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MO Comp News

- Winter in Sheboygan **December, 2015**

My Nomination

I really enjoy my job. I get to work with some great people in my office and some great clients. I get frustrated as everyone does with certain aspects of my job. Lately for me this has been with the increasingly liberal decisions from the Court in the area of my practice– Missouri Worker's Compensation. There really are too many for me to recite, but let me outline my vote for worst case of the year to date for you to consider.

In **Beem,** a Western District Court of Appeals case from October, at the time of her injury her Employer allowed, but did not require, its employees to take a fifteen-minute paid break in the morning and afternoon, during which employees were allowed to leave the premises. Ms. Beem took a break around 10:00 a.m. to go home and **let her dog out.** Ms. Beem exited the building and walked across the parking lot toward her car. The parking lot had been plowed and the snow was piled on the sidewalks. Snow from a pile on the sidewalk had melted and refrozen on the parking lot. Ms. Beem slipped on this ice on the way to her car, suffered a broken ankle, and required surgery to repair the ankle.

The property owner, under the lease with the Employer, had agreed to provide 23 parking spots. Based upon this provision, the Commission and the Court found enough "control" by the Employer over the lot to extend the liability for this parking lot slip and fall under the "retained" extension of premises doctrine. What was worse than this application of the law was the fact there was no consideration that the Claimant was in route **to let her dog out to pee**. Even if you want to provide for parking lot accidents to constitute a compensable accident when they occur when arriving or leaving work for the day, how is letting your dog out to pee "in the course of" the Claimant's employment? How is that activity related to her employment?

What if Ms. Beem was going out to her car to retrieve an AK47 to kill her co-employees? Still compensable? Is that action and intent still "in the course of" her employment? I would assume the Western District would so find that it would be. In a prior decision by the name of **Henry**, the claimant fell on the parking lot on the property of his Employer but he was in the process of retrieving a rock to help a fellow mechanic secure his personal car on the rack. That Court affirmed the finding that the accident was not compensable as the accident did not occur "in the course of" the mechanic's employment. Letting your dog out to pee? Really? The upshot appears to be that if your employee does anything on a parking lot and sustains an injury, you bought the claim under workers' compensation.

The **Beem** rationale is already getting further press and interpretation. In the **Wright** decision from the Eastern District in November, the Claimant was sitting on a chair in Employer's lunchroom eating his lunch, when the chair collapsed under him. Claimant fell to the floor and injured his low back. The Court found the accident compensable affirming the idea that the "personal comfort doctrine" is alive and well. The Court stated as well that allowing recovery under Section 287.020.5 (parking lot cases) for injuries sustained while an employee is on the way to or from lunch "but not when injured on the premises is impractical and inconsistent with the statutory language and purpose." They might have well stated it this way: "we already adopted the idea that all accidents on parking lots are compensable, so to be consistent, we find all accidents compensable that actually occur on the property."

Following the trends from the Court of Appeals and the Industrial Commission is a key advantage our firm provides clients. Kenny Rogers had it right that the key in playing the game of poker is to "know when to hold them and know when to fold them." The same idea applies to effective litigation management: analyzing the exposure on a file including the costs involved with providing further defense, and balancing the same with an honest and accurate assessment of the chance of successfully defending the case or issue. With the current trend of cases, Kenny Rogers would recommend folding more often than playing out the case to trial and appeal.

Cases of Note

An award of multiplicity can be provided by the Commission.

Kolar v First Student ED 102450 September 2015

Claimant slipped and fell sustaining a fracture to his right leg in a compensable accident. He weighed close to 400 pounds. Due to the right leg injury, he developed left knee symptoms requiring treatment as well including the suggestion of the potential need for a total knee replacement. The claimant returned to work as a bus driver for two years before other health issues related to his obesity forced him to retire.

The commission affirmed the award solely of permanent partial disability for the right leg fracture and for left knee injury but also awarded a "multiplicity factor" to the claimant. They denied the claim for open medical for a left knee replacement but otherwise affirmed the open medical award for the retained hardware in the claimant's right leg. They denied the claim of permanent total disability against the employer or the second injury fund.

The court affirmed the award as provided also finding as a matter of law that the commission is free to award "multiplicity" for the opposing injuries the claimant was found to have suffered:

"However, we note neither the original nor the amended version of the Workers' Compensation Act mentions the use of a multiplicity factor. Instead, that mechanism was developed by case law. We find allowing multiplicity factors to continue to be used is not inconsistent with the strict construction of the Workers' Compensation Act. Had the legislature intended to discontinue their use, it could have done so explicitly in the amended statute. Because it did not do so, we presume it did not intend to prohibit their use."

Industrial Commission retains jurisdiction over settled claims.

Isp v The Commission Mo. S.CT July 2015

The Missouri Supreme Court found that the Industrial Commission retains jurisdiction to hear disputes over medical treatment in a case that settled with provisions providing for open medical treatment. The stipulation provided for further treatment for a pulmonary medical treatment. There arose a dispute in regard to whether the claimant needed certain prescribed inhalers.

The Supreme Court of Missouri held that the Missouri Industrial Commission impliedly retained jurisdiction. There was no reason to distinguish the retained jurisdiction over a settlement with that of an award.

Who has got the Burden?

Let us stop kidding ourselves. The claimant by statute has the burden to prove up the elements of a compensable case but the real burden is on the defense to prove otherwise. With the recent case law, most accidents will be found "work –related" and stemming from a "risk source" related to a claimant's employment.

Medical causation is assumed. The injury, if not related to a specific accident: will be found related to the popularly plead alternative theory of a "repetitive trauma" occupational disease. The claimant had symptoms at work, therefore work was the prevailing factor.

Permanent disability is statistically assumed in the state of Missouri. You want compensation, claim a back injury, retain counsel, file a claim and you will get paid eventually. Easy-peezy. The system is ripe for an undercover sting operation. Any volunteers?

Odds and Ends

- I enjoyed speaking to **MOPRIMA** group in Holt Summit, Missouri a few weeks ago discussing case law and claim and litigation management.
- Attorney Mike Korte and I will be on the big stage as the key note speakers next June at the **DWC conference** at the Lake of the Ozark. 16th year of being invited to speak on case law.
- Thank you to **Four Seasons** hotel for becoming a new client of our firm. It is a beautiful hotel downtown on the Mississippi riverfront, right next to **Lumiere Place** hotel and casino, another client of our firm.
- I certainly do not expect much from this Legislative year that will start in January in Missouri with Governor Nixon still in office despite the Republican majorities in the Legislature. I am making a list and checking it twice for 2017 though!!
- Our newest associate **Rodney Campbell** recently became a father once again. His wife gave birth to **Cally Ruth** a few weeks ago. She joins older sister Gwyneth and older brother Rodney Campbell III ("Thrice"). All are doing well.
- Pat McHugh's son **Mike McHugh** is finishing his college football career at Northwestern. Injuries have impacted his playing time but he is finishing off strong as a standout wide receiver.
- Thank you to all of you who expressed condolences over the passing of my Dad, Bernard Archer, after a three week battle with lymphoma in September. I miss him.