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MO Comp News

- Dominic Archer **June, 2019**

Co-Employee Liability

In *Danny Brock v Peter Dunne*, the claimant sued his supervisor in negligence for ordering him to clean a laminating machine that was still running and whose safety guards had been removed. The claimant sustained injuries when his hand got caught in the rollers. The suit proceeded to a verdict and the supervisor appealed.

The court found that the elements of a co-employee suit were proven in the allegation of negligence. First, the supervisor committed an <u>affirmative negligent act</u> or acts in removing the guard and ordering the machine to be cleaned while still running. Second, the court identified that the <u>duty breached in this case was not foreseeable</u> to the employer and therefore was beyond the employer's non-delegable duty to provide a safe work environment. As there were warning signs on the machine and instructions given on how to safely clean it, it was not foreseeable that the supervisor would violate those explicit employer instructions.

Section 287.120 RsMo effective August 2012 states as follows:

> "Any employee of such employer shall not be liable for any injury of death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability therefor whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an **affirmative negligent act** that **purposefully and dangerously** caused or increased the risk of injury."

The case has been accepted by the Missouri Supreme Court with a decision from them expected within a few months. In a similar case decided in May from the same eastern district court of appeals, *Mems v Labruyere*, a supervisor was sued in negligence for having ordered the claimant to assist in moving a heavy roller door. He was ordered to stand under the door that became unhinged and fell, impaling the claimant's leg. The court in this case likewise found the 2012 statutory language satisfied with the finding of a personal duty and breach of that duty by the supervisor. This case also is likely to be appealed or stayed pending the Supreme Court's decision in *Danny Brock v Peter Dunne.*

A couple of observations concerning these co-employee liability cases. First, the general liability (GL) coverage is usually triggered with the employer ultimately getting involved thru their GL policy, although these two cases did involve a supervisors' alleged negligence. It is unknown if a non supervisor co-employee would have the GL coverage. Second, it is technically a third party case and arguably the rules of subrogation apply with the Employer's workers' compensation insurance carrier being able to collect against the Employer's GL carrier consistent with the statute.

The third comment I would make is the nebulous nature of the statutory language that mirrors the nebulous nature of the logic in the case law. Phrases such as "affirmative negligence," "purposefully and dangerously,' along with the case law that trips over itself searching for a co-employee's duty that is separate from the Employer's non-delegable duty to provide a safe work place; these concepts are all as malleable as play-dooh. See *Mems* case mentioned above. How are the facts in that case not simply an accident involving a supervisor who simply showed poor judgement? There was no evidence that the supervisor intended to injure. What makes doing something stupid, affirmative negligence? We hope to get some clarity from the Missouri Supreme Court soon.

The erosion of the conservative changes in the Act continues. The goal of the 2012 statutory changes was to re-establish the delicate balance to protect Employers but also punish co-employees who's actions were reckless in causing an accident to occur. The language used was borrowed from *Badami,* a case from a few decades ago that had established a good balance. Unfortunately, a liberal court of appeals seems to want to open the door as wide as possible for these suits to proceed. If co-employee liability suits are permitted based upon such liberal interpretation, the same will threaten the original bargain Employers made that was the bedrock of workers' compensation.

Mesothelioma Update

If you were wondering what that scream was on May 21, 2019 coming from downtown St. Louis in the afternoon, it was me. The court of appeals for the Eastern District reversed and awarded the mesothelioma bonus or enhanced benefit in the *Hegger* case I had won before the ALJ and the Commission. The majority opinion was 13 pages but the dissent was 21 pages. I think the majority simply gave up trying to explain what they were doing and how they arrived at their decision.

The "bonus" is payable in the cases of mesothelioma when a claim is filed after the effective date of the statutory changes on January 1, 2014. The Missouri Supreme Court in the *Accident Fund* v Casey opinion from 2018 had found Accident Fund liable for the bonus as they insured the relevant Employer who last exposed the Claimant although they insured them in 2014, not when the Claimant last worked for the policyholder. The court avoided the constitutional prohibition of applying statutory or substantive law changes retrospectively by relying on the fact Accident Fund had provided an endorsement confirming coverage for the mesothelioma benefit, even if Accident Fund certainly had thought the new bonus would apply solely prospectively to exposures to asbestos after January of 2014 when they provided coverage.

In *Hegger*, Amerisure Insurance had the coverage when the Claimant last worked for their policyholder, Valley Farm– who ceased to exist in 1994. The ALJ and Commission denied the bonus as there was no evidence of an election by Valley Farm to pay the bonus to secure their exclusive jurisdiction protection– a right clearly provided for in the statutory framework for this specific toxic exposure. The logic would be that failing the ability to elect or reject, no bonus can be payable.

The majority opinion in *Hegger* disregarded the plain language in the statute and the precedent in *Accident Fund* made by the Supreme Court in 2018. If it stands, and we are appealing, how could they interpret the statute to provide that two different carriers might have the liability for the same benefit? How can a carrier from three decades ago be forced to provide a benefit that first came into existence in 2014 and how would this not be a retrospective application of law?

We will find out as we appeal for rehearing and or transfer of the case to the Missouri Supreme Court. I will try to keep any more screams to a minimum.

Can you ever really close a case?

The Cornejo Commission has interpreted the Act to not allow the parties to resolve and settle future medical treatment inclusive of the Claimant's waiving his/her ability to reopen a settled claim for a change in a prosthetic or for treatment for a life-threatening condition related to the case. In *Redzic v Allied Healthcare*, the parties submitted a joint request to resolve and settle an outstanding medical treatment obligation with the funding of a Medicare set-aside account. The Commission refused to approve the settlement on two grounds.

First, the only "claim" or dispute identified by the parties was a general statement that there was a dispute "pertaining to the compensability of treatment not directed by employer/insurer." Citing the *Dickemann* case from the Supreme Court of Missouri from 2018, and their interpretation of their authority under 287.390, the Commission stated the parties' expression of the dispute being resolved by settlement was inadequate.

The second point they made in the decision was to simply state they feel they can not approve any settlement that purports to waive by the Claimant the ability to reopen the settlement for the change in prosthetic of for life-threatening treatment under section 287.140.8 RsMo.

Section 287.390.1 RsMo states:

"no agreement by an employee or his or her dependents to waive his or her rights under this chapter shall be valid…nor shall an administrative law judge or the commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter."

To the extent that we have crossed out on the DWC stipulation the right of the Claimant to reopen under section 287.140.8 even by identifying money set side for future medical, it is unknown if those terms and approved settlements would be honored if challenged. It is also likely that the Administrative Law Judges will no longer approve any settlement that purports to have the Claimant waive 287.140.8 RsMo.

From a practical point of view, the Insurance regulators and procedures have not required insurance carriers or Employers in Missouri to maintain a reserve on all cases for the potential "reopening" of a settled case under section 287.140.8.

Odds and Ends

- I was approached to do some in-house training for **CCMSI** in St. Louis, covering subrogation and recent case law in Missouri workers' compensation. I enjoy these "lunch and learn" seminars although I admit it is likely more about the food.
- I was asked to speak at the **16th Annual Greater St. Louis Safety and Health Conference** on October 17th. Call for a brochure.
- The **Kids' Chance of Missouri CLE** I host occurred June 7th at SLU Law School. It was a success with over $20,000.00 raised "for the kids."
- If you have not interacted with him yet, introductions may be in order; **Keith Unger** has joined the firm as an Associate. Keith has been an attorney for 25 years practicing in the area or workers' compensation and corporate law. We are glad to have him.