition and it was related to her work. She worked for 20 years and over 1,000 accident scenes. Is this really the case you defend based upon "no greater hazard" thru the court of appeals? The commission provided for benefits and employer appealed. Result, mental injuries need no longer be based upon the comparison of similar employees' exposure to stress. We will now see more mental stress claims.

The politics of litigation ebbs and flows. Employers in Missouri are about due for a swing back in their direction. It will not come from the courts however, and any changes will be subject to the courts' interpretation and their determination of intent, gleefully applying "strict construction." The question that is in the minds of those invested in the system is whether this potential conservative swing will throw out Chapter 287 and have them start over. There are certainly other states whose systems are more conservative and whose systems do not provide for representation or litigation. Will a conservative legislative initiative with perhaps a Republican Governor go nuclear with this approach? They could and might and I would not blame them. I wonder what I will do for a living if the system changes to get rid of attorneys? Perhaps farming? Or maybe become a lobbyist?

## Cases of Note

### Thomas v Forsyth Care Center SD 34151

Claimant was found to have sustained a compensable injury after a hardship hearing. The Employer failed to comply with the temporary award which later was converted to a final award finding that the Claimant was permanently and totally disabled. The final award was affirmed by the Industrial Commission and Court of Appeals. The claimant then filed a motion to commute the indemnity benefits to the Commission who granted the motion.

The evidence suggested that the Employer did not tender authorized care but scheduled Independent Medical Examinations and forced the Claimant to pay for treatment to be reimbursed later by the Employer on a sporadic basis. This conduct supported the commission's granting of the commutation of the benefits as they were just such "unusual circumstance" under section 287.530.2 to justify the commutation.

Editor's note: The opinion has been withdrawn as the parties settled the case but let this case be a warning.

*Tripping or rolling your ankle while on the property of your Employer will constitute a compensable accident if any "risk source" is identified related to the premises.*

### Lincoln University v. Narens WD 79003

Claimant was leaving work at the end of her work day and started walking to her car that was parked in a parking lot on Lincoln's campus. The Claimant walked down a ramp and turned right onto a sidewalk that led to the parking lot. Bumpers from cars parked on the left edge of the sidewalk made the sidewalk narrow. Claimant said students were walking toward her, so she stepped to the right. When she stepped to the right, her right foot landed on a steep edge of the sidewalk and turned. As her right ankle turned, Claimant overcompensated to her left, fell, and broke her left ankle.

The ALJ, and Commission awarded compensation. CARO defended the case on the argument that walking was the "risk source" of the accident and therefore the Claimant was equally exposed in non-employment life to this risk of injury. The court affirmed the award of benefits stating in part: "... , walking was not the risk source of her injury. Stepping off the steep edge of a sidewalk was the risk source of her injury. Stated another way, Narens was not injured because she was walking. She was injured because while walking, she encountered a steep drop off on the sidewalk--a risk source that she would not have been equally exposed to outside of the workplace in normal nonemployment life."

## Mesothelioma Update

The first "enhanced benefit" case was decided in Kansas City in April of this year. The carrier who insured the Employer after 1-1-14 was found liable for the enhanced benefit of close to \$516,000.00, despite the Claimant having been last exposed to asbestos long before.

The Administrative Law Judge found that the legislative intent of the 1-1-14 legislative changes was to create a "claims made" policy. He avoided the constitutional challenge of a retroactive application of a remedy by finding the more current carrier responsible, also noting they had the opportunity to collect premium for this risk. The case is *Casey v E J Cody*, #14-102671. It is being appealed to the commission.

There are many issues in these occupational disease claims. The enhanced benefit of the \$516,000.00 is payable by the Employer if the Employer elected by notice to the DWC for the enhance benefit which in turn secures for the company protection from civil suit for the condition. Although it would seem to most that \$516,000.00 with no subrogation of this payment, would seem to be a steep price to pay for this protection, it is also the case that many general commercial policies exclude from their coverage these exposure cases. They could therefore fall on the employer liability policy under coverage B, but his is unclear as well.

## Odds and Ends

- The annual **Kids' Chance of Missouri CLE seminar** was held on Friday May 20th at the St. Louis University School of Law. We raised **\$22,500** for the scholarship fund with this single day seminar.
- Speaking of Kids' Chance of Missouri, this scholarship fund has grown with 40 students set to receive **\$4,500/each** to go toward college or trade school this Fall. Kids' Chance has provided 1.7 million dollars in scholarships over the years.
- Attorney Mike Korte and I were the keynote speakers at the **Missouri Division of Workers' Compensation Conference** at the Lake of the Ozark this past June. It is an honor to be invited to speak every year. Call or email me for a copy of our yearly case law review.
- I will be speaking at the Annual Missouri Self Insured Workers' Compensation Conference to be held in St. Louis September 18-20th speaking on "**The Pitfalls of Strict Construction**".
- If interested in having me out for some training, case law update or to talk on litigation management, call me at **314-241-2481 ext 101**