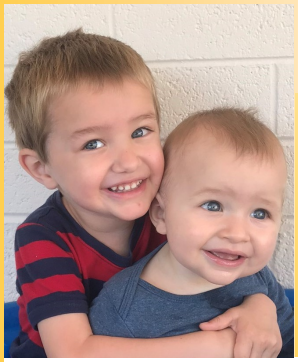

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MO Comp News

- Peter and Dominic **October, 2019**

Where's the Deference?

In *Customer Engineering Services v Mark Odom*, the southern district court of appeals recently outlined the extreme deference to be provided factual findings of the industrial commission, chastising the employer in that case for appealing the award of permanent total disability in light of their deferential standard.

"A successful not-supported-by-substantial-evidence challenge involves three analytical steps: 1. Identify a factual proposition needed to sustain the result; 2. Identify all favorable evidence in the record supporting that proposition; and 3. Demonstrate, in light of the whole record, that the step 2 evidence and its reasonable inferences are so non-probative that no reasonable mind could believe the proposition." Id.

They affirmed the permanent total award. They could have just as easily have stated it this way: "We think work comp is boring and hate looking at theses cases, so please stop appealing them to us." The court in this case did reverse the award of roughly two thousand dollars in past medical expenses based upon the undisputed fact that the Employer had no awareness of the need for additional care at the time the treatment related to the expenses was tendered. A nice case to keep in mind if you have a similar situation.

It is interesting to contrast this decision and opinion with the eastern district decision in *Annayeva v SAB* decided in late July. In this case, the ALJ denied the claim for compensation based upon the credibility of the claimant who was claiming a "somatoform" disorder or conversion disorder from soft tissue injuries she suffered in a slip and fall accident that occurred as she was entering her school to teach one morning in 2013. She developed extreme symptoms and complaints from her knee contusions and neck strain she claimed made her totally disabled. She obtained a psychiatric opinion that the accident was the prevailing factor in her conversion disorder. The ALJ denied the claim on medical causation basing the denial on his credibility determination of the claimant and on her evidence presented. The commission however denied the claim on appeal based upon the claimant failing to credibly identify how or why she fell.

The court of appeals reversed the denial of benefits and remanded the case to the commission to address medical causation and benefits owed, finding that the commission decision was not supported by substantial and competent evidence. The only evidence on how or why she fell however was the claimant's testimony that was not found to be credible by the ALJ? How can the court of appeals reverse the commission and ALJ especially after it had chastised the defense in the *Odum* case above citing the extreme deference to be afforded the commission? Double standard?

The eastern district court of appeals has become the most liberal. There have been a string of recent cases from this district that have been outliers of any reasonable jurisprudence:

- In *Mems v Labruyere*, the eastern district extended liability to a co-worker for simple negligence and poor judgment. The Missouri Supreme Court has accepted transfer of this case.
- In *Kappel v Prater* involving a car accident, the Judge allowed into evidence some photos of minimal car damage. The eastern district ruled that this was prejudicial and ordered a new trial. The Missouri Supreme Court accepted transfer of this one also.
- In a case we are defending, *Hegger v Valley Farm Dairy*, the eastern district awarded the "mesothelioma enhanced benefit" to be payable by the last insurance carrier to have insured a defunct Employer in 1998 despite the finding being inconsistent with *Accident Fund v Casey* decided two years ago by the Missouri Supreme Court. The Supreme Court accepted transfer of this case too.

Annayeva, *Kappel* and *Hegger* all involved the same panel of three judges in the eastern district. We will see if the Supreme Court accepts *Annayeva* on transfer as well. I would not bet against them doing so.

Permanent Totals after Cosby

In 2014, Douglas Cosby injured his left knee at work. He subsequently filed a workers' compensation claim against his employer which he settled and a claim against the second injury fund alleging he was totally or, alternatively, partially disabled as a result of his knee injury combined with his preexisting disabilities. Following an evidentiary hearing, an administrative law judge denied benefits from the fund pursuant to section 287.220.3.1 The labor and industrial relations commission affirmed the ALJ's award.

On appeal to the Missouri Supreme court, the claimant asserted the commission erroneously interpreted section 287.220 to find he was not entitled to PPD benefits from the fund because his knee injury occurred after January 1, 2014. Alternatively, he contends interpreting section 287.220.3(2) to not provide PPD benefits from the fund violates the Missouri open courts provision as well as his due process and equal protection rights.

The statute had changed to prohibit claims against the SIF for permanent partial disability for accidents or injuries after 1-1-2014. In an earlier case however, *Gattenby*, the court had stated that for claims against the SIF for permanent total disability, the old more liberal law applied that existed before 1-1-14 if any of the prior disabilities existed before 1-1-14 regardless of when the primary injury occurred.

Unfortunately for employers in Missouri, not only did the Missouri Supreme court disallow the claim for PPD from the SIF in this case, they also ruled that *Gattenby* should no longer be followed.

We have not had one court of appeals opinion yet interpreting the new language contained in the statute dealing with the scope of SIF liability for permanent total disability after 1-1-14 because of *Gattenby,* which is now moot. The key provision that would most likely still find the SIF liable for permanent total disability states as follows:

"…but such preexisting disability **directly and significantly aggravates or accelerates** the subsequent work-related injury and shall not include unrelated preexisting injuries or conditions that do not aggravate or accelerate the subsequent work-related injury ."

With the SIF caught up with their benefit payments, and with the extra surcharge money still coming in, you would hope that the language above would be interpreted broadly to help employers avoid the big dollar cases impacting their premiums to a large extent. In a case from the prior commission a year or two ago, the employer got hit for the permanent total benefits in a fact pattern that previously would have been the SIF's liability under their interpretation of the new statutory language above. We certainly have new commission however.

The more interesting argument not made in *Cosby* would have been for the claimant to argue that the employer owes the additional disability that had been previously been paid by the SIF. The claimant had thankfully settled with the employer however. We will see this argument.

Top 5 Mistakes in Defending a Missouri Claim

Number 5: Too often I have seen adjusters and defense attorneys rely on incomplete medical records. Often, claimant attorneys only request records that exist after the date of accident. The business record affidavit in Missouri does not state that the records are complete– just that the records attached are true and accurate. The initial history of how the injury occurred is often a key fact or admission. Be forewarned.

Number 4: Requiring the other side to get a rating is a strategic mistake. I often try to settle a litigated claim before the other side gets a rating and before I have to pay to get one also. Ratings are often ignored. If you offer low end of reasonable before they spend that money, we save in exposure and expense.

Number 3: Many attorneys organize their files by certified medical records in separate folders. I organize all the medical in date order separating the records solely to distinguish treatment before and after the injury or accident. It is so much easier to pick up a file and understand the timeline when organized in this way. It is a rule in my office, up there with a ban on small paperclips which I hate.

Number 2: Many firms force an expert deposition which is often a mistake. If their report is defective, you can argue against it at the time of trial and in your proposed decision. If you conduct cross-examination, the other side gets to remedy any deficiency on redirect examination. Waste of time and money and counterproductive. On the other hand, taking a treating MD's deposition or a key witness depo might be best approach early in the case. As memories fade and witnesses disappear, often jumping early in the case to take witness depositions proves beneficial. It has on a few of my big exposure cases in the past.

Number 1: Not using a firm that works to close a file efficiently and with the least amount of time and expense along with resolving for the least amount of benefits. Use a firm that identifies exposure early including exposure for litigation costs and works to improve your bottom-line.

Odds and Ends

- I was asked to speak at the **16th Annual Greater St. Louis Safety and Health Conference** on October 17th. Call for a brochure.
- The new max rate for TTD / PPD effective 7-1-19 is **$981.65 / $514.20.** The new mileage reimbursement rate for travel after 7-1-19 is **$.55/ mile.**
- I was approached to give my wish list for workers' compensation reform for the upcoming legislative session. There is little hope for any litigation reform this year however, but reason to hope in the few years that follow. If you want any input, send me an email at **chris@askarcher.com**.