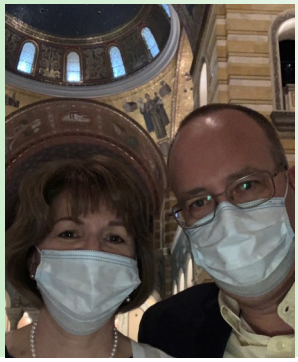

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MO Comp News

- Wife and I **June 2020**

Johme, Miller and Schoen

The Supreme Court of Missouri added to its' precedent on defining the "no greater hazard" defense contained in the definition of "arising out of and in course of" outlined in 287.020. First, we had *Miller v MHTC* in 2009. Miller's knee popped when walking briskly on even ground at work. His claim was denied:

"An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved—here, walking—is one to which the worker would have been exposed equally in normal non-employment life. "

Next we had *Johme v St John's Mercy* in 2012. Johme fell out of her sandal while making coffee at work. The Supreme Court denied that Johme sustained a compensable accident:

"At the time of Johme's fall, she was wearing sandals with a thick heel and a flat bottom, with a one-inch thick sole. Johme was alone in the kitchen during the fall. There were no irregularities or hazards on the kitchen's floor. The floor was not wet, and there was not any trash on the floor.."

The Missouri Supreme Court surprised most with an opinion rendered a few weeks ago in *Schoen v Mid-Missouri Health Care Center.* Schoen was accidently tripped by the authorized doctor in his waiting room and landed on her shoulder. She claimed benefits related to this event as it "arose" out of treatment for her occupational respiratory claim. She argued it "flowed" from the original case and claim. Historically, her argument had merit as there had been a number of prior cases finding accidents such as these compensable. In *Bear v Anson Implement* the Western District had stated:

"In the case before us, Mr. Bear's work did not continue at his destination, and he was off of the employer's time clock. A subsequent medical appointment for treatment of a prior work-related injury may fall within the scope and course of employment, but that is not the factual case presented here. In this case, the commission did not err in determining that injuries received while travelling home from a medical appointment are not compensable."

Left unanswered is whether an authorized doctor's medical malpractice is compensable? Why would that form of negligence be compensable, but the doctor negligently tripping the claimant not be compensable?

On behalf of my employers and carriers, I will take the win. The boldfaced language seems to suggest tripping at work might not be a risk peculiar to employment:

"Employee's assertion of simple but-for causation is not sufficient to demonstrate a causal connection with her work. For her injury to arise out of and in the course of her employment, Employee must demonstrate the accident is a prevailing factor of the injury *and* is not a risk that the claimant would have been exposed outside of and unrelated to the employment. Section 287.020.3(2)(a)-(b). **Employee is unable to demonstrate the risk of her accidental tripping was a risk she would not have been exposed to outside of her employment as required by section 287.020.3(2)(b)."**

In another recent case from the court of appeals, *Marks v Department of Corrections*, the claimant twisted his knee when descending some stairs at work. His initial statement failed to identify any "risk" related to his employment: ie nothing on the stairs; he was not carrying anything; he was not in a hurry. The claim was denied by ALJ and Commission when at trial claimant came up with a new story that he was distracted talking to a co-worker when he twisted his knee. The court affirmed the denial: **"[Claimant did not face] an increased risk of injury descending stairs while at work."** Initial investigations are more important than ever!

Case of Note

Vincent Hegger v Valley Farm Dairy (MO SCT 2/2020)

I am very pleased to report that we were successful in defending this mesothelioma claim. At issue was whether a carrier who insured a defunct or out of business Employer, where a claimant was last exposed to asbestos, had the liability for the mesothelioma "bonus" provided for in claims filed for that benefits after January 2014 when the statute was modified to provide for the same.

The Supreme Court ruled that Amerisure did not have liability as the Employer had not and could not have "elected" to accept the provision and payment of the bonus. The Employer ceased to exist in 1998 and the provision and election started in 2014. The statute had provided that an employer may "elect to accept or reject" the bonus. If they rejected, they would be seen to have waived their protection from civil liability.

The election is only for mesothelioma and not for the other "toxic" diseases outlined in the statute that provide for a lesser bonus amount. Presumably Amerisure would have had the liability for the "traditional" benefits although they were waived as a negotiated issue before trial.

Of some concern is the language contained in the decision that stated as follows: "This Court holds the plain language of section 287.200.4(3)(a) operates such that employers that do not make the requisite affirmative election to accept liability for the enhanced benefit **are deemed to reject such liability under 287.200.4(3)(b) and thereby are exposed to civil liability** outside the context of the workers' compensation statutes."

Does the General Commercial carrier for the defunct Valley Farm who insured them in 1990 when the claimant last worked there, now face civil liability for mesothelioma? How can this 2014 law erase a prior right and exclusive jurisdiction defense? I understand the argument that exclusive jurisdiction protection was not preserved for occupational diseases after 2005 due to simple legislative oversight at that time, but Valley Farm ceased to exist in 1998.

I tend to doubt these civil suits will be pursued unless a successor in interest can be found to the Employer who would have that potential liability. Even then, the Missouri Constitution forbids retrospective application of laws, although with their language in their decision quoted above, they are begging for that civil case to be filed.

Issues remain in regards to whether subrogation applies to traditional benefits still as the new law certainly suggests subrogation no longer applies at least to the "bonus" payable. Additionally, there remains arguments about the compensation rate to be utilized for even traditional benefits in these case where the earning may have been from 20 years ago. We will get these answers from decisions and opinion moving forward but as I pointed out, sometimes the court answers one question and then raises a new one itself.

Is Covid-19 Compensable?

This is a common question I have received the past few weeks. For first responders and likely for hospital workers, doctors, nurses and those essential workers with greater exposure to the public, my answer has been yes.

For first responders, the additional question is whether the Governor's emergency order requires TTD to be paid for any ordered period of quarantine even if testing is not performed or testing is negative for the virus. I have two such claims that were filed and neither claimant ended up testing positive for the virus but were nevertheless quarantined at home for fourteen days. As neither developed any symptoms, they were allowed to return to work. Despite being paid their regular salary without having to use their PTO, their Attorney is seeking TTD.

The Commission promulgated **8 CSR 50-5.005 Presumption of Occupational Disease for First Responders** under the State of Emergency order of Governor Parsons:

(1) A First Responder, defined as a law enforcement officer, firefighter or an emergency medical technician (EMT), as such occupations are defined in Section 287.243, who has contracted or is quarantined for COVID-19, is presumed to have an occupational disease arising out of and in the course of their employment. **Such presumption shall include situations where the First Responder is quarantined** at the direction of the employer due to suspected COVID-19 exposure…

(3) A First Responder is not entitled to the presumption in section (1) if a subsequent medical determination establishes by clear and convincing evidence that the First Responder did not actually have COVID-19, or contracted or was quarantined for COVID-19 resulting from exposure that was not related to the First Responder's employment.

Now, I am all for supporting our essential workers and the first responders and I personally have two nephews doing this work, but the idea that the intent of the order is to allow a windfall to any first responder asked to quarantine is not an easy interpretation to accept. As we can show they were unlikely to have contracted Covid from the exposure at issue, we will defend their pursuit of this TTD windfall.

Odds and Ends

- In addition to the *Hegger* case we won at the Missouri Supreme Court, we are defending a couple others at the Commission and Court of Appeals– two perm totals we won but got appealed and a "last exposure" case we won.
- The **Kids' Chance CLE** that was to take place in June has been postponed until September due to the virus. We are looking for a new venue as SLU Law School is not an option this year.
- Grandson number 3 is in route for delivery in June to my son and daughter-in-law in Phoenix. There is a good chance you will see a photo of **Joseph Maximillian Archer** in the next newsletter.