Archer & Lassa LLC
www.askarcher.com (314) 241-2481

MO Comp News

- Grandson Vinny **December 2022**

What we know now about Second Injury Fund Liability

As I have highlighted before, the Missouri workers' compensation community has been awaiting the interpretation of section 287.220.3 RsMo., for primary injuries after January 2014 addressing the Second Injury Fund's liability for permanent totals. Here is the 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.

From two Supreme Court decisions, and a host of other decisions, we know that there is no SIF liability if the experts considered non-qualifying pre-existing conditions. The fifty weeks has to be for one body part. More than one qualifying 50-week pre-existing disabilities can also be considered.

What is likely, is that the pre-existing disability to qualify from a prior work comp case, can be from an occupational disease or repetitive trauma or an accident even though section ii above only references 287.020 that defines "accident."

What we really do not know is how "**significantly aggravated or accelerated**" will be interpreted and defined? As an example, if a Claimant has a prior total knee replacement with some permanent restrictions that are pre-existing and sustains a non-operated herniated disk in his neck from the primary accident, how would the prior knee "significantly aggravate or accelerate" the neck injury? Can a doctor credibly testify that it does? What if the Claimant is 72 years old; is he more likely totally disabled but if he is 35?

The current Industrial Commission seems to narrowly construe SIF liability consistent with the Missouri Supreme Court cases alluded to above. The Second Injury Fund is running a financial surplus currently and I know why.

"The Really Stupid Accident" Defense

In July 2011, Bryan Keith Hedrick, Jr. ("Claimant") "intentionally [lit] a can of glue held in a co-worker's hand on fire with a lighter" at the Big O Tires ("Employer") shop in Camdenton. His startled co-worker dropped the flaming can, which exploded on impact and severely burned both men. Hedrick filed for workers' compensation benefits.

Hedrick testified that the horseplay at Employer's shop "never" involved "any dangerous stuff" and he "never did any dangerous stuff" and he knew that "lighting a can of glue on fire would be dangerous"

The claim was denied but how or why is was denied makes this 2017 court of appeals opinion interesting.

You would assume that the claim was denied because the lighting of the glue was not in the "course and scope" of Hedrick's employment. It was an action that really had nothing to do with his work. That defense would maybe work before 2005 but not after. They re-defined "arising out of and in the course of" solely to be a risk analysis. Did the accident come from a risk that the Claimant was exposed to in non-employment life?

If you guessed that the Court applied this "new" definition and claimed that Hedrick was equally exposed to lighting glue in non-employment life, you would also be incorrect.

What logic was used to deny the claim?

"Section 287.020.2 was amended in 2005 to narrow the definition of accident[,]" and an "accident" is now defined as "an ***unexpected traumatic event or unusual strain*** identifiable by time and place of occurrence…"

The Court denied because it was clearly foreseeable and therefore not "unexpected" that the accident would occur and injuries would be sustained.

"...it is the accident, and not the injury, that is the event which is unforeseen and relates to a wound. It is therefore possible that an expected traumatic event may produce unexpected injuries, but that does not change the event from a non-accident to an accident.

As a result, we do not need to decide whether Claimant expected or foresaw the specific injuries he suffered. **The issue is whether he expected or foresaw that the event of igniting a can of flammable adhesives held by another person could produce wounds."**

I will dub this the "Really Stupid Accident" defense. It actually probably comes up more than you think. How many cases can you think of where it might apply?

Recreational Marijuana

With our new Missouri State Constitutional amendment that is set to legalize recreational marijuana in Missouri that is to take effect February, 2023; what does this mean for Missouri's drug penalty in section 287.120 RsMO?

In the Missouri workers' compensation act, there is a 50% penalty for a positive same day drug test for a non-prescribed controlled drug. We have had medical marijuana now for a few years but coming soon, marijuana will be legal without a prescription under Missouri State law. Will a same day positive drug test for marijuana still permit a 50% penalty? I would say probably not.

Although marijuana is still "illegal" based upon Federal law, I would bet that the work comp act will be interpreted to apply solely Missouri state law on defining what is a "non-prescribed controlled drug."

Until the Courts have addressed, I would still argue for the application of the penalty and would also point out that if the positive drug test results in termination of employment, I would argue that the positive test is "post injury misconduct" which forgives TTD or TPD being owed.

Is Covid Compensable?

I get this question often and my office is defending several of these claims involving first responders or medical personnel who allegedly contracted covid from an exposure at work. There is no case law yet on how "covid" claims will be handled. Here are the three statutory sections to be applied:

Section 287.020 in defining injury states: "These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, **nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment,** ...

Section 287.063. "An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists."

Section 287.067 "Ordinary diseases of life to which the general public is exposed outside of the employment **shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section."**