



# MO Comp News

- Dominic– he’s got his pacifier and dirt: a good life!

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## Second Injury Liability for Perm Totals

After *Gattenby* was arguable overturned in a footnote in the *Cosby* Supreme Court decision late last year, the attention of the Missouri workers’ compensation community has turned to how the 2014 changes to section 287.220 RsMo, defining the scope of Second Injury Fund (SIF) liability, will get interpreted and applied. On behalf of Employers, we are monitoring closely the cases under the assumption that Employers are likely to face greater exposure for permanent total cases if the SIF is not found liable. The *Gattenby* case had allowed the good old days of broad SIF liability to apply if any of the claimant’s pre-existing injuries and disabilities existed prior to January 1, 2014. As one could often find a medical condition that would qualify, there were not many cases defining the new provisions.

For accidents and likely occupational disease injuries after January 2014, the new statute states as follow:

“Claims for permanent total disability under section 287.200 against the second injury fund shall be compensable must be based upon 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...”

The Commission recently found that only those pre-existing injuries that are found themselves to amount to 50 weeks of compensation will be included in the analysis for SIF liability and not the broader calculation of multiple medical conditions and prior injuries and disabilities combining to reach the 50 week threshold. See *Klecka v Johnny Jones*, 14-036899, decided January 14, 2020. The Commission overturned the ALJ’s award of permanent total disability against the SIF. The claim against he Employer had been settled.

There is a case pending in the Western District court of appeals, *Dubuc v SIF*, that may impact how this section will be interpreted, although the Commission in that case had analyzed the liability under the old statutory framework relying on the *Gattenby* precedent that may have been overturned by *Cosby*. I would bet the case will be remanded back to the Commission for further evidence and deliberation under the new statutory framework.

What is certainly true is that there are many cases pending against the SIF for permanent total disability where the claimant now regrets settling the primary case against the employer, having assumed *Gattenby* would apply and the SIF would have liability for the claimant being totally disabled. I would assume the *Klecka* commission decision will get appealed to the Eastern District court of appeals and we should have an answer soon as to how broad the liability will be for the SIF for permanent total disability– if not with the *Dubuc* decision, than with *Klecka*.

It certainly is in the best interest of employers to keep the SIF having broad liability for these cases. It is a built in system to spread the risk associated with these bigger cases which I grant impact self-insured employers greater than smaller employers who have insurance; but even these smaller employers will see their reserves for these alleged permanent total cases impact their experience mod and ultimately their premiums.

## Case of Note

### *Hazeltine v State of Missouri, Custodian of Second Injury Fund*

Claimant sustained a compensable injury in an accident to her head, a left shoulder strain, and neck strain. Claimant returned to work after the accident, but she struggled to keep up with the job demands. Employer's plant was very noisy, which caused Claimant to suffer headaches and lose concentration. Claimant worked light duty for one week and worked one day of full duty before she was fired. She has not returned to work since Employer fired her. She settled her claim against her employer prior to trial.

Claimant had a prior history of anxiety and depression for which she was prescribed medication. She had lost her daughter in a rape/murder that occurred when her daughter was a teenager. Her testimony was that she had to quit a prior job because of her symptoms.

Claimant presented multiple experts who found her to be totally disabled due to a combination of her pre-existing disability and her primary injuries. The Commission affirmed the ALJ who found claimant's experts not persuasive because they had "little or no specific history of any prior psychiatric symptoms or problems" and only had preexisting psychiatric treatment records from Claimant's primary care physician to consult in reaching their opinions..."

The court overturned the decision and awarded permanent total disability against the second injury fund. "Based upon the evidence in the record, the Commission's finding that Claimant did not establish her preexisting disabilities constituted a hindrance or obstacle is not supported by sufficient competent evidence and is against the overwhelming weight of the evidence."

See also *Harris v Ralls County, ED 107606*, October 2019. In both *Hazeltine* and in *Harris*, the court overturned the commission's decisions and awarded compensation. Both cases involved claims of total disability against the SIF but were older primary cases, before the statutory changes of 1-1-14 effecting SIF liability for permanent total disability. (see article on page 1)

The court of appeals certainly has been active in finding permanent total disability and also SIF liability for the same. Soon they will determine if this trend will continue with the appeal expected of *Klecka v Johnny Jones*, discussed on the cover. It would behoove Defense counsel to assist in fashioning the expert testimony to meet the threshold of 50 weeks of prior "disability" to the greatest extent possible. Securing an inflated rating of pre-existing conditions might just help your client in escaping greater liability for permanent total disability.

## Missouri Work Comp Trivia

- \* The maximum weeks of TTD that is payable is 300 weeks.
- \* Dental injuries involving the front teeth, "shall be rated as disfigurement in an amount sufficient to cover the reasonable cost of artificial teeth." 8 CSR 50-5.010 Presumably, the claimant is entitled to PPD as well as this "disfigurement" and open medical.
- \* The Labor Representative to the Missouri Labor and Industrial Relations Commission is now former Senator **Ms. Shalonn "Kiki" Curls** from Kansas City area. **Mr. Curtis Chick** had served in this position since 2011.
- \* Eyeglasses that are broken in a compensable accident are to be replaced as the statute defines the same as a prosthetic under section 287.020.3(5) RsMo
- \* An Employer may allow or require an employee to use any of the employee's paid leave to attend to medical treatment, therapy or evaluations during work time. Section 287.140.14 RsMo
- \* There were 301 awards provided by the DWC in 2018, down from 329 the year prior.
- \* Missouri ranks 27th in work comp premium costs compared to other states. North Dakota was the cheapest and New York was the most expensive in 2018.
- \* There were only 65 "toxic" occupational disease claims filed in the state in 2018. Only 25 were mesothelioma claims.
- \* The "reverse" shoulder replacement procedure where the clavicle is shaped into the ball and the humerus is shaped into the socket, was first developed in France.

## Odds and Ends

- **Dennis Lassa** will be traveling to Italy later this year with his wife. Contact him for your free gift he would be glad to send you upon his return. Maybe a good Italian leather satchel or an Italian pashmina scarf?
- **Tim Maurer** is in training for a half marathon later this year after turning 40 last year. I get tired driving that far.
- We are approved counsel now for Chubb Insurance who is the carrier for **Cigna Insurance**, who bought **Express Scripts**.
- We welcome new client **Wegg Transformers**, from Washington, Missouri as a new client. We look forward to working with and for you and **PMA Companies** on your behalf.
- We are approved counsel now for **CUTA** who is the College and University Trust Association, adjusted through CCMSI.
- We are in the process of becoming approved counsel for **Applied Underwriters** as well.
- The St Louis CLE benefitting **Kids' Chance of Missouri** will be held at SLU Law School in St. Louis on **Friday, June 5th**. I am working on the program.
- My favorite Christmas gift this year—a portrait of St. Thomas More that my kids gave me.