

2024 Missouri Comp – Advanced Litigation Strategies and Management

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- **Accident**
- **Occupational Disease**
- **Medical Causation**
- **Medical Bills**
- **Intoxication**
- **Permanent Total Disability and SIF liability**

Risk peculiar to the Employment

- **Despite the collapse of “arising out of and in the course of” to be one test as to “risk”, more cases are being denied.**
- **Climbing stair and knee pops; tripping over dog in waiting room; coughing spell eating breakfast sandwich in co car;**
- **Investigating “risk” and nailing down story.**

Know your Best Defense

Example- Claimant trips on step going outside to smoke cigarette on unpaid break.

Defend- not “arising out of”? Risk of stumbling step is everywhere?

Defend - not “in course of”? Not doing work at the time of the accident- no benefit to Employer?

Defend- not “in course of” as a recreational activity? 287.120.7 if no unsafe condition- winner



Know your Best Defense

- 7. Where the employee's participation in a recreational activity or program is the prevailing cause of the injury, benefits or compensation otherwise payable under this chapter for death or disability **shall be forfeited** regardless that the employer may have promoted, sponsored or supported the recreational activity or program, expressly or impliedly, in whole or in part. The forfeiture of benefits or compensation shall not apply when:

- (1) The employee was directly ordered by the employer to participate in such recreational activity or program;
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- (2) The employee was paid wages or travel expenses while participating in such recreational activity or program; or
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- (3) The injury from such recreational activity or program occurs on the employer's premises **due to an unsafe condition** and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition.



Occupational Disease/ Repetitive Trauma- Defenses

- **Last Exposure Rule**
- **Disability defined how you want it to be defined**
- **No “three-month rule” for carriers**
- **Three months of “exposure”**

Occupational Disease/ Repetitive Trauma- Defenses

Medical Causation Tips:

- **Hayes v Hudson Foods -no similar worker has condition**
- **Have claimant in depo confirm job description, analysis or video**
- **Find and define risk factors**
- **Use diagnostic testing to explain**
- **The diagnostic steroid injection**

Medical Causation

- **Armstrong:** The doctor opined that Claimant was not actually injured on *May 12, 2010*, but probably perceived some limitation in his shoulder motion while performing a new task....that the "precipitating event" was the lifting episode on *May 12, 2010*, which may have aggravated the bursitis and created mild tendinitis. Dr. Cooper opined that it was not really possible for this lifting incident to create clinical damage: "[b]ased on the MRI this appears to be chronic and long-term in nature as well as pre-existing. I do not believe his work related injury was the prevailing factor."

Burden of Proof for Medical Treatment

- ❖ “Prevailing factor” in causing resulting medical condition and disability
- ❖ “Cure and relieve” effects of injury
- ❖ “Reasonable probability” for need

Past Medical Bills

- ❖ Unauthorized care- great defense if you otherwise were authorizing
- ❖ “Reasonable and customary” Martin v Mid America- you best have someone to testify. Business Records statute requires records ie bills to be served 7 days prior to trial.
- ❖ Self-funded group- you get credit
- ❖ Medicaid and Medicare liens-

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Missouri settles Medicaid lien suit for \$16M

BY SCOTT LAUCK

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A federal judge has given first-round approval to an estimated \$15.5 million settlement with the Missouri Department of Social Services on claims that it filed liens against Medicaid recipients in violation of federal law.

The settlement, set for final approval in Jefferson City on Sept. 9, also includes \$780,000 in attorneys' fees and administrative costs.

In a lawsuit filed in 2010, plaintiff Ramona Denise Wilhoite filed a class action suit against the department, which runs the state's Medicaid program, MO HealthNet. The class members are Medicaid recipients who, after settling personal

injury claims, had received liens from the state seeking reimbursement for the medical costs that MO HealthNet paid on their behalf.

The lawsuit alleged that the state statute permitting the liens was pre-empted by federal law. In 2006, in *Arkansas Department of Health and Human Services v. Ahlborn*, the U.S. Supreme Court upheld a ruling by the 8th U.S. Circuit Court of Appeals that a state can only seek a lien on the portion of a settlement that represented payment for past medical expenses.

"When we read through the statute and looking at how [Missouri] was handling their liens, we realized they were in violation of the federal anti-lien statute and the 8th Circuit's and the Supreme Court's rulings in *Ahlborn*," said Nathan

Duncan, of Douglas, Haun & Heidemann in Bolivar, an attorney for the plaintiffs.

U.S. District Judge Nanette Laughrey ruled in a summary judgment order last year that the state's lien statute was too broad. Following mediation under Magistrate Judge William Knox, the parties settled the case in June. Laughrey OK'd the settlement on Thursday.

According to court records, the class comprises about 12,000 members who are eligible for reimbursement of a portion of the money they paid to the state. In court filings, the parties said the maximum benefit is "not likely to exceed \$15,514,483," though the actual amount paid out will depend

SEE SETTLEMENT, PAGE 3 ▶

Past Medical Bills

- ❖ Martin v Mid America- they get the charged bills if they submit the bill and the records. They satisfy their burden .
- ❖ Incumbent on Defense to prove what is the Claimant's true exposure for the bills now and what is "fair and reasonable" and "usual and customary" amount for the services rendered.

Past Medical Bills

- ❖ 3. All fees and charges under this chapter shall be **fair and reasonable**...A health care provider shall **not charge** a fee for treatment and care which is governed by the provisions of this chapter greater than the **usual and customary fee** the provider receives for the same treatment or service when the payor for such treatment or service is a **private individual or a private health insurance carrier**.

Medicare

- ❖ Settle with an Addendum?
- ❖ Settle Indemnity with Defense option to investigate and fund an MSA: if so then address whether it has to be CMS approved: professionally administered; annuity funded; retained reversionary interest?
- ❖ EBMSA- Examworks guarantee
- ❖ Stipulated hearing

Intoxication Defense and Penalty

- 287.120 (4) Any positive test result for a **nonprescribed controlled drug** or the metabolites of such drug from an employee shall give rise to a **rebuttable presumption**, which may be rebutted by a preponderance of evidence, that the tested nonprescribed controlled drug was in the employee's system at the time of the accident or injury **and that the injury was sustained in conjunction with the use of the tested nonprescribed controlled drug** if

Intoxication Defense and Penalty

- **Refuse the test-** forfeiture of benefits- Er has to request
- Same day positive- 50% penalty “in conjunction with” *Nolan*
- Positive test and evidence of wackiness, defend as not in course and scope.
- Above .08, they have burden to prove not related to alcohol

Perm Total Exposure and SIF Liability

- Employers are not being “let out” of claims for perm total even where it used to be clear the Second Injury Fund should have the liability.
- The Horror Story of the *Harper* case. Missouri Supreme Court Decision Nov, 2023

Perm Total Exposure and SIF Liability

- (a) a. An employee has a medically documented **preexisting disability equaling a minimum of fifty weeks of permanent partial disability** compensation according to the medical standards that are used in determining such compensation which is:
 -
 - i. A direct result of active military duty in any branch of the United States armed forces; or
 -
 - ii. A direct result of a compensable injury as defined in section 287.020; or
 -
 - iii. Not a compensable injury, 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; or
 -
 - iv. A preexisting permanent partial disability of an extremity, loss of eyesight in one eye, or loss of hearing in one ear, when there is a subsequent compensable work-related injury as set forth in subparagraph b of the opposite extremity, loss of eyesight in the other eye, or loss of hearing in the other ear; and
 -
- b. Such employee thereafter sustains a subsequent compensable work-related injury that, **when combined with the preexisting disability**, as set forth in items i, ii, iii, or iv of subparagraph a of this paragraph, results in a permanent total disability as defined under this chapter; or
-

Perm Total Exposure and SIF Liability

- **Easiest SIF case- back on a back where old back injury was from compensable accident that settled or was awarded 50 weeks.**
- **If prior back is not from compensable injury, need testimony “aggravated and accelerated” the primary.**
- **If prior 50 week disability is to different body part, hard to establish credible expert testimony explaining how a bad knee “aggravates or accelerates” the primary injury if that is an operated back.**

Perm Total Exposure and SIF Liability

- **Pretty compelling statutory interpretation that an Employer will be hit for perm total disability if they are left in the case.**
- **Unanswered as precedent whether you can add prior compensable disabilities to the same body part. *Likely according to IC and SCt footnote***
- **Unanswered whether prior occupational disease claims that resolve for more than 50 weeks can be considered. *Likely and IC agrees can be.***
- **Very clear that experts can only consider qualifying pre-existing to support SIF claim**

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Reconsider Vocational Rehab?

- **287.149. 1. Temporary total disability or temporary partial disability benefits shall be paid throughout the rehabilitative process until the employee reaches maximum medical improvement, unless such benefits are terminated by the employee's return to work or are terminated as otherwise specified in this chapter.**
- **(Editor's note: effective August 28, 2017 by HCS SS SCS 66, 99th General Assembly)**

Vocational Rehab?

- **287.149. 3.** Refusal of the employee to accept rehabilitation services or submit to a vocational rehabilitation assessment as deemed necessary by the employer shall result in a fifty percent reduction in all disability payments to an employee, including temporary partial disability benefits paid pursuant to section 287.180, for each week of the period of refusal.

Take-aways

- **Increased exposure for Perm Totals with more limited SIF liability**
- **Vocational Rehabilitation Services - no TTD**
- **Future Medical- if agreeing in stip to future medical- make sure you preserve right to “authorize” and keep option open to fund MSA: delineating professional administration or not; reversionary interest or not; CMS approval or not. If you did not preserve, have to go to the Commission to settle open medical.**
- **I like stipulated trials- gets rid of 287.140 reopening exposure and takes into account Medicare- two birds with one stone.**
- **Preserve secondary defenses on the medical bills.**
- **Last quickie- do not try a non-contested death case- commutation v settlement.**