Written Notice of Injury Defense and Exceptions

By: Chris Archer, 2023

First the statute:

287.420. No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the **diagnosis of the condition** unless the employee can prove the employer was not prejudiced by failure to receive the notice.

Note: A problem exists in applying the "new" notice defense for occupational diseases and repetitive trauma. An unchanged statute section dealing with the posters that are required to by posted by Employers provides for the following:

287.127 Notice, employer to post, contents--division to provide notice, when --penalty.

1. Beginning January 1, 1993, all employers shall post a notice at their place of employment, in a sufficient number of places on the premises to assure that such notice will reasonably be seen by all employees. An employer for whom services are performed by individuals who may not reasonably be expected to see a posted notice shall notify each such employee in writing of the contents of such notice. The notice shall include:

(1) That the employer is operating under and subject to the provisions of the Missouri workers' compensation law;

(2) That employees must report all injuries immediately to the employer by advising the employer personally, the employer's designated individual or the employee's immediate boss, supervisor or foreman and that the employee may lose the right to receive compensation if the injury or illness is not reported within thirty days **or in the case of occupational illness or disease, within thirty days of the time he or she is reasonably aware of work relatedness of the injury or illness**; employees who fail to notify their employer within thirty days may jeopardize their ability to receive compensation, and any other benefits under this chapter;

Notes and Comments:

- Eliminated were the exceptions that swallowed the notice defense. Actual notice or knowledge of the employee's injury is still sufficient notice, excusing the written notice requirement. The same has been found to be conclusive evidence of the Employer having not been prejudiced.

- The Courts had previously found prior to 2005 that there was no "notice" defense if the injury is from an occupational disease (repetitive trauma). Note the addition of language now explicitly providing for one: thirty days after diagnosis of the condition. In *Allcorn* court of appeals case (below) the court stated that the thirty days does not begin to run until medical advised of the diagnosis and that it was related to an exposure at work. Even if this is provided, the Claimant can show that the Employer was not prejudiced by the late notice provided.

- The obvious inconsistency of the 2005 section dealing with occupational diseases with the poster language is of concern.

Case Decisions:

Allen Allcorn v Tap Enterprises and Travelers Commercial Casualty Co. MO APP SD 29311 May 2009

Claimant performed heavy repetitive work for Employer and was diagnosed by MRI as having herniated disc in 2004. Claimant did not provide any notice to his Employer of his condition being related to his work until he filed formal claim in 2006 alleging an occupational disease/ repetitive trauma injury to his low back providing for date of injury as January 31, 2004. The Claimant's employment did not begin until February 1, 2004.

The claimant was first medically advised that he suffered from an occupational disease when sent to a doctor to address possible causation in September 2006. It is this date the court decided that began the running of the claimant's thirty day window to provide written notice to his Employer. The court found that "after diagnosis of the condition" as provided in section 287.420 RsMo 2005 meant when medically advised of a repetitive trauma injury being the cause of the injury.

The court found that written notice of the injury was timely, as it was actually before the diagnosis of a work related occupational injury, but found that the written notice providing for accurate "time of injury" was not provided as the claimant did not begin to work until February 1, not January 31, 2004. The court remanded for additional evidence of prejudice or lack of prejudice on the part of the Employer.

The Court's logic:

"[n]o proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice . . . has been given to the employer no later than thirty days after the diagnosis of the condition "

"Strictly construing this sentence, we find that "the condition" is referring to the previously stated "occupational disease or repetitive trauma." Therefore, the question then becomes, at what point is an occupational disease or repetitive trauma diagnosed? Looking to the plain, obvious, and natural import of the language, it follows that a person cannot be diagnosed with an

"occupational disease or repetitive trauma" until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure."

This decision paves the way for more repetitive trauma cases being brought as it in effect nullifies any notice defense for this theory of liability that it was the nature of the claimant's work and exposure in general that caused the injury.

Case Scenario: Claimant was sprinkler fitter who developed CTS. He received treatment and surgery and did not report condition as related to his work to his Employer. He filed claim for comp which was first notice to ER of allegation of work related injury. Clmt submitted medical bills for unauthorized care for reimbursement. Er denied claim on causation and on late notice.

McCutchen- 2010 Commission- Er has to pay for unauthorized treatment- see also Meyers v Wildcat Materials from 2008 Ct of App where Er had to pay for unauthorized treatment (applying pre-2005 statute)

Ritchie v. Silgan Containers Manufacturing Corp., 625 S.W.3d 787 (Mo. Ct. App. W. D. 2021)

An award of the labor and industrial relations commission was affirmed. A treating doctor's records noting the possibility of the contribution of an employee's work activities to the injury he diagnosed was not sufficient notice to the employee of the casual connection of the injury to the work activities to require the employee to report the injury to the employee's employer pursuant to The Workers' Compensation Law.

Claimant was fork lift driver operating the forklift 9 hours a day. She developed left elbow pain. While attending TX for a non work related wrist FX, her MD in October 2015 mentioned that her work "could be contributing to Claimant's pain." Claimant went thru two left elbow SX and then gave notice to her Employer. The Claimant went on to have another Sx and CRPS and found totally disabled. The ALJ and Commission affirmed. One defense was notice, but ALJ and Commission stated that the prior stmts in the medical records were not sufficient to start the clock for the CLmt to report.

Interesting that they submitted 50k in bills but also conceded only 25k were bills incurred after notice was provided. The ALJ and Commission affirmed only the 25k amount. Contesting the payment of the original bills, Employer had HR director testify in general "that their Group Health carrier would work out reimbursement" This was insufficient testimony to satisfy Employer's burden after *Martin v Mid America* is satisfied.

Sell v. Ozarks Med. Ctr., 333 S.W.3d 498 (Mo. App., 2011)

"Here, the burden of proving Employer's lack of prejudice in not receiving written notice rested on the Claimant. Once Claimant presented substantial evidence that Employer had actual notice of the relevant injury, however, the burden of showing prejudice then shifted to Employer." Doerr, 258 S.W.3d at 528.

Claimant testified that, shortly after hurting himself, he called and told a maintenance worker—to whom he had been told to report in the absence of his actual supervisor—about the injury; he further testified that, after receiving a doctor's note excusing him from work for the rest of that week, he delivered the note to his supervisor the day after his injury via his wife. Claimant's wife testified that she delivered that doctor's note the day after the accident to Hutchings and that she informed Hutchings at that time that the injury had occurred on the job. Such testimony constitutes substantial evidence supporting that Employer had actual notice of Claimant's workplace injury.

In response, Employer presented the testimony of two individuals: maintenance worker Stephen Tackitt, and Cal Hutchings, Claimant's supervisor. Tackitt testified that although he recalled speaking with Claimant on the day of the accident, he did not recall Claimant mentioning his being in pain or hurting himself at work. Hutchings testified that he received a doctor's note from Claimant's wife but that he thought he received it much later than May 30, 2006; he denied that Claimant's wife told him that the injury was work related. Hutchings also testified that he heard about Claimant's injury—and that the injury had taken place at work—from another groundskeeper but that he did not ask Claimant about the origin of the injury.

Employer's proffered testimony no doubt contests whether Employer had actual notice of Claimant's injury. To that end, the Commission was forced to make a credibility determination, which it did explicitly:

We resolve the conflicting testimony of the parties as follows. We find the testimony of Claimant to be more credible than that of Mr. Tackitt. We find that Claimant notified the maintenance worker on duty in the shop on May 20, 2006, that he had been injured while working that day. We find the testimony of Claimant's wife to be more credible than that of Mr. Hutchings. We find that Claimant's wife informed Mr. Hutchings on May 30, 2006, that Claimant had been hurt at work, and that Mr. Hutchings should contact Claimant if he had questions. This Court defers to the Commission's credibility determinations. Pavia, 118 S.W.3d at 234. While Employer spends the vast majority of its brief attempting to challenge the credibility of Claimant and his wife, it ultimately acknowledges that we must defer to the Commission on such findings.

Once we determine that substantial evidence supports the finding that Employer had actual notice of Claimant's work-related injury on the day after the accident at the latest, the issue then becomes whether Employer met its burden of showing that it suffered prejudice as a result of Claimant's failure to give written notice of that injury as required by section 287.420. See Doerr, 258 S.W.3d at 528. The Commission found that "there is no testimony, nor can we find any other form of evidence in the record, sufficient to demonstrate that Employer was hampered in its ability to investigate the incident, or that Employer was denied an opportunity to minimize Claimant's injuries." Absent any such evidence, which we also could not find from our review of the record, the Commission did not err in finding that Employer failed to meet its burden. Thus,

its finding that Employer was not prejudiced by failing to receive written notice is supported by substantial evidence in the record as a whole and is not against the weight of the evidence.

Prior Case Decisions: Pre SB 1 and 130:

Gander v. Shelby County, 933 S.W.2d 892 (Mo. App. 1996)

"[i]t is not enough, however, that the employer, through its representatives be aware that the claimant "feels sick," or has a headache, or fell down, or walks with a limp, or has a pain in his back, or shoulder, or is in the hospital, or has a blister, or swollen thumb, or has suffered a heart attack. There must in addition be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim."

Seyler v. Spirtas

Employee allegedly suffered an injury December 11, 1995 reporting pain in legs and head as well as in the neck as a result of being struck when the high lift he was operating stopped suddenly. The employee did not seek treatment until 35 days after this injury on January 16, 1996. The Report of Injury was filed 1/17/96. The employer denied the case after investigation, and the claimant filed a workers' compensation claim. Determining that the employer did not have actual notice of the accident until January 16, 1996, the court held it was the employee's responsibility to demonstrate that the employer was not prejudiced by the delay in receiving notice. This prejudice, according to the court, was not just in the investigation of the claim. The prejudice can also manifest as a lost opportunity to provide treatment. While Mr. Seyler could demonstrate that the employer was not hindered in its investigation, he provided no evidence that the employer was not prejudiced by the loss of 35 days in attempting to treat the employee's injury. The evidence suggested that Mr. Seyler's injury simply got worse over the month he waited to see the doctor. The Judge held that the employer was not provided an opportunity to minimize Mr. Seyler's injury. Therefore, waiting 35 days to seek medical attention deprived the employer of their statutory right to treat the employee in a timely fashion. The employee's claim was denied.

Farmer-Cummings v Future Foam Inc.

Claimant appealed an award of 80% permanent partial disability and a denial of past medical bills she incurred for a lung exposure case and injury she sustained while working for Personnel Pool at Future Foam Inc. The employer appealed based upon a lack of written notice of the condition having been given to Personnel Pool.

The Western District clearly delineated and quoted the prior case law finding that in occupational disease types of cases, there is no written notice required by Section 287.140. (See also definitive statement by the Missouri Supreme Court in **Oswald v National Fabco Manufacturing**, June 2002 that sated that there is no notice defense in occupational disease claims)

The Court of Appeals went on to award past medical benefits that had been denied. The Court noted that written notice to an employer of a work related accident is not a prerequisite for the recovery of the cost of medical services where the employer suffers no prejudice. **"In examining for prejudice, the issue to be determine is whether Ms. Cummings' resulting**

disability would have been less if Personnel Pool had been afforded the opportunity to promptly furnish her with medical aid." The court went on to affirm the Commission's findings that there was no prejudice to the employer.

The Court of Appeals also affirmed that a settlement for a medical malpractice claim pertaining to treatment the claimant received would be subject to a subrogation interest and/or offset and remanded the case for that calculation pursuant to Section 287.150.

Soos v Mallinckrodt,

The claimant worked for the employer for close to twenty-five years. In October of 1995 the claimant was repairing a piece of machinery and felt a shooting sensation into his right leg. When he finished that day, he felt his back stiffen and start to ache. The claimant failed to report his work related injury of mid-October until two and one half months later toward the end of December of 1995. Prior to that time the claimant had sought medical treatment from a number of different physicians and had undergone an MRI, which revealed a large disc herniation. A neurosurgeon recommended surgical intervention.

The Court of Appeals affirmed the Industrial Commission denying benefits based upon the notice defense contained in 287.420. The only evidence offered by the claimant on the issue of prejudice was the fact the supervisor did not conduct any investigation into the accident when the same was reported at the end of December. The Court of Appeals rejected this argument as it had in a previous decision, *Willis v. Jewish Hospital*, 854 S.W.2d 82 (Mo. banc 1993). The Court went on to state that the claimant did not produce any evidence that the supervisor was able to conduct a thorough and accurate investigation of all witnesses and records two months after the injury.

Messersmith v University of Missouri-Columbia,

The claimant is a licensed nurse who was working for a University of Missouri hospital and lifted a resident and felt immediate pain down her left arm. She continued to work and did not report the accident as being in any way related to work until some forty-five days later. The claimant denied a work related cause of her symptoms to the initial treating physicians and had denied at first to several people who worked for the employer that she had sustained any type of injury. On cross-examination the claimant admitted to having sustained two prior work related injuries and reporting those injuries the same as they occurred.

The Administrative Law Judge as well as the Commission allowed benefits in the case over the objection based upon the notice defense. They found that the claimant had good cause, which would excuse the written notice requirement of Section 287.420. They stated that the claimant credibly testified that she was unaware of the connection between the incident at work and her subsequent neck and shoulder pain until she was diagnosed with a herniated disc in her neck several weeks later.

The Missouri Supreme Court overturned the court of appeals that had denied the case based upon the notice defense. The Supreme court stated: "The Commission found that Messersmith's delay was reasonable given the initial dissipation of her symptoms and the diagnoses of her doctors. In the accident, the patient fell on Messersmith's neck and right shoulder - the right side of her body

- but she felt initial pain in her left arm, which dissipated and later recurred. The Commission found: “It is easy to understand how a reasonable lay person would not make a connection between a left arm injury and a pain following on the lay person's right shoulder and neck.”

The Supreme Court stated: “Messersmith's injury is the type of latent injury that this Court has held to be a good cause for an innocent delay in filing an injury report with an employer. *See State ex rel. Buttiger*, 51 S.W.2d at 1009. The evidence in the record may not be overwhelming or uncontroverted, but it is sufficient to support the Commission's findings of fact and to warrant the award."