



MO Comp News

- Joseph Archer

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Mom was Correct: Do not inhale your food.

Gary Boothe worked as a service technician for DISH Network Inc. for 12 years. One morning in July 2017, Boothe checked in at 7:15 a.m. from his home. His first appointment was approximately 30 minutes away in Plato. After loading the company van, he stopped at a convenience store and purchased a breakfast sandwich, then proceeded to the job in Plato. While driving, he choked on the breakfast sandwich, blacked out, ran off the road and struck a concrete pillar, suffering chest contusions in the accident. Boothe filed a workers' compensation claim; following a hearing, an administrative law judge awarded him benefits. DISH appealed to the labor and industrial relations commission, which concluded Boothe's injuries were not compensable because the accident did not arise out of or in the course of his employment.

The Missouri Supreme Court affirmed the denial of benefits. "Boothe failed to establish his injuries arose out of and in the course of his employment. To be eligible for workers' compensation benefits, a claimant must establish the risk was related to the employment and the claimant would not have been equally exposed outside of and unrelated to the employment in normal nonemployment life. The injury's risk source is key. Boothe's injury's risk source was eating while driving, which created a risk of choking and led to the accident resulting in injury."

Eating while driving was not related to Boothe's employment, as DISH did not require him to eat breakfast during the workday and, as he acknowledged, he could have had breakfast beforehand despite a tight schedule. Furthermore, although Boothe alleged he ate at home when not working, he otherwise failed to establish he was not equally exposed to risk of injury from eating while driving in nonemployment life. Accordingly, his injury was not compensable.

In an excellent amicus brief prepared and filed by the Attorney General's office, the point was made that:

"... the plain language of § 287.020.3(2)(b), the risk source provision, reveals that the statute does not merely require an employee to make an affirmative showing of a causal connection to work; rather, the provision is phrased in an exclusionary manner. Crucially, an employee must show that the injury "does not" come from a hazard or risk unrelated to employment. This provision is intended to limit the range of compensable injuries, and it clearly contemplates the possibility of more than one risk source of an injury, one or more of which may be unrelated to employment."

This opinion is similar to the Missouri Supreme Court's opinion recently provided in the 2020 case of *Schoen v Mid Missouri Health Center*: "Employee's risk of being tripped accidentally (by a dog in the waiting room) is a risk she equally is exposed to outside of her employment. Any of Employee's injuries stemming from the accidental tripping did not occur because of a condition of her employment."

The logic used in both of these cases, if taken to an extreme, would not find many true accidents that occur at work, compensable accidents under this restrictive analysis of "risk source". With these two cases, among a few other opinion that similarly denied benefits, realize many more cases have a defense that the accident did not arise out of and in the course of employment when you analyze why the accident happened and the true "risk source" that caused the accident.

Saving Expense on a File

Here are some quick and easy ways to save some expense on the defense of a Missouri workers' compensation file:

- ⇒ If it has become a litigated file before the Claimant is at MMI and released from care, wait on ordering a rating. It is not required if the person is represented and most doctors charge extra for them to throw a number on a report.
- ⇒ If Claimant is on medicare or eligible for medicare, avoid the expense of submitting the case to CMS for a waiver or for funding of an MSA (medicare set aside account). Instead, have a friendly suit or a "dummy trial" arranged; stipulating to the indemnity (PPD) to be approved and have the ALJ address past and future medical treatment. This is cheaper in expense and exposure and also gets rid of section 287.140.8 and ability for the Claimant to "reopen" a **settled** claim for a prosthetic or life threatening treatment. It is an award, not a settlement.
- ⇒ I advise clients to offer low end of reasonable and not just their rating to a pro-se Claimant. You might get that 5% PPD rating approved for that operated shoulder but if he/she gets an attorney you will pay 4x that amount plus more expense.. Better odds and policy is to offer 10%.
- ⇒ Try not to hire that obese 55 year old employee with a bad back who is an accident waiting to happen. Second Injury Fund liability is going to be more limited moving forward as everyone awaits the *Klecka* and *Lexow* opinions from the Missouri Supreme Court. That permanent total we "dumped" onto the Second Injury Fund is going to be harder to dump now.
- ⇒ Have a light duty program.
- ⇒ Have safety policies and ongoing training or meetings that can be used as evidence of "reasonable" record of training to substantiate a safety penalty of 25-50% of all forms of compensation. They might also prevent an accident from occurring.
- ⇒ Try to offer 80% of the trial value of a PPD case before the other side gets a rating. Offering 50% is easy for the Attorney to convince his/her client to reject. Offering 80% makes an Attorney explain how expensive a rating is to get and the delay in the resolution of their file.
- ⇒ Order surveillance sparingly and only when you can contrast any footage with an IME or deposition.

ZOOM Training

I have conducted a few zoom seminars covering updated work comp topics for my clients including the "risk source" defense and Second Injury Fund liability and of course the compensability of covid claims.

Although I prefer to be in person as I learn more from participants who can interact more with me and each other, the zoom is efficient for sure.

If you are interested in having me zoom a seminar, let me know by calling me or emailing me at chris@askarcher.com.

I have provided the summaries for all Attorneys in the state of Missouri of workers' compensation case law for more than 18 years for the Missouri Bar. I have served as a guest lecturer for St Louis University Law School. I have been consulting or advising Attorney for business lobbying groups for the Missouri Legislature. I have 30 years of practice experience. Let me help you and your organization. Just ask archer.

Odds and Ends

- Archer and Lassa's new address is **3668 S. Geyer Road, suite 365, St. Louis, Mo 63127.**
- As it certainly is not anticipated that Attorneys will be actually appearing in person at the DWC offices any time soon, does it make sense now to refer any or all of your Missouri work comp defense cases to our firm? I think so.
- Missouri has a new **Labor and Industrial Commissioner**. Attorney **Rodney Campbell** started his tenure on April 21, 2022. He will serve out a remaining one year term although he hopes to be retained for another 6 years after that. **Commissioner Campbell** worked for this firm for a few years back in 2015-2016. I hope he remembers his time with our firm fondly.
- The virtual **Kids' Chance of Missouri CLE** is scheduled for June 3rd with 9 hours of Missouri workers' compensation material including ethics. Hope to raise \$30,000 for the scholarship fund. More info is available at mokidschance.org
- The **Missouri Division of Workers' Compensation annual seminar** was live this year at Margaritaville at Lake of the Ozarks held on May 5th and 6th, I spoke on "arising out of and in the course of." If you want me to provide you the material I discussed or other topical handouts, contact me.