



MO Comp News

- Joseph Maximillian

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It is all about Parker

As I have highlighted before, the Missouri workers' compensation community is awaiting the interpretation of section 287.220 for primary injuries that have occurred after the effective date of the changes made to the statute in January 2014 addressing the Second Injury Fund's liability for permanent totals. There are pending two cases at the court of appeals in the Eastern District that will weigh on how broad the SIF liability will be for these serious cases, although *Parker* is the name of a case already at the Missouri Supreme Court. Employers have a vested interest in broad SIF liability due to the simple fact that the court will likely find the Employer liable for lifetime indemnity payments if the SIF is not found liable. Here is language in the statute:

Section 287.220

(a) a. An employee has a medically documented preexisting disability equaling a minimum of fifty weeks of permanent partial disability compensation according to the medical standards that are used in determining such compensation which is:

i. A direct result of active military duty in any branch of the United States armed forces; or

ii. A direct result of a compensable injury as defined in section 287.020; or

iii. Not a compensable injury, but such preexisting disability directly and significantly aggravates or accelerates the subsequent work-related injury and shall not include unrelated preexisting injuries or conditions that do not aggravate or accelerate the subsequent work-related injury; or

iv. A preexisting permanent partial disability of an extremity, loss of eyesight in one eye, or loss of hearing in one ear, when there is a subsequent compensable work-related injury as set forth in subparagraph b of the opposite extremity, loss of eyesight in the other eye, or loss of hearing in the other ear; and

b. Such employee thereafter sustains a subsequent compensable work-related injury that, when combined with the preexisting disability, as set forth in items i, ii, iii, or iv of subparagraph a of this paragraph, results in a permanent total disability as defined under this chapter.

The current Industrial Commission has narrowly interpreted the language in the statute in a number of cases finding no SIF liability; although each of them have dealt with cases tried solely against the SIF with the Employer having settled their file. Their interpretation is that only the qualifying pre-existing disability can be considered with its resulting synergistic effect on the primary disability. If other disabilities are considered, the claim for permanent total disability against the SIF must be denied. Their interpretation suggests iii above should be read to be also in b. above. The cases have also ignored the disjunctive "or" that separates the qualifying pre-existing disabilities.

If the current Commission's interpretation holds, there will be many claimants who will not qualify for permanent total disability from the Second Injury Fund. That permanent total liability will shift to the Employer I am afraid in those cases. We will see if the Missouri Supreme court agrees; likely early next year.

Recent Cases of Note

James Atchison v Second Injury Fund

An award of the labor and industrial relations commission was affirmed. Pre-existing degenerative disk disease was a pre-existing disability even though it was asymptomatic where it was assigned 65% permanent partial disability of the body as a whole by the ALJ and the commission affirmed. An important fact is that the primary accident occurred prior to January 1, 2014 when the Second Injury Fund statute changed.

“Instead, Appellant argues that the employer at the time of the work-related injury should pay for the entire disability. Appellant argues that the pre-existing permanent partial disability was not symptomatic and, therefore, not compensable. The facts as found by the Commission indicated preexisting disabilities based on the testimony of Dr. Garth Russell of the degenerative disease process. Dr. Russell testified that Employee had objective signs of degenerative disc disease and degenerative joint disease. The Commission specifically found that the degenerative diseases were serious enough to be a hindrance or obstacle for future employment or re-employment.”

Williams v. Second Injury Fund

The date a claimant reaches maximum medical improvement is a finding based upon expert testimony that the commission is charged to credit or discredit.

Appellant was found to be permanently and totally disabled by the commission who also found that the SIF had the liability for that disability. The sole issue on appeal was the appropriate date of maximum medical improvement from which permanent total disability from the SIF was to begin.

The medical records and medical testimony that was unimpeached and found credible supported an earlier date of MMI than found by the commission. The commission was required to accept uncontradicted and unimpeached expert testimony.

Customer Engineering Services v Mark Odom

In an appeal of a permanent total disability award of compensation, the Employer sought reversal based upon a review of the evidence.

The court affirmed the decision but did reverse an award of past medical expenses based upon the undisputed fact that the Employer had no awareness of the need for additional care at the time that treatment related to the expenses was tendered.

It is the awareness of the need for treatment for the condition and then the failure to direct authorized care that triggers the liability. Stated another way, it is not the Claimant's burden to demand **authorized** care, it is actually the Employer's burden to show their offer of treatment. It is a subtle but important fact to keep in mind.

Injury Trends

When you have practicing work comp defense for 30 years you start noticing broader trends. Here are a few I have noticed:

- Every single Claimant who is claiming hearing loss has tinnitus. The cynic in me assumes this trend has to do with the automatic 5% PPD BAW you can collect without any objective test available to determine the validity of the complaints.
- Concussions and post concussive syndrome are also on the rise. Unlike tinnitus however, a good neuro-psyche assessment can help determine what is real and likely what is not. Order one early and often as these cases often blow up to excessive claims for lost time and disability.
- Cancer claims are the new frontier for litigation in work comp for first responders. After the Western District affirmed a liberal Commission decision a few years ago, we are seeing more of these. It is not just lung cancer for firefighters which most would find reasonable. It is really any form or type of cancer— bladder, prostate, lymphoma etc.
- It has already become more difficult to settle any case that involves probable SIF liability for permanent total disability. I can not blame the other side with the current Commission's interpretation of the statute. If Employers will start getting hit for more permanent total disability claims, I would warn my Employers to be careful who you hire and specifically how old the applicant is, as well as their physical condition.

Odds and Ends

- The **Kids' Chance CLE** took place virtually in September, and we raised a record **27k** for the scholarship fund. Great timing as Kids' Chance is having a down year on fund raising due to covid. We produced and broadcasted it from a studio. We are likely to do this moving forward tendering it to a broader audience state-wide.
- Archer and Lassa LLC moved out of downtown St. Louis after 23 years. Our new address is **3668 S. Geyer Road, suite 365, St. Louis, Mo 63127.**
- Third grandson, Joseph Maximillian Archer was born in June. He is doing well in Phoenix with his two older brothers.
- Having been successful in the Missouri Supreme Court in the mesothelioma case *Hegger* last year, we recently won another case at Court of Appeals and two others at the Commission. We are on a proverbial appellate roll it would seem?
- As it certainly is not anticipated that Attorneys will be actually appearing in person at the DWC offices any time soon, does it make sense now to refer any or all of your Missouri work comp defense cases to our firm? I think so.