



# MO Comp News

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March 2018

## A Great Start to a new year for Archer & Lassa

The firm has been on a great run of late. I held a win at the Industrial Commission of the second mesothelioma bonus case tried in Missouri. The statutory changes in 2014 provided for a bonus to be paid for certain toxic occupational disease cases that would entail potential exposure of \$500,000 in additional compensation without subrogation. The ALJ and now the Commission denied that this additional bonus is payable if the Employer who last exposed the Claimant was not in existence and therefore did not make an “election” provided for in the statute after 2014. We will see if I can keep the win at the Court of Appeals.

Dennis Lassa is on a streak of wins on cases he tried which entailed permanent total exposure. A Claimant had prior low back surgery 25 years prior to sustaining a compensable accident to his low back that resulted in three additional low back surgeries needing to be performed. Despite testimony from the Claimant that he was “fine” for more than a decade with no symptoms from his prior surgery, Dennis was able to fashion the expert testimony to establish Second Injury Fund liability for the permanent total disability. He established the evidence and testimony that despite a lack of symptoms, the Claimant’s prior surgery had compromised the Claimant’s back and this fact created a “synergistic” effect from a medical standpoint with the primary injury, creating an overall greater level of disability.

Mark Cero avoided permanent total disability in a case tried in mid-Missouri for severe bilateral ankle/foot fractures a Claimant sustained when he fell off a roof. Mark established that the Claimant was not compliant with physical therapy taking the extra step in deposing the therapist who testified to statements the Claimant had made that drew into question his credibility. The ALJ not only denied permanent total disability benefits but also denied the claim for future medical which is extremely rare in Missouri the last few years with this current Industrial Commission.

Although we enjoy the trial work, our firm’s greatest attribute is the value we provide in resolving cases effectively and efficiently by settlement. With the declining number of cases and claims, many defense firms have become more aggressive in their advice to clients and in their posture, just to keep a file open longer to bill more time. Every day we see defense firms travel from Kansas City to appear for a prehearing in St Louis. Claimant attorneys are surprised when we call them with an offer often before a deposition is taken or a setting of the case is scheduled. We identify issues early and work to close the file on favorable terms to our client’s exposure for benefits and litigation expense.

January marked the 20th anniversary of the firm. It has gone by quickly. I have enjoyed the work and the people I have met and worked with and for over time. Through the work of adjusting and defending a claim, I have become true friends with many of you. I have had the privilege to work with some great attorneys and colleagues and stakeholders in the workers’ compensation system.

I was advising attorney in 2005 for one of the most comprehensive statutory reform initiatives for Missouri employers. This year I was asked to help draft proposed legislation that may or may not make it through the process. It is an honor however to be asked to help shape the system I have spent my professional career working. Most of HB 1697 is the result of this work.

In addition to Missouri HB1697, an additional legislative initiative has been the introduction of a Senate Bill calling for a medical fee schedule for Missouri. Missouri is one of a small handful of states that does not have a fee schedule for their workers’ compensation system. Statistics reflect that Missouri employers are paying 170% of the average for medical treatment benefits. I am surprised at the apparent lack of support for this Senate Bill from either business or the insurance coalition. With medical expenses comprising over 50% of any claim, the reduction of these costs would seem to be very real and effective reform that would lower the premiums for all employers. The state of Illinois has had a medical fee schedule for many years. Hard to imagine that Illinois is more business friendly than Missouri, but this appears to be the case, at least when it comes to this issue.

## Case Law Update

### White v Conagra- Supreme Court / Heart Attack

Ulysses worked for ConAgra Packaged Foods, Inc. ("ConAgra") for twenty-four years in Marshall, Missouri. At the time of his death, Ulysses worked in ConAgra's machine shop making parts for the facility's production line. The machine shop did not have air conditioning but did have windows and fans to help cool the building.

On June 30, 2012, Ulysses reported to work for his usual shift. Ulysses was wearing a leg brace due to a tendon injury in his foot. Ulysses began his work day in the machine shop making parts. Following the scheduled power outage that occurred sometime between 9:00 a.m. and 9:30 a.m., Ulysses walked from the machine shop to the waste water system pumps to ensure they had restarted. Ulysses then walked back to the machine shop, where he continued his work until taking a thirty-minute break for lunch at 11:00 a.m.

One of Ulysses' co-workers found him collapsed on the floor in the machine shop at approximately 11:45 a.m. Despite receiving medical attention, Ulysses died the same day. An autopsy revealed that the cause of Ulysses' death was "a cardiac arrhythmia resulting from severe coronary artery disease." The autopsy noted evidence of pericardial adhesions, coronary artery disease, and emphysema.

The ALJ denied compensation. The ALJ concluded that Patricia "failed to sustain her burden of proof that [Ulysses] sustained an accident or occupational disease." The ALJ observed that both Dr. Schuman and Dr. Farrar "agree that the mechanism of death was ischemia or lack of blood flow to [Ulysses'] heart which caused ventricular fibrillation and cardiac death." And the ALJ observed that "[b]oth physicians also agree that the coronary artery could not supply adequate blood to [Ulysses'] heart. The Commission affirmed the denial.

The Supreme Court affirmed the denial, but remanded the case on a technical basis to the Commission. "The Commission's Award is affirmed insofar as it finds that Ulysses sustained an accident, as modified by this Opinion to refer to Ulysses' sudden cardiac event. The Commission's Award is reversed in all other respects. This matter is remanded for the limited purpose of requiring the Commission to determine whether Patricia sustained her burden to establish that Ulysses' death did not come from a hazard or risk unrelated to employment pursuant to section 287.020.3(2)(b)."

## Taking into Account Medicare

On a permanent total case I recently resolved with an excess carrier for one of my clients, I learned that they have used a vendor **Amestros Financial** to coordinate their Medicare set-asides and conditional liens. In a creative approach, Amestros provides the projection of future medical needs, both Medicare covered and otherwise, but they also professionally administer the fund and do so without necessarily obtaining the approval of CMS. The excess carrier has done this for many years relying on the projections and the professional administration. They get annuities to fund the projections as well.

At first I was skeptical of this approach but to be recalled is CMS itself does not stand by its own approval of a Medicare set-aside proposal suggesting that the delay in getting approval is not necessary. I like the professional administration as it affords true protection that the funds will be used as contemplated and not for a new boat. Amestros is able to negotiate discounts from the providers realizing a savings there as well. Because of the annuity funding and the retained reversionary interest, it seems to be a winning approach for everyone involved.

You can check out their **CareGuard** program and the Amestros family of products at [amestroscards.com](http://amestroscards.com).

### Odds and Ends

- I was a panel speaker for an attorney ethics seminar sponsored by the Bar Association of St. Louis, speaking with Chief ALJ Edwin Kohner in January.
- The **Kids' Chance** workers' compensation seminar is set for **April 20th** in St. Louis. I have arranged for a great program that includes the outgoing Chairman of the Commission; Chief Counsel for the Labor Division of the Attorney General's Office and the newly appointed Director of the Division of Workers' Compensation. I will be speaking on case law with my colleague, attorney Mike Korte.
- I have updated the Kids' Chance Statute book if interested in purchasing a copy. Proceeds go to the scholarship fund. It has all the changes made to the Act delineated since 2005.
- Thank you to **Thomas McGee** and **Creative Risk Solutions** who join the firm as clients along with **Safety National**.
- I was invited back to teach a class at St. Louis University law school on workers' compensation this semester.
- If interested in having me out for some training, case law update or to talk on litigation management, call me at **314-241-2481**.
- I failed to recognize attorney **Tim Maurer's** contribution and successes on page one. He has been a great associate and I am not just saying that because he is skilled at fencing and the broad sword. Ok, that is partly the reason.