



MO Comp News

- Doreen Archer: rest in peace, Mom.

February, 2019

Happy New Year!

As many of you know, I lost my eighty year old Mom right before Christmas. She was struggling with stage 4 COPD having smoked for many years earlier in life. She was a tough bird beating the odds in getting out of ICU at the Cleveland Clinic and getting home on hospice for 10 days. I enjoyed being with her for much of December. I helped her order Christmas presents for the 17 grandkids and 2 great grandchildren. I helped her decorate her house for Christmas and I dutifully gained 10 pounds during that time. I can stress eat like a champ and when Mom says to eat, you eat. After my youngest brother Matt died at age 44 of a heart attack last summer, Mom's health declined rather quickly. I made many trips to Cleveland in 2018 and do not regret any of them.

I will not further eulogize my Mom. This would not be the venue for such a piece. I did want to thank our clients and friends who read this newsletter for the outpouring of "thoughts and prayers." My family and I and my Mom do appreciate your prayers. I am looking forward to a happier 2019. Thank you.

On a professional level, the new Industrial Commission is humming along. They are providing some much needed stability in deferring to the Administrative Law Judges and their awards, affirming the vast majority of cases, including the denials of compensation. You can review any and all of their decisions on the Commission website. Not sure if anyone has the time or inclination or interest that I do to follow these decisions. As factual decisions such as the credibility of witnesses is exclusively the province of the Commission, I think it is important to track trends at this level for our clients to give them good advice on the cases we are handling.

We have been impressed with the newer Administrative Law Judges that have been appointed over the past two years. There are additional appointments in the works. Judge Amy Young who was a practicing workers' compensation defense attorney in Cape Girardeau has been appointed an ALJ for that office. Judge Robbins retired recently. Judge Lorne Baker in St. Louis is now an Associate Circuit Judge in St. Louis County, leaving another vacancy in St. Louis for the Republican Governor Mike Wilson to appoint a replacement.

With the changing of the year, we have been trying to update our list of claims adjuster resources we provide clients. This would include the firm's St. Louis Area Medical Panel. Providers come and go and change practices often. We attempt to be fair and not delete a provider for one bad result or bad report or deposition, or for that matter some bad publicity in a decision from the Commission. We take into account costs as I have eliminated a few doctors who charge too much in my opinion or whose office is difficult to work with. If you have input or would like a copy of this resource or other topical handouts, send me an email at chris@askarcher.com. Some of the resources are available on our website as well.

The Missouri Legislature is in session but there would not appear to be much interest in legislative reform touching upon workers' compensation. There was not an increase in average rates for Missouri employers this year so there is less interest in addressing the statute. I still have my list from last year of largely clean-up provisions, but they will keep for another year. I would be happy to share my work in this regard or listen to any input you have on proposal for the statute in case I am asked to get back involved.

As the new year begins, we also wanted to thank you all for your support of this firm. I opened the firm in January 1998 as a solo operation working part time for Liberty Mutual Insurance Company for whom we still do some work. We have seen clients come and go for a variety of reasons. We have been pleasantly surprised at the number of clients that value our service and approach we focus on with identifying issues and exposures early, in order to save our clients money in exposure for benefits and legal fees.

Here is looking forward to a **HAPPY NEW YEAR!**

Shrinking Liability for TTD

There certainly has been a trend of legislative changes that narrow and shrink the liability for Missouri employers for temporary total disability (TTD) benefits.

No TTD is owed if the claimant applied and receives unemployment, or if discharged for "post-injury" misconduct:

287.170. 3. An employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation.

287.170. 4. If the employee is terminated from post injury employment based upon the employee's post injury misconduct, neither temporary total disability nor temporary partial disability benefits under this section, section 287.170, or 287.180 are payable. As used in this section, the phrase "post injury misconduct" shall not include absence from the work place due to an injury unless the employee is capable of working with restrictions, as certified by a physician.

After August, 2017, the statute now provides that TTD is no longer owed after the claimant reaches MMI which had been the case law for decades but is now codified in 287.149. The law also provides that no TTD is owed if light duty had been available but the claimant resigns:

287.149. 1. Temporary total disability or temporary partial disability benefits shall be paid throughout the rehabilitative process until the employee reaches maximum medical improvement, unless such benefits are terminated by the employee's return to work or are terminated as otherwise specified in this chapter.

287.170. 5. If an employee voluntarily separates from employment with an employer at a time when the employer had work available for the employee that was in compliance with any medical restriction imposed upon the employee within a reasonable degree of medical certainty as a result of the injury that is the subject of a claim for benefits under this chapter, neither temporary total disability nor temporary partial disability benefits available under this section or section 287.180 shall be payable.

If a claimant refuses to take a post-accident drug test that an Employer's policy requires, all benefits including TTD are forfeited:

287.120.6(3): ...An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section 195.010, RSMo, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

All of the above provisions are in addition to the argument that is provided in the simple definition of "total disability" that is contained in 287.020 that: "The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident."

Do you Need a MD to say Perm Total?

Dennis Moss v SIF

The Second Injury Fund appealed an award of permanent total disability, "because a physician did not demonstrate and certify permanent total disability as required by § 287.190.6(2)."

"Consistent with the definition of "total disability," we interpret § 287.190.6(2)'s mandate that permanent total disability "be demonstrated and certified by a physician" to require that a physician show clearly and attest as being true the employee's medical condition and resulting work-related restrictions post injury.

Once a physician does that, the requirement of § 287.190.6 (2) is satisfied, and it is within the Commission's expertise to determine whether the employee, with the medical conditions and physical limitations confirmed by the physician, is employable."

The court affirmed the award of compensation.

Odds and Ends

- I will be speaking at the annual conference of the **Missouri Concrete Association** in St. Charles at Ameristar Casino on February 18th.
- The **Division of Workers' Compensation** annual seminar at the Lake of the Ozarks is Thursday May 2nd and Friday May 3rd. I was invited to speak for the 19th year partnering again with Attorney Mike Korte.
- I will be a guest lecturer once again for **St. Louis University School of Law** this semester, training the next generation of attorneys who may practice in this area.
- I was honored to be asked to author and edit the **Missouri Bar desk book on Workers' Compensation**. It is the reference book used by attorneys throughout Missouri.
- I have updated the **Kids' Chance of Missouri Statute book** if interested in purchasing a copy. The charge is \$30.00 with proceeds going to the scholarship fund. It has all the changes made to the Act delineated since 2005. It is literally, "for the kids."
- The **Kids' Chance CLE/Seminar** is set for Friday June 7th at SLU Law School. The Chairman of the Industrial Commission **Robert Cornejo** and the Director of the DWC **Colleen Vetter** will both speak. We hope to again raise 25k for the scholarship fund. Contact me for a brochure if interested.
- We welcome **Eldorado Resorts Inc** as a client as they take over Lumiere Place Casino as well as **Boyd Gaming** who bought Ameristar Casinos. We looking forward to representing you.