



# MO Comp News

- Grandson Peter Archer- who else would it be?

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## Times, they are a Changing'

The Missouri Legislature adjourned without taking any action on a number of workers' compensation bills. The mistaken impression of the Legislature was that they addressed workers' compensation reform last year. It is historically the case that it is rare to see changes to the Act in successive years. This was perhaps a missed opportunity to make some changes based upon missed impressions of the current state of Missouri workers' compensation. I will explain.

The headline numbers would suggest that there is certainly no emergency. The premium base was 1.69 billion in 2008 and it is 1.69 billion in 2017. Missouri ranked at 104% of the National median for insurance premium which was a little north of the average in other words— ranking 30th. Looking behind these numbers however is the cost associated with each claim and the dangerous case law precedents that forecasts some troubled waters moving forward. You see in 2008, there were 121,000 reported injuries, yet in 2017 that number was down to 99,000, down **20%**. In 2008, there were 28k settlements and 892 awards issued by the DWC. In 2017, there were only 19k settlements and only 510 awards, down **32%** and **42%** respectively. There are less cases, but the premium base has stayed constant? That doesn't make sense, does it?

The reason in part is the fact each claim is costing more in benefits; with the greatest increase being the costs associated with medical expense. The *Work Comp Research Institute* released a report that confirmed that Missouri is one of the last states to adopt a medical fee payment schedule. Because of this, Missouri Employers have seen a tremendous growth in the expenses they pay for treatment of their employees in Missouri. Missouri's standard of "reasonable and customary" is simply not much of a retardant to medical bill inflation. Providers inflate their charges, accept the initial payment based upon some vendor's "reasonable and customary" algorithm, and then simply file a fee dispute for the balance. By then the vendor does not want to bother fighting and they reach a settlement for additional compensation. They trumpet their original cuts as the value they provided and move on to the next bill.

The defense bar has had been partly to blame for the increase in the costs to the system. In a climate that has been hostile to Employers in Missouri, defense firms have dug in their heels and kept files open longer and done more work on each file than was necessary or advisable. As reflected in the numbers above, the settlements and trials or final awards are down significantly more than the decline in the case count. Purely anecdotal, but I have taken over several files from other firms and have been amazed at how creative firms can be with billing for doing nothing of substance on a file. One example is appearing for multiple prehearings to simply announce a continuance to the Judge. ALJ Fisher has gotten so tired of this practice that she has rejected requests for prehearing settings without a specific issue identified on the request that she needs to address. I do not blame her. Talk about a boring outstate docket.

There would appear to be some hope for Missouri Employers. Now Former Greitens recently appointed an Employer Representative to the Industrial Commission, *Reid Forrester*. The position had been vacant for 16 months - but at least it is filled now. Also, both the Labor Representative *Curtis Chick* and Chairman *John Larsen* will be replaced soon or at least it is hoped. If you have read past newsletters, you know how liberal the case law has become not just from the Commission but from the Court of Appeals as well. Hope springs eternal for Employers in Missouri. We will also hopefully get some changes next legislative session!

## Case Law Update

### Rhonda Clark v Dairy Farmers of America

Claimant felt a sharp pop and pain in her chest when doing shoveling activity at work which was part of her regular duties for her Employer. She was diagnosed with a fractured rib but also a rare malignancy which can weaken a bone. She underwent treatment including radiation for her condition and pursued her fractured rib injury as an accident under Missouri law.

Experts disputed whether the shoveling she was performing was the prevailing factor and a compensable injury. The ALJ denied compensation but the Commission reversed and awarded compensation. The court affirmed quoting the statute that an accident is defined as “an unexpected traumatic event or an unusual strain” under section 287.020.3 (1). They quoted *Young v Boone Electric Coop*, 462 S.W.3d 783,792 (Mo. App. W.D. 2015) for support for their affirming the Commission decision. “An event may fall into both categories, but “it is compensable if it falls under a single category.’ Id at 793. Here it is an “unusual strain.”

**Editorial comment:** The case is interesting in that it highlights how low in reality “the prevailing factor” standard is when applied. It is clear if the standard was “a factor” that compensation would be payable. The anticipated higher burden of the work accident or exposure being “the prevailing factor” simply has not been applied to deny compensation very often, if ever, since it was introduced and made the law in 2005. It is also an example, from many, where the ALJ denied benefits and this current Commission reversed and awarded benefits.

### Accident Fund v Casey

The Missouri Supreme Court found the current carrier of an existing Employer responsible for payment of the mesothelioma bonus that was written into the law effective 1-1-14 even though the Claimant had last been exposed to asbestos working for the Employer long before the effective date of the statute. The court found that the claim being filed after 1-1-14 triggered the liability; finding also that Accident Fund had provided an endorsement for the coverage.

Accident Fund had argued that the provision as applied to exposure before the effective date would violate the Missouri constitutional prohibition against retrospective application of a civil statute. The court disagreed suggesting that Accident Fund had taken the risk of this interpretation in providing for the endorsement which was also the evidence of the election by the Employer to pay the bonus.

Issues remain as to whether only current Employers can be found liable for the bonus, when they “elect to accept.”

## Dealing with a Medicaid Lien

If you are handling the defense of a file with a Missouri Medicaid lien, you might soon have less options to avoid the payment of the lien if you want to resolve the case by settlement. Up until October of last year, the Federal law that defined the scope of a state Medicaid lien exempted any compensation provided for in a settlement that was not defined as money for past medical. Such had been the interpretation by the US Supreme Court in a case a number of years ago and Missouri actually paid on a class action case when they claimed a broader lien.

Although the Federal law changed in October, there is a question if Missouri has adopted by law, regulation or simply policy to take advantage of this change. Their letters currently still claim a limited scope to their lien which I would argue can be relied upon.

The safer bet however would be to arrange for the settlement to be paid into a Medicaid special needs trust if the facts of the case otherwise suggest that approach. A special needs trust also preserves a Claimant’s eligibility for Medicaid assistance. If they rely on that coverage for treatment for the disputed work related injury or for other medical conditions, the settlement of a case otherwise can throw them off of Medicaid.

Between Medicaid considerations and Medicare issues that similarly involve “conditional payments” and set asides, these cases can get complicated pretty fast. Don’t worry though, we are here to help you through the mine field and enjoy the challenge working on these cases.

## Odds and Ends

- The **Kids’ Chance** workers’ compensation seminar on **April 20th** in St. Louis raised more than \$25,000 for the scholarship fund. Thank you to those who attended.
- I have updated the Kids’ Chance Statute book if interested in purchasing a copy. The charge is \$25.00 with proceeds going to the scholarship fund. It has all the changes made to the Act delineated since 2005.
- The Missouri Division of Workers’ Compensation Seminar at the Lake of the Ozarks is scheduled for **August 15th and August 16th** at Tan-Tar-A Resort. I was invited to speak for an 18th year in a row with my colleague, Attorney Mike Korte, covering case law.
- If interested in having me out for some training, case law update or to talk on litigation management, call me at **314-241-2481**.
- Thank you to **Mercy** who invited me recently to come out to do some training and eat some pizza and pie. The food was better than the talk I would admit. Fortel’s pizza and McArthurs’ apple pie, if you were wondering.