

Workers' Compensation

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ARKANSAS WORKERS' COMPENSATION

I. JURISDICTION

A. Act will apply where:

1. The injury occurred in the state of Arkansas.
2. The contract of employment is entered into in Arkansas between an Arkansas resident and an employer who is a resident or who maintains an office in Arkansas exercising general control over the employee, even if the injury occurred in a different state in which both parties contemplated the employment would be performed.
3. Claimant is entitled to a presumption of jurisdiction, but such presumption is rebuttable. Multiple factors are considered for jurisdiction determinations.

II. ACCIDENTS

A. Compensable Injury Ark. Code Ann. § 11-9-102(4)(A)

1. Specific Incident – Claimant must prove each element by a preponderance of the evidence:
 - a. An injury arising out of and in the course of employment;
 - i. “Arising out of” refers to the cause of the accident. An injury arises out of employment if the employee is carrying out the employer’s purpose or advancing the employer’s interests.
 - ii. “In the course of” refers to the time, place and circumstances of the accident. The accident must occur within the time and space boundaries of the employment
 - b. That the injury caused internal or external harm to the body which required medical services or resulted in disability or death;
 - i. An aggravation of a pre-existing condition can be compensable if all of these elements are met for the aggravating incident
 - c. Medical evidence supported by objective findings, as defined in Ark. Code. Ann. 11-9-102(16);
 - d. That the injury was caused by a specific incident identifiable by time and place of occurrence.
2. Gradual Onset/Repetitive Motion: Injuries caused by rapid repetitive motion (carpal tunnel specifically included) or gradual onset injuries to the back or hearing loss require proof of the following elements:
 - a. An injury arising out of and in the course of employment;
 - b. That the injury caused internal or external harm to the body which required medical services or resulted in disability or death;
 - c. The injury was the major cause of the disability or need for treatment;
 - d. Medical evidence supported by objective findings.
3. Mental illness Ark. Code Ann. § 11-9-113

- a. For mental illness to be a compensable injury it must be caused by physical injury to the employee's body, demonstrated by a preponderance of the evidence, and diagnosed by a licensed psychiatrist or psychologist.
 - b. Exception: victims of crimes of violence.
 - c. Maximum compensation is 26 weeks.
- 4. Heart or cardiovascular injury, accident, or disease Ark. Code Ann. § 11-9-114
 - a. Compensable only if an accident is the major cause of the physical harm.
 - b. The employee must show that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work or that an unusual and unpredicted incident occurred which was the major cause of the physical harm and stress must not be considered.
- 5. Hernia Ark. Code Ann. § 11-9-523
 - a. Employee must show that the hernia occurred immediately following and as a result of sudden effort, severe strain, or the application of force directly to the abdominal wall; that there was severe pain in the hernia region that caused the employee to immediately cease work; that the employee gave the employer notice within 48 hours afterward and that medical attention was required within 72 hours.

B. Occupational Disease Ark. Code Ann. § 11-9-601

- 1. Occupational Disease is defined as any disease that results in disability or death and arises out of and in the course of the occupation or employment or naturally follows or results from a compensable injury.
- 2. There must be a causal connection between the occupation and the disease established by a preponderance of the evidence.
- 3. An occupational disease is characteristic of an occupation, process or employment where there is a recognizable link between the nature of the job performed and an increased risk in contracting the disease in question.
- 4. The test of compensability is whether the nature of the employment exposes the worker to a greater risk of the disease than the risk experienced by the general public or workers in other employments.
- 5. The amount of compensation will be based on the average weekly wage of the employee when last exposed to the occupational disease.

III. NOTICE Ark. Code Ann. § 11-9-701

- A. Notice of the accident should be given immediately after it occurs and must be reported on the appropriate form prescribed or approved by the Commission (Form N).
- B. Failure to give notice will not bar a claim if:
 - 1. The employer had knowledge of the injury; or
 - 2. If the employee had no knowledge that the condition or disease arose out of and in the course of employment; or

3. If the Commission excuses the failure due to a satisfactory reason that the notice could not be given.

IV. REPORT OF INJURY Ark. Code Ann. § 11-9-529

- A. Employers must file a report of injury (Form 1) with the Arkansas Workers' Compensation Commission within 10 days of receiving notice or knowledge of the injury.
- B. The report filed with the Commission must include:
 1. Name, address, business of the employer;
 2. Name, address, occupation of employee;
 3. Cause and nature of the injury; and
 4. Date, time and location of the injury.
- C. Failure to file a report could result in a \$500 fine.

V. CLAIM FOR COMPENSATION

- A. A claim for an injury other than an occupational disease must be filed within 2 years from the date of the injury unless compensation has been paid, in which case a claim for additional compensation must be filed within 1 year from the date of the last payment of compensation or 2 years from the date of the injury, whichever is greater.
 1. The date of the injury is defined as the date of the occurrence of the accident from which a compensable injury results.
- B. Claims based on occupational diseases must be filed within 2 years from the date of the last injurious exposure to the hazards of the disease. The statute of limitations does not begin to run until the employee knows or should be reasonably expected to be aware of the extent or nature of the injury.
- C. If the employee has not made a request for a hearing within six months of filing a claim for compensation the employer may move to dismiss the claim without prejudice.
- D. Failure to file a claim within the statutory time limits is not a bar to the right to file a claim unless the employer objects at the first hearing on the claim.
- E. Benefits not claimed on the Form C are barred by the SOL, if later claimed, but more than 1 year from last payment of compensation. *Flores v. Wal-Mart Dist. and Claims Mgmt. Inc.*, 2012 Ark. App. 201.

VI. INTENT TO ACCEPT OR CONTROVERT CLAIM Ark. Code Ann. § 11-9-803

- A. Employer must file a statement of its intent to accept or controvert a claim (Form 2) within fifteen days of the date upon which it receives notice of the alleged injury.
- B. Employer may request a time extension if it has made a good faith effort to obtain medical records, but has been unable to do so and is therefore unable to determine the validity of the employee's claim.
- C. Note that this step must be done within fifteen days of the injury, **not** within fifteen days of the claim for compensation, so that this step will typically be required before the employee has even filed a claim for compensation.

VII. MEDICAL TREATMENT Ark. Code Ann. § 11-9-508

- A. Employer has the right to select the initial treating physician. If the employer has contracted with a certified managed care organization, then the employer has the right to select the initial primary care physician from among those in the organization.
- B. However, the employee may request a one-time change of physician from the employer or carrier.
 - 1. If the employee's request for a change of physician is denied, the employee can petition the Commission and if the Commission agrees, they may select the physician if they do not agree with the employee's choice.
 - 2. When the employee petitions for a change of physician, the new physician must be either:
 - a. Associated with the managed care entity chosen by the employer, or
 - b. The regular treating physician of the employee provided the following factors are met:
 - i. the physician maintains the employee's medical records;
 - ii. the employee has a bona fide doctor-patient relationship with they physician;
 - iii. there is a history of regular treatment prior to the onset of the compensable injury;
 - iv. the primary care physician agrees to refer the employee to the managed care entity for specialized treatment; and
 - v. the primary care physician agrees to comply with the rules, terms, and conditions regarding services performed by the managed care entity chosen by the employer.
- C. Treatment furnished by any physician other than the ones selected according to these methods, except emergency treatment, will be at the employee's expense.
 - 1. Exception: If the employer does not deliver to the employee, either in person or by certified mail, a copy of a notice which explains the employee's rights and responsibilities concerning a change of physician, then the changes of

physician rules do not apply and the employer will be responsible for the unauthorized treatment.

- D. If the employer fails to provide prompt medical services within a reasonable time, the Commission may direct that the injured employee obtain the medical service at the expense of the employer.

VIII. VOCATIONAL REHABILITATION Ark. Code Ann. § 11-9-505

- A. Upon a finding by the commission that a vocational rehabilitation program is reasonable, an employer will be liable to an employee for vocational rehabilitation costs if the employee:
 - 1. Is entitled to receive compensation benefits for permanent disability; and
 - 2. Has not been offered an opportunity to return to work or reemployment assistance.
- B. Employer's responsibility for payments for the program will not exceed 72 weeks.
- C. Employee will not be required to enter a program against his or her consent.
 - 1. If employee waives rehabilitation or refuses to participate in an offered program, the employee will not be entitled to benefits beyond the established percentage of permanent physical impairment.
- D. Employee must request the program by filing a request with the Commission prior to a determination of the amount of permanent disability benefits payable to the employee.

IX. AVERAGE WEEKLY WAGE Ark. Code Ann. § 11-9-518

- A. Computed based on the contract of hire in force at the time of the accident, considering the fifty-two weeks prior to the accident, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer as well as tips and commissions.
- B. Piece-basis employees: divide the earnings by the number of hours required to earn those wages during the fifty-two weeks preceding the week in which the accident occurred, then multiply this hourly wage by the number of hours in a full-time workweek.
- C. Overtime: add to the regular weekly wages, compute by dividing the overtime earnings by the number of weeks worked by the employee.

X. DISABILITY BENEFITS

- A. Temporary Total Disability (TTD) Ark. Code Ann. §§ 11-9-501(b), 11-9-519

1. Compensation rate is two-thirds of average weekly wage (AWW) up to statutory maximum.
2. If an injured employer refuses suitable employment he loses any entitlement to compensation unless the Commission determines the refusal is justifiable.
3. Waiting period:
 - a. For the first seven calendar days, no TTD is due.
 - b. For more than seven, but less than fourteen days, only the second week is due.
 - c. For more than fourteen days of disability, go back to the first day of disability.
 - d. The waiting period does not include the date of injury.
4. TTD is calculated using the calendar week with each day being one-seventh of the week.
5. Failure to pay TTD without an award within fifteen days after it becomes due is an eighteen percent penalty which must be paid at the same time as the installment unless notice of controversion is filed or an extension is granted.
6. If a TTD installment payable under an award is not paid within fifteen days after it becomes due, there is a twenty percent penalty.
7. Willful failure to pay a benefit results in a penalty up to thirty-six percent.

B. Temporary Partial Disability (TPD) Ark. Code Ann. § 11-9-520

1. Compensation rate is 2/3 of the difference between the employee's average weekly wage prior to the accident and his wage-earning capacity after the injury.

C. Permanent Partial Disability (PPD) Ark. Code Ann. §§ 11-9-501(d)(1), 11-9-521

1. Compensable injury must be the major cause (more than 50%) of the injury for Claimant to receive permanent benefits.
2. Compensation rate is 75% of TTD rate up to the statutory maximum if the TTD rate is \$205.35 or greater. If TTD rate is below \$205.35, PPD rate is 2/3 of average weekly wage.
3. Permanent partial disabilities not listed in the statutory schedule will be apportioned to the body as a whole with a value of four hundred fifty weeks.
4. In claims for disability in excess of permanent partial impairment for unscheduled injuries (wage loss claims), the Commission may take into account the employee's age, education, work experience, and other matters that may affect his future earning capacity.
5. Compensation is allowed after twelve months after the injury, for serious and permanent facial or head disfigurement for not more than \$3,500.
6. The clinical impairment rating must be pursuant to the AMA Guides to the Evaluation of Permanent Impairment (4th Edition).
 - a. If the employee is back to work, only the clinical rating is due.
 - b. If the employee is unable to return to work, the rating is negotiable and can be awarded by the ALJ.

7. PPD payments should start from the date the rating is given and notification in writing should be given to the injured employee.

D. Permanent Total Disability (PTD)

1. Permanent total disability means the inability because of compensable injury or occupational disease to earn any meaningful wages in the same or other employment.
2. Compensation rate is 2/3 of the average weekly wage.
3. The employer or carrier may, annually, require the injured worker receiving permanent total disability benefits to certify that he is permanently and totally disabled and not gainfully employed.
4. As of January 1, 2008 the cap for PTD is 325 times the maximum total disability rate established at the date of injury.

E. Death

1. For deaths occurring as the result of an injury that occurred on or after July 1, 1993, the employer is responsible for funeral expenses of \$6,000 or less.
2. There is a rebuttable presumption that death did not result from the injury if:
 - a. death does not occur within one year from the date of the accident; or
 - b. within the first three years of the period for compensation benefits.
3. Compensation for death of an employee is payable to the dependents in the following percentages of the average weekly wage and in the following order of preference:
 - a. Widow/Widower with no children: 35% paid until his/her death or remarriage;
 - b. Widow/Widower with children: 35% paid until his/her death or remarriage and 15% for each child;
 - c. One child with no widow/widower: 50%;
 - d. More than one child with no widow/widower: 15% for each child and 35% to the children as a class to be divided equally among them;
 - e. Parents: 25% each;
 - f. Siblings, grandchildren, grandparents: 15% each.
4. If a spouse remarries before complete payment of benefits, he/she must be paid a lump sum equal to compensation for 104 weeks.
5. Benefits to children will terminate at age eighteen unless the child is a full-time student under the age of twenty-five.
6. Incapacitated dependants are entitled to compensation regardless of age or marital status.

F. Illegally Employed Minor

1. Minors employed in violation of federal or state statutes pertaining to minimum ages for employment of minors are entitled to double the statutory amounts of compensation or death benefits.

2. This provision applies unless the minor misrepresented his or her age, in writing, to the employer.

G. Attorney's Fees Ark. Code Ann. 11-9-715

1. Capped at 25% of compensation for indemnity benefits.
2. Attorney's fees are not payable on medical benefits.
3. Where the Commission determines that a claim has been controverted, in whole or part, attorney's fees are paid $\frac{1}{2}$ by employer in addition to compensation awarded and $\frac{1}{2}$ by the claimant out of compensation payable to them.

XI. PROCEDURE

A. Pre-Injury Posting (Form P)

1. Employers should have Form P displayed in a conspicuous place to instruct employees in how to deal with an injury.

B. Employee's Notice of Injury (Form N)

1. Employee is required to fill out Form N and provide notice of his injury to the person and place specified by the employer.
2. Employer is not responsible for any benefits to the employee incurred prior to notification of the injury, except for emergency treatment that occurs outside the normal business hours of the employer, so long as a report of injury is made the next day.
3. Employee can be excused for failure to file Form N if:
 - a. the injury renders the employee incapable of informing the employer of it;
 - b. the employee did not know a condition arose out of employment; or
 - c. the employer had actual knowledge of the injury.

C. Employer's Report of Injury (Form 1)

1. Employer must report an employee's injury to the workers' compensation commission within ten days from receipt of notice of actual knowledge using Form 1.
2. Failure to do so may result in a fine up to \$500.

D. Claim for Compensation (Form C)

1. Employee must file a claim for compensation using Form C within the limitations period, which is 2 years from the date of injury or 1 year from the last payment of compensation.
2. The claim will be assigned to one of six geographic districts throughout the state, based on the county in which the injury occurred or the district in which the respondent's place of business is located if the injury occurred outside the state.

3. Ark. Code Ann. § 11-9-704. The Commission must notify the employer and any interested parties that an employee has filed a Claim for Compensation within ten days of such a filing.
4. Ark. Code Ann. § 11-9-702. If the employee fails to request a hearing within six months of filing his or her claim the claim may, upon motion and hearing, be dismissed without prejudice, allowing the employee to refile his claim within the two-year statute of limitations.

E. Employer's Response (Form 2)

1. Employer must file a statement of its intent to accept or controvert a claim (Form 2) within fifteen days of the date upon which it received notice of the alleged injury.
2. Form 2 may be required well before the employee files a Form C.
3. Employer may request a time extension if a good faith, but unsuccessful effort has been made to obtain medical records rendering the employer unable to determine the validity of an employee's claim.

F. Payment of Benefits

1. The first installment of compensation must be paid on the fifteenth day after the employer received notice of the injury, with payments to continue every two weeks thereafter.

G. Disputed Claims

1. Preliminary Conference
 - a. Mediation Conferences will be held in all cases in which the amount in dispute is less than \$2,500.
 - b. For cases in which the amount in dispute is more than \$2,500 the parties may request a voluntary mediation if all parties agree.
 - c. The conference will be informal, nonbinding, and confidential, by telephone or in person.
 - d. Attendance by the parties or a representative is required and the mediator is authorized to compel attendance, however the mediator is not authorized to compel settlement.
 - e. Following the conference, the Report of Mediation Conference (Form R) is placed in the file and copies are sent to all the parties.
2. Depositions
 - a. Any party may conduct depositions after the claim has been controverted by the filing of Form 2, however prior to the time a case has been controverted, the Commission may order depositions for good cause shown and upon application of either party.
3. Settlement
 - a. If both parties agree to a settlement a joint petition must be filed with the Commission.
 - b. The Commission will hear the petition, take testimony, and make investigations to determine whether to allow the final settlement.

- c. Neither party may appeal an order or award denying a joint petition, however the denial is made without prejudice to either party.
- 4. Hearing
 - a. Either party may file an application for a hearing that clearly identifies the specific issues of fact or law in controversy and the applying party's contentions.
 - b. If ordered, the Commission must give interested parties ten days notice of the hearing.
 - c. The hearing will be held in the county where the accident occurred, or the county of the employer's residence or place of business if the injury occurred outside the state.
 - d. Evidence may include verified medical reports provided the party using the reports has given opposing counsel notice and copies of all records and reports within seven days of the hearing.
 - e. Expert testimony is only permissible if such testimony complies with the requirements of Daubert and Kumho.
- 5. Award
 - a. The order denying the claim or making the award will be filed in the office of the Commission and a copy will be sent to each party.
- 6. Appellate Process
 - a. Full Workers' Compensation Commission
 - i. 30 days from the date of receipt of the order or award to file application for review
 - ii. Will review the evidence, or hear the parties, their representatives, and witnesses.
 - b. Court of Appeals
 - i. 30 days from the date of receipt of the order or award to file notice of appeal
 - ii. Notice filed in office of commission
 - iii. Court will review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award upon any of the following grounds, but no others:
 - (a.) The commission acted without or in excess of its powers
 - (b.) The order or award was procured by fraud
 - (c.) The facts found by the commission do not support the order or award
 - (d.) The order or award was not supported by substantial evidence of record

XII. DEFENSES

A. Assault

- 1. Employee's claim will be barred if it occurred as a result of an assault absent a showing by a preponderance of the evidence that the incident arose out of a

work related animus or hostility between the claimant and the co-worker who caused the assault.

B. Horseplay

1. An injury that occurs as a result of horseplay will not be compensable except as to innocent victims of the playing.
2. Arkansas statutes and cases do not define horseplay, but find it synonymous with the terms “skylarking,” or “rough or boisterous play.” *Morales v. Martinez*, 88 Ark. App. 274.

C. Going and Coming Rule

1. Precludes recovery for an injury sustained while the employee is going to or returning from his place of employment.
2. Premises exception no longer exists in Arkansas. The 1993 Act excludes from compensation injuries that occur “at time when employment services were not being performed.”
 - a. Merely walking through an employer’s parking lot will not qualify as performing “employment services” and therefore a claim for injury arising out of that activity will likely be precluded. See *Hightower v. Newark Public School System*, 57 Ark. App. 159.
3. The rule does not preclude benefits where the journey itself is part of employment services, such as in the case of delivery drivers.
4. Dual Purpose Exception
 - a. An injury occurring during a trip that serves both a business and personal purpose is within the course of employment.
 - i. A trip that involves the performance of services for the employer which would have caused the trip to be taken by someone else falls under this exception
 - b. Applies to out of town trips, trips to and from work, and miscellaneous errands such as visits to bars and restaurants if motivated in part by the intention to transact business there.
 - c. Exception will not apply to identifiable deviations from the business trip for personal reasons until the employee returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial.

D. Recreational or social activities

1. An employee injured while engaging in or performing or as a result of engaging in or performing any recreational or social activities for the employee’s personal pleasure is precluded from receiving compensation benefits.

E. Employment services were not being performed, employee had not yet been hired or employment relationship had terminated.

F. Intoxication Ark. Code Ann. § 11-9-102(4)(B)(iv)

1. An injury “substantially occasioned” by the use of alcohol or drugs is not compensable.

2. The mere presence of alcohol or drugs creates a rebuttable presumption that the accident was substantially occasioned by the use of the drugs or alcohol.
3. By performing services for the employer, the employee has impliedly consented to reasonable drug and alcohol testing for the presence of these substances in the employee's body at the time of the accident and refusal to test precludes the employee from receiving benefits unless he proves it did not substantially cause the injury.
4. The employee must prove by a preponderance of the evidence that the alcohol or drugs did not substantially occasion the accident.
5. If a reasonable suspicion of alcohol exists at the time of the accident testing must be done within eight hours.
6. If a reasonable suspicion of drugs exists at the time of the accident testing must be done within thirty-two hours.

G. "Shippers Defense" from *Shippers' Transport of Georgia v. Stepp*, 265 Ark. 365.

1. A false statement in an employment application will bar workers' compensation benefits if the following conditions are shown:
 - a. The employee knowingly and willfully made a false representation as to his or her physical condition;
 - b. The employer relied upon the false representation;
 - c. The reliance upon the false misrepresentation was a substantial factor in hiring the employee; and
 - d. There is a causal connection between the false representation and the injury.
2. For the defense to apply, the questions asked on the employment application must request factual information, not an opinion.

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RECENTLY ASKED QUESTIONS IN ARKANSAS

FROM ISSUES ADDRESSED IN RECENT ARKANSAS CASES

Q. Are parent corporations immune “employers” under the exclusive-remedy provision of the Workers’ Compensation Act?

- A.** Yes. In *Myers v. Yamato Kogyo Co.*, a steel plant worker died while working. The worker’s employer, Arkansas Steel Associates, did not dispute that his death was work-related, and their insurance carrier paid death benefits to his wife. In May of 2016, the deceased worker’s wife, Mary Myers, filed a lawsuit against ASA’s parent companies and various third party entities in the White County Circuit Court. The circuit court, in part, transferred jurisdiction to the Arkansas Workers’ Compensation Commission, who in June of 2018 found that the parent companies were entitled to the exclusive-remedy provision of the Arkansas Workers’ Compensation Act. Myers appealed, arguing that there was no “employer-employee” relationship between her deceased husband and ASA’s parent companies.

While the appellee parent companies were, either indirectly or directly, owners of ASA, they were separate and distinct entities from ASA: they had their own headquarters; their own officers, directors and managers; and they did not hire, fire, pay salaries to or set the work schedules of ASA workers. According to Myers, ASA was her deceased husband’s sole employer because no agents of the parent companies were present at the jobsite where her husband was killed, and they did not treat him as an employee. Therefore, she argued, she could not sue ASA in tort, but could sue the parent companies.

The parent companies, in contrast, argued that there does not have to be an “actual” or “true” employer-employee relationship for an entity to qualify as a statutory “employer.” They argued the statutory language that “any principal, officer, director, stockholder, or partner acting in his or her capacity as employer” applied to them since ASA was a subsidiary of theirs, meaning they owned a controlling share of ASA, and that all an entity must do to qualify as immune is meet the statute’s requirements.

The court sided with the appellee parent companies, holding that parent companies that own subsidiaries which have a direct employment relationship with the injured worker are statutory “employers”. This holding was based on the plain language of the section 11-9-105(a), which at the end of the second sentence omits the word “partner” but includes the words “principle” and “stockholder.” The court also noted that, in the first sentence of the subsection, there is no comma between the word “partner” and the phrase “acting in his or her capacity as an employer,” which indicates that the phrase “acting in his or her capacity as employer” modifies only “partner,” and not the other nouns listed before it. As such, the court reasoned, the statute counsels to look to whether a partner is acting as an employer, but not to whether a principal or stockholder is acting as an employer. The court distinguished such entities from those of third parties, such as the lessor or manufacturer of equipment, against whom an action may be maintained if responsible for a worker’s injury. But since it was stipulated that the companies in question were

stockholders and principals in the company, those companies were, by definition, statutory employers.

Myers v. Yamato Kogyo Co., Ltd., __S.W.3d__ (Ark. Ct. App. May 29, 2019)

Q. If a claimant files a claim for additional benefits but names the wrong employer on the form, and then files for the same additional benefits with the correct employer named on the form after the two-year statute of limitations period, does the statute of limitations still preclude the claim?

A. Yes. In *Farris v. Express Services, Inc.*, Walter Farris injured his head, neck and left shoulder while working when a crane fell on him. Express Services, Inc., the temporary employment agency that employed Farris at the time of his injury, paid benefits for his workers' compensation claim. About two years after he was injured, Farris submitted a Form AR-C through which he sought additional benefits. On the form, he named Great Dane Trailers as his employer.

While Express Services had assigned Farris to a Great Dane location, he actually worked for the temporary agency. Upon realizing his mistake, he filed a new, amended claim naming the correct employer. However, the amended claim was filed one day after the 2-year statute of limitations had passed.

The Administrative Law Judge who conducted a hearing on Farris' entitlement to additional workers' compensation benefits found that his claim was barred by the statute of limitations. The Commission affirmed, adopting the ALJ's findings. Farris appealed to the Arkansas Court of Appeals who, relying on *Dillard v. Benton County Sheriff's Office*, 192 S.W.3d 287 (Ark. Ct. App. 2004), held that his mistake on his original additional benefits claim form was a "mistake to form and not to substance." *Farris v. Express Servs., Inc.*, 546 S.W.3d 530, 532 (Ark. Ct. App. 2018). In *Dillard*, the claimant filed a timely claim form for additional benefits but checked the "initial benefits" box instead of the "additional-benefits" section. The *Dillard* court held that the claimant's failure to correctly fill out the form should not be fatal to his claim, and that there was insufficient evidence to support the Commission's finding that his claim was properly dismissed. Relying on *Dillard*, the court of appeals in Farris' case concluded that the statute of limitations was tolled and reversed and remanded to the Commission.

The Supreme Court of Arkansas disagreed with the appeals court, holding that Farris' claim for additional benefits was barred by the statute of limitations. The reasoning behind their holding was that the case at bar was distinguishable from *Dillard*. There, the claimant mistakenly checked the wrong boxes on one claim form, whereas here, the claimant had filed two claim separate forms for additional benefits. Farris corrected his error by adding the correct employer on the second form he submitted, but the second form itself, unlike the individual timely but improperly submitted form in *Dillard*, was submitted after the period set forth by in section 11-9-702(b)(1). Accordingly, claimant failed to meet his burden of timely filing his additional benefits claim within the statutory time frame.

Farris v. Express Services, Inc., 572 S.W.3d 863 (Ark. 2019)

Q. Is a one-car, motor vehicle accident which is suffered by a home health aide, while traveling in between two patient's homes, and after stopping at the employee's own home, compensable?

A. Yes. Stacy was a home health aide for Absolutely Care Management. As a part of her duties, she was required to travel to the homes of her clients and give them aide. On September 16, 2015, she was scheduled to see 2 clients. For the first client, she ran to the grocery store and delivered groceries. When she completed her duties there, she decided to go home and get a battery charger for her cell phone, as well as a bite to eat. On her way to her house, she stopped at her son's house to check in, then eventually went home, got her charger, a sandwich, and a soda. She then headed out to her next client, and called to let the client know she was on her way. She also called her office at ACM to inform them she was on her way to the next client. As she was leaving her home heading to her next client's house, she had a single vehicle accident and sustained severe injuries, including a brain injury and broken spinal cord.

The employer denied based on the coming and going rule. As a general rule, an employee traveling to and from the work place is not within the course and scope of their employment. However, the court likened this to the *Olsen* case where employee was a nursing assistant required to travel to patient's homes to provide nursing services. The court reasoned that Stacy was required to travel to her client's home and provide aide, she had completed her first client and traveled home before going to see her second client. The court determined it was of no consequence that she returned home before going to her second client's house as she was in route to the second client when she sustained her accident. The Court of Appeals affirmed the Commission.

Absolute Care Management v. Stacy, _____ S.W.3d _____ (2018 Ark. App. 166)
Opinion delivered February 28, 2018.

Q. Is weed eating sufficiently repetitive enough to establish a "gradual onset injury?"

A. No. This case posed to the Court of Appeals whether or not an Arkansas Highway & Transportation Department's employees' weed eating activities equated to a rapid repetitive movement as defined by the Workers' Compensation law. Dale Carlat is a 54 year old man who worked for the highway department since 2002. In October 2014, he complained of sharp pain in his shoulder, but did not report it as work-related until March 2015. Carlat ultimately had shoulder surgery for his reported injury, and the medical records note that Carlat complained that his shoulder pain was related to using a weed eater. The Commission rejected Carlat's claim indicating that while weed eating was arguable a repetitive activity, the Claimant failed to prove that performing this task was repetitive as required under the statutory provisions for establishing a gradual onset injury. Claimant testified that during mowing season he was required to conduct various work-related duties in his position, and these duties were verified by other witnesses. They included other duties that did not require weed eating. The Commission indicated that while weed eating was an integral part of Claimant's work-related activities at a certain time of the year, the record demonstrated that weed eating was neither the

Claimant's sole or primary responsibility, nor was Claimant required to perform this activity on a constant basis. Therefore, he failed to meet his burden of proof to show that weed eating was repetitive for purposes of the claim.

The Court of Appeals stated that for an injury to be compensable under gradual onset rapid repetitive motion law, a Claimant must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; (3) the injury was caused by rapid repetitive motion; and (4) the injury was a major cause of disability or need for treatment. The Court noted that no case in Arkansas had yet decided whether weed eating is repetitive movement. In fact, the Court cited that most of the repetitive movement cases involved factory or assembly line jobs. The Court likened this case to *Lay v. UPS*, in which the court affirmed the Commission's denial of benefits because a delivery truck driver, who briefly performs several different rapid motions, repeated at different intervals and separated by periods of several minutes, did not engage in rapid repetitive motion. Therefore, the Court of Appeals found that while Carlat had a physical job that required hard work, on the whole, the Commission's decision was not insufficiently supported and was therefore affirmed.

Carlat v. Arkansas Highway & Transportation Dept., _____ S.W.3d _____ (2018 Arkansas App. 157). Opinion delivered February 28, 2018.

Q. *In order for a Claimant to receive additional medical treatment, after a claim is denied, must they prove a change in their physical condition after the initial case was denied?*

A. Yes. On April 3, 2015, appellant sustained a compensable injury to his low back at work when he was lifting a tub of melted plastic that weighed an estimated 40 to 50 pounds. Claimant underwent care at UAMS and eventually had an MRI in July 2015 at Washington Regional Medical Center. He returned to follow-up with Dr. Knox, and Dr. Knox recommended an injection and physical therapy. Appellant sought compensation for the 2015 treatment at UAMS, as well as treatment with Dr. Knox. The employer controverted the additional treatment, and a hearing was held in which the ALJ issued an opinion denying the employee's claim and specifically ruling that employee failed to prove that the 2015 treatment was reasonable and necessary. That decision was not appealed.

Dr. Knox then corresponded with the employee's attorney in 2016 concerning causation and continuing difficulties. The employee saw Dr. Knox in June 2016 and the history provided on that date was essentially the same as given in 2015. The employee subsequently filed another claim for additional treatment contending that he was presenting a new issue as to whether or not he was entitled to additional medical care after the April 4, 2016 opinion by the ALJ. The only record of treatment after that decision was the visit with Dr. Knox on June 6, 2016, when he discussed the possibility of surgery. The employer contended that this additional treatment was barred by res judicata and collateral estoppel, and by the statute of limitations at a hearing. The hearing was held

in November 2016 and the ALJ ruled in a 2017 opinion that appellant's claim for additional treatment was not barred by the statute of limitations, but barred by res judicata. The court ultimately held that Claimant must first prove by a preponderance of the evidence that he sustained a change in his physical condition in order to overcome an application of the doctrine of res judicata. The Claimant, in this case, failed to prove by a preponderance of the evidence that he sustained a change of physical condition since the prior hearing, and therefore, res judicata applied. Claimant's underlying need for additional medical treatment was the same as it was in the previously denied claim, and that is why the claim was barred by res judicata. Substantial evidence supported the Commission's finding and appellant's claim was barred. The Court of Appeals affirmed the Commission.

Rothrock v. Advanced Environmental Recycling, _____ S.W.3d _____
(2018 Ark. App. 88). Opinion delivered February 7, 2018.

Q. *Can a Claimant be entitled to additional medical treatment when a work-place injury aggravates or accelerates a pre-existing condition, to the point where additional treatment has been recommended?*

- A.** Yes. Claimant sustained an injury to her right index finger and left knee while working for the Arkansas Department of Human Services. She was 49 at the time of the injury. In 2013, a hearing was held to determine the compensability of her knee, and the Administrative Law Judge found that she proved by a preponderance of the evidence the injury to her knee was compensable. It was appealed and affirmed in 2014.

A second hearing was held in 2016 regarding if Claimant was entitled to a total knee replacement, entitled to permanent partial disability benefits in the form of an impairment rating, determination of temporary total disability and permanent partial disability rates, and whether Claimant was entitled to additional TTD benefits spanning from 2013 through August 2015. The employer argued that Claimant was not entitled to a knee replacement for her work-related injury, but rather to pre-existing, longstanding, degenerative joint disease. The Administrative Law Judge found that Claimant gave credible testimony with regard to her knee being asymptomatic prior to her injury; but that she did not dispute that she had pre-existing degenerative changes in her knee as shown by her medical records. The Administrative Law Judge found Claimant was entitled to 50% impairment to the left lower extremity, and that her rates for temporary total and permanent partial disability benefits established in a prior order would remain the same, and she would be awarded TTD from December 2013 through August 2015.

The employer argued on appeal that the Claimant's claim for a total knee replacement and corresponding disabilities benefits were barred by res judicata because she did not present evidence to preserve the issue regarding the surgery at the 2013 hearing, and despite having made an argument to the Commission, the Commission did not rule on the issue. The court found that the issue had been waived, and the merits did not need to be readdressed on appeal. As to additional care and benefits, the court found that

employers take employees as they are found, and an aggravation of a pre-existing, non-compensable condition by a compensable injury is compensable. The Administrative Law Judge had previously found that Claimant gave credible testimony as to not having had difficulties with her knee prior to her 2012 injury, and that after her fall, her knee became symptomatic. The Administrative Law Judge concluded that whatever damage was done to the Claimant's left knee due to her specific injury in 2012, caused the pre-existing condition to accelerate that resulted in the need for the total knee replacement, therefore, the surgery was a reasonable and necessary medical treatment. The court went on to affirm all of the other issues as found by the Administrative Law Judge below.

Arkansas Dept. of Human Services v. Shields, _____ S.W.3d _____ (2018 Ark. App. 247). Opinion delivered April 11, 2018.

Q. *Can a worker be found to still have access to the open, competitive labor market, after an upper extremity amputation?*

- A. Yes. It was undisputed in this case that the Claimant sustained a compensable work-related injury on September 15, 2013, while working for Tyson. Claimant injured his left hand and amputation below his elbow was necessitated. He was given prosthesis and reached maximum medical improvement on June 24, 2015. The Claimant sought permanent total disability benefits and provided a lengthy "constitutional brief" where he challenged the constitutionality of the Workers' Compensation Act, and indicated that he had submitted evidence that established the executive branch of the State of Arkansas and private interest had exerted pressure on the workers' compensation Administrative Law Judge Commissioners that infringed upon their decision independence and results.

The injury he sustained was to his non-dominant left hand, rather than his dominant right hand. He testified that although his left hand was injured, he had not been able to work since the injury. He had graduated from high school and before his employment with Tyson, was in the Navy for 9 years as a machine operator. Claimant also testified that after the injury, he received psychiatric treatment and had previously felt suicidal and useless. He was diagnosed with PTSD, was still experiencing nightmares, and wanted to return to a psychiatrist at the time of the hearing. The court found that the Commission did not err in concluding that Claimant had failed to prove that he was permanently and totally disabled and unable to earn any meaningful wages as a result of the compensable injuries. The court noted that the Commission had found that Claimant was able to perform household chores, cook for himself, had graduated high school, and 2 vocational rehabilitation assessments had identified potential jobs for him. As to the constitutionality arguments, these were rejected without discussion.

Woods v. Tyson Poultry, _____ S.W.3d _____ (2018 Ark. App. 186). Opinion delivered March 7, 2018.

Q. *Can a claim which is not filed against the proper employer under the Statute, until after the Statute of Limitations has expired still proceed, when the Claim for Compensation itself was timely filed, but an improper employer was originally named?*

A. Yes. In this case, the court found that a Claimant who had initially named the wrong employer on his claim for additional benefits, but then amended the claim to correct the named employer had his statute of limitations tolled despite his initial mistake. The Claimant here appealed from a Commission decision finding that his claim for additional benefits was barred by the statute of limitations. The Court of Appeals agreed with the Claimant and reversed and remanded the case. Claimant was injured on May 12, 2014, when a crane fell on him. The only question on appeal was whether Farris's claim for additional benefits was time barred because he mistakenly named the wrong employer, in an otherwise timely filed claim. The court found that Claimant's action of filing, even an incorrect claim, tolled his statute of limitations. The court noted that in previous cases it was found that the failure to technically comply with the "call of the form should not be fatal to a claim when it was clear what was intended." Farris's mistake in his claim form for additional benefits incorrectly naming an employer who had previously paid benefits to him is a mistake as to form and not substance, and the statute of limitations was tolled. The case was reversed and remanded.

Farris v. Express Services, Inc. _____ S.W.3d _____ (2018 Ark. App. 189)
Opinion delivered Marcy 7, 2018

Q. *Can a claim be denied when an alleged work-related injury which is controverted, is worsened by a subsequent non-work related accident?*

A. Yes. Claimant, Alice McCutchen, appealed the decision of the Commission and the Administrative Law Judge that she failed to prove by a preponderance of credible evidence that she had sustained a compensable injury to her right knee. The Court of Appeals affirmed.

Claimant worked for the Human Development Center in 2013 as a food prep specialist. Her duties included cooking, cleaning, sweeping, prepping food, and answering the phone. She claimed that while working on May 9, 2016, she injured herself between 2:45 p.m. and 5:00 p.m. while on break. She testified that she was preparing to eat a sandwich, and the stool she was attempting to sit on moved, causing her to fall and land on top of it. After the fall, she received a phone call to prepare more food for a client, which she did and completed the remainder of her duties and left. After her shift, she went to church and while standing at church, she felt a crack and noticed immediate pain and swelling in her right knee. She went to the emergency room the following day and reported the injury to her employer that same day. She was ultimately diagnosed with a meniscal tear, osteoarthritis, synovitis and chondromalacia, and underwent surgery on July 1, 2016. She was released to return to work the following August.

Claimant testified she was unsure of the time of her injury, but believed it was around 5:00 p.m. She was unsure when she fell if her knee twisted, but she indicated to the Court her ankle went one way and her knee went the other, and all of her weight was on her right knee. She indicated that a co-worker saw her on the floor and asked if she was okay. She denied doing anything to her knee between the time she left work and arrived at church and felt the crack in her knee. When questioned by the Administrative Law Judge at trial, she stated she really didn't experience any pain or symptoms after her fall until she went to church following her shift at the time her knee popped. The Administrative Law Judge found that Claimant injured her knee at church and denied benefits.

The Commission affirmed and adopted the Administrative Law Judge's findings. The Court of Appeals noted the only testimony reflecting that appellant fell at work on the claimed date of injury came from appellant. They noted that the testimony of an interested party is always considered to be controverted, and it was within the Commission's province to determine the credibility and weight to give her testimony. Because Claimant did not have evidence that she had experienced any pain, swelling, or symptoms until her knee popped and buckled while she was sitting at church, and she was able to complete all of her job duties during her shift that day, they affirmed the Commission's decision and the claim was denied.

McCutchen v. Human Development Center, _____ S.W.3d _____ (2018 Ark. App. 239). Opinion delivered April 4, 2018.

Q. *Can a claim still be compensable, even though the claimant admits to illicit drug use within 24 hours to the work place injury?*

- A.** Yes. The issue in this case was whether methamphetamine was present in the Claimant's body when he was injured, and if the employer and insurer were entitled to receive a rebuttal presumption that the work place injury was substantially caused by the drug use. The Commission denied that assertion and the employer/insurer appealed the decision. The Court of Appeals affirmed.

Claimant was employed as a truck driver and was carrying a load from Van Buren to St. Louis on June 4, 2015. Claimant was injured at a nursery loading dock when his left hand became wedged between two plates and a hydraulic lift. The Claimant was able to free himself, phone a friend for directions to a nearby hospital, and drove himself for medical treatment. The emergency room doctor noted that Claimant had a normal mood and affect, and the orthopedic surgeon who removed the Claimant's thumb stated in her preoperative and postoperative diagnosis that Claimant suffered acute methamphetamine use in that he had admitted to recreational drug use of methamphetamine every month or two, and that patient stated he smoked and injected "go fast," another name for methamphetamine, within the last 24 hours and he appeared to be intoxicated.

At trial when the Claimant was questioned about his deposition testimony, he stated he did not know why the history within the medical records noted that he would have used methamphetamine within 24 hours of the injury. The court noted that under Arkansas law, workplace injury is not compensable if it is substantially occasioned by the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's order. The court noted that given the evidence in the medical records and the Claimant's testimony, a conclusion contrary to the one made by the Commission was conceivable, but that they were going to have to make a close call on a conflicted record. After having considered the whole record, the court held the Commission did not commit reversible error by deciding that the accident that occurred on June 4, 2015 was not substantially occasioned by the use of an illegal drug. No drug or paraphernalia was found on Claimant's person, and there was no other physical clue that he had ingested methamphetamine in reasonable proximity to the injury. Therefore, the Commission was confirmed.

National Transit Staffing, Inc. v. Norris, _____ S.W.3d _____ (2018 Ark. App. 229). Opinion delivered April 4, 2018.

Q. *Can a work-place accident be found compensable even when there are no witnesses to the accident, and no physical evidence or symptoms of an injury?*

- A.** Yes. Migliori was an administrative analyst for Northwest Arkansas Community College. When she arrived at work on July 28, 2016, she retrieved a yoga ball from a co-worker's office and used it in place of her office chair. When she stood up to get a book behind her and turned around and pushed off from her desk, she fell off the ball and hit the left side of her head on the desk. She reported it that day and sought medical treatment. She was ultimately diagnosed with post concussive headaches, reported ringing in her ears, reported having a bump on her head, as well as issues with vertigo and visual impairment. The employer argued that Claimant did not sustain disability, and that the fall did not happen.

The Commission found that there was enough medical evidence to substantiate Claimant's story that she fell. Despite that the employer argued there were no witnesses to the fall, it did not knock off her glasses, and no one saw a cut, bump, bruise, or swelling to her head immediately after the accident. The court found that Claimant had established a compensable head injury, including the diagnosis of post concussive headaches, as well as a contusion of the scalp. In fact, one of the doctors had ordered face and CT scans based upon the diagnosis of contusion of the scalp after examining Claimant. The court found the Commission did not disregard medical evidence, but rather weighed it, giving more weight to the experts that indicated the Claimant's current complaints were caused by the fall from the yoga ball rather than any pre-existing conditions. Therefore, the case was affirmed.

Northwest Arkansas Community College v. Migliori, _____ S.W.3d _____ (2018 Ark. App. 286). Opinion delivered May 2, 2018.

ARKANSAS SUPREME COURT

Q. Are attorney's fees awarded to a Claimant calculated based upon the amounts owed to Claimant prior to any statutory offset?

A. Yes, but with a strong dissent. This case was a decision appealed from the full Commission, regarding Oscar Gerard, who was sustained a compensable injury on May 12, 2002. It was an accepted claim paid by the Arkansas Game & Fish Commission. Between 1999 and 2013, Gerard had 3 surgeries for his work-related injuries while employed by the Arkansas Game & Fish Commission. He was declared to be at maximum medical improvement and the Arkansas Game & Fish Commission accepted liability for 16% impairment rating, and a 10% wage loss. The Arkansas Game & Fish Commission accepted Gerard's 23% injury rating.

In 2015, Gerard sought additional temporary total disability benefits stating that he was entitled to either permanent total disability of benefits or alternatively, wage loss disability benefits as a result of his work-related injury. Gerard argued that he was entitled to permanent partial disability benefits in excess of the 10% due to the 7% increase in his impairment rating, entitled to additional temporary total disability benefits. The ALJ held that Gerard established that he was entitled to a 35% wage loss and that the Arkansas Game & Fish Commission was allowed to take a credit for the previous 10% wage loss paid. Further, the ALJ found that that Arkansas Game & Fish Commission was entitled to the offset provided in Arkansas Code Ann. 11-9-411, because it appeared that Gerard's Arkansas public Employment Retirement System benefits would far exceed his monthly worker's compensation rates. The ALJ also found that Gerard's attorney was entitled to a 25% fee on the indemnity benefits awarded with one-half to which was to be paid to Claimant and one-half to be paid by the respondent in accordance with Arkansas Code Ann. 11-9-715. Gerard filed a motion to enforce payment of the attorney's fees and asserted that his disability retirement compensation exceeded the award of additional benefits and the offset depleted the payable benefits from which the attorney's fee should be paid. Gerard argued that he never received any compensation because Arkansas Code Ann. 11-9-715(a)(b)(2)(B)(i) requires that Gerard's payment of attorney's fees come from any benefits he was awarded, and the Arkansas Game & Fish Commission must pay the remaining half of the fees.

The court found applying those rules and statutory construction that 11-9-715 provides that attorney's fees will be paid one-half by the employer or carrier in addition to compensation awarded and one-half by the injured employee or dependents of the deceased employee at compensation payable to them. Compensation in this case, meant money allowance payable to the employee or his dependents under 11-9-102. The amount of attorney's fees calculated was based on Gerard's additional award of benefits, specifically, the 7% increase in the impairment rating and 25% wage loss that the Arkansas Game & Fish Commission challenged. Gerard's one-half was to be paid

from the amount payable to him from the Arkansas Game & Fish Commission for his compensable injury.

The court indicated that based on the plain language of the statute, Gerard's one-half of the fee is to be derived from the sum he is paid by the Arkansas Game & Fish Commission for his injury. The Arkansas Game & Fish Commission must provide Gerard's one-half of the fee from the compensable award because the plain language provides that Gerard's fee is to come from compensation to his him for his work-related injury. In other words, one-half of Gerard's fee to his attorney is to come from the Arkansas Game & Fish Commission, the party that caused the litigation. The court indicated the plain language of the statute dictates that the parties here each pay one-half of the attorney's fees. For Gerard, that one-half is derived from compensation payable to him because of his compensable injury, and the court found to hold otherwise would punish Gerard, an injured employee involved in a controverted claim, and that the amount of the fee thus comes from the payable amount owed to Gerard *prior* to any offset. The interpretation, the court stated, was supported by the case law surrounding Arkansas Ann. Code 11-9-715, in *Cleak v. Great Southern Metals*, 335 Ark. 342 , 981 S.W.2d 529 (1998).

Dissent:

Chief Justice Kemp dissented indicating that strict construction meant narrow construction indicating the doctrine of construction was to use the plain meaning of the statute. Judge Kemp noted that §11-9-715 and §11-9-411 should be read harmoniously and expressly provided that each party be responsible for one-half of the attorney's fees, and that the Claimant's one-half is paid out of the compensation payable to the Claimant. Therefore, if the compensation was zero, because §11-9-411's offset eliminates Arkansas Game & Fish Commission's obligation to pay any additional benefits to Gerard, then deducting from zero still leaves Arkansas Game & Fish Commission with no responsibility to pay Gerard's share of the attorney's fee. Judge Kemp further noted there was no statutory provision for employers to be fully responsible for attorney's fees, and no provision that permitted them to seek reimbursement from employers for 100% of attorney's fees when no compensation is due to the Claimant. Judge Kemp believed that the Commission erroneously interpreted §11-9-715 and §11-9-411. Therefore, Judge Kemp indicated he would reverse the Commission's decision rather than affirm it.

Arkansas Game & Fish Commission v. Gerard, _____ S.W.3d _____ (2018 Ark. 97). Opinion dated March 29, 2018.

Q. *Can a business contest Workers' Compensation benefits to an employee who is injured on-the-job, if that same worker is an employee of a separate employer providing a shared employee on an independent contractor basis?*

A. Yes. Deputy Morgan injured his ankle on February 19, 2014, while working a part-time security job at Brookshire Grocery Store. He noticed a female in the store, who he

believed was shoplifting, approached her, found several pieces of merchandise concealed on her person. Upon speaking with the manager, who insisted the shoplifter go to jail, he handcuffed the female suspect and formally placed her under arrest. She was then uncuffed when she asked to go to the restroom and when the restraint was unlocked, she bolted. Deputy Morgan pursued her and sprained his ankle while sprinting after her down the stairs. Deputy Morgan informed the sheriff's department of his injury, and his medical expenses were submitted to his health and accident insurance carrier, but personnel at the sheriff's department told him it was a worker's compensation claim. Brookshire contested its liability for Deputy Morgan's worker's compensation benefits arguing that he was an independent contractor, not an employee.

The court noted it was consistent in its holdings that an independent contractor is one who contracts to do a job according to his or her method, and without being subject to the control of the other party, except as to the result of the work. There was no fixed formula for determining who is employee versus an independent contractor, therefore, the determination will be particular to the facts of each case. The court noted that Deputy Morgan testified he is a certified law enforcement officer 24 hours a day, and the sheriff's department required that he secure from them "permission" to provide security for Brookshire. Brookshire did not control what he wore, as the sheriff's department would have when he was on duty, Brookshire did not provide his tools, and his job duties were sworn to him by a fellow deputy, whereas Brookshire never provided him training. Deputy Morgan stated that his formal training as a law enforcement professional was from the police academy. There was nothing in the record that indicated that Deputy Morgan should be considered an employee of Brookshire, as Brookshire did not interview him for his position, though his time at Brookshire was scheduled by an independent agent that was not directly connected with the store. Deputy Morgan was essentially a uniformed deputy who was assigned a time slot to provide a police presence at Brookshire to maintain law and order. Therefore, the court found that Deputy Morgan was an independent contractor and the court reversed and remanded the case to the Workers' Compensation Commission for further proceedings.

Dissent:

Chief Justices Kemp, Goodson & Wendt dissented, with Chief Just Kemp writing the dissent indicating that while there was no hard and fast rule for determining employee versus independent contractor and each case must be analyzed as to its facts, if this case presented facts upon which reasonable minds could differ, the court should have deferred to the Commission and affirmed the decision.

Brookshire Grocery Co. v. Morgan, 218 Ark 62 (2018), 539 S.W.3d 574.
Opinion delivered March 1, 2018.

Q. *Should a single eye injury be converted to a body as a whole disability rating, when the work-place injury causes other ratable impairments?*

- A. No. On February 24, 2012, Yousey was severely injured while unloading equipment from Multi-Craft and suffered multiple facial fractures. He also suffered a broken foot, a broken hand, and a torn rotator cuff. Yousey underwent surgical repair, but was left with a misalignment of his eyes to the left eye being sunken in and downwardly displaced. Because of the left eye injury, he had ongoing issues with double vision and was unable to pass a required physical, and it prevented him from holding his commercial driver's license. He also continued to have problems with ongoing headaches that required medication, would have to get injections in the back of his head to treat headaches, had ongoing problems with short term memory, as well as facial numbness and sensitivity to cold food or beverages. He also had issues with ongoing depression issues.

When tried before the ALJ, the opinion issued indicated that Yousey was entitled to 29% impairment to the body as a whole for his brain injury, but not entitled to a 100% impairment to his vision. In addition, he was awarded \$3,500.00 for his facial disfigurement, and an additional 15% impairment rating for facial disfigurement, and 20% for uncontrolled facial neuralgia pain. The employer appealed indicating that the ALJ award of a 15% rating for facial disfigurement and an award of a 20% impairment for uncontrolled facial neuralgia pain was contrary to facts and law. Yousey filed a cross-appeal indicating that the ALJ erred in concluding that he failed to prove he was entitled to a 29% whole body impairment from his brain injury and a 100% rating for the loss of vision in his left eye. He also believed that the ALJ erred in concluding that he attempted to prove a 100% impairment to his visual system, whereas Yousey indicated he was asking for impairment only to his left eye, not his entire visual system. The Commission affirmed in part, and reversed in part, the ALJ's decision.

The Commission found Yousey was entitled to the 29% for his brain injury, and 24% for the left eye, maintained the award for \$3,500.00 for facial disfigurement, but that Yousey was not entitled to permanent anatomical impairment for facial disfigurement in excess of the cap imposed by the statute. They also found that Yousey was not entitled to benefits based on a permanent anatomical impairment rating based on pain. Again, the employer appealed indicating that the Commission's determination that Yousey was entitled to the 29% impairment rating for the brain injury was not supported by substantial evidence and the Commission was in error in determining that the 25% impairment to the body as a whole for the left eye injury was not supported by evidence. Yousey filed a cross-appeal indicating that the Commission was in error in determining he was not entitled to the 25% impairment to the body for damage to the cranial and trigeminal nerves that resulted in uncontrolled facial neuralgia and pain, and the Commission was in error in determining he was not entitled to a 15% impairment for structural integrity of the face.

The court found the Commission's decision that Yousey was entitled to 29% impairment rating was supported by substantial evidence citing that the neuropsychological testing presented without more was not adequate to establish organic brain injury by objective findings within the meaning of the statute. However, Yousey had presented neurological testing and additional medical evidence of his brain injury. Yousey did not simply suffer a mere concussion or scalp laceration, but was so severely fractured according to Dr. Morse that his CT scan revealed skull fractures that were so severe that air was able to

go from the outside to the inside of his skull surrounding his brain. As to the left eye injury, the court found that Yousey was entitled to 100% vision loss of his left eye, and that the Commission should not have converted such impairment to the body as a whole. Because Yousey's impairment came within a scheduled injury category, he would be limited to the 100% impairment of the left eye and the award should be modified accordingly. The court cited Dr. Andrew Lawton, an ophthalmologist with specialty in neuro-ophthalmology who testified that Yousey had surgery, but continued to have issues with movement of the left eye, as well as additional vision problems because of the misalignment of the left eye being sunken in and downwardly displaced permanently following surgery. As to the trigeminal nerve injury claim, the court affirmed the Commission's denial of these benefits indicating that when determining physical or anatomical impairment, a physician or other medical provider, nor the judge, can consider complaints of pain. Therefore, Yousey was not entitled to an impairment rating for the nerve injuries because the rating by Dr. Morse was solely based on a level of pain.

Multi-Craft Contractors, Inc. v. Yousey, 218 Ark. 107 (2018).
Opinion delivered April 5, 2018.

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ILLINOIS WORKERS' COMPENSATION

I. Jurisdiction - Illinois jurisdiction is appropriate when:

- A. If the petitioner is injured in Illinois, even if the contract for hire is made outside of Illinois.
- B. The petitioner's employment is principally localized within Illinois, regardless of the place of accident or the place where the contract for hire was made.
- C. If the last act necessary to complete the contract for hire was made in Illinois.

II. Compensability Standard

- A. Accident or accidental injury must arise out of and in the course of employment.
 - 1. Accident arises out of the employment when there is a causal connection between the employment and the injury.
 - 2. Injury must be traceable to a definite time, place, and cause.
- B. *Medical Causation*: The petitioner must show that the condition or injury might or could have been caused, aggravated, or accelerated by the employment.

III. Employee must provide notice of the accident.

- A. The petitioner must give notice to the employer as soon as practicable, but not later than 45 days after the accident.
- B. Defects/Inaccuracy in the notice is no defense unless the employer can show it was unduly prejudiced.
 - This is difficult to show in Illinois because the petitioner directs his/her own medical treatment.

IV. Accident Reports

- A. Employer must file a report in writing of injuries which arise out of and in the course of employment resulting in the loss of more than three scheduled workdays.
 - This report must be filed between the 15th and 25th of each month.
- B. For death cases, the employer shall notify the Commission within 2 days following the death.
- C. These reports must be submitted on forms provided by the Commission.

V. Application Filing Periods - Statute of Limitations

- A. Petitioner must file within three years after the date of accident, or two years after the last compensation payment, whichever is later.
- B. In cases where injury is caused by exposure to radiological materials or asbestos, the application must be filed within 25 years after the last day that the petitioner was exposed to the condition.
 - 1. New legislation (SB 1596) allows toxic exposure claims to be filed beyond the 25-year period directly against the employer in civil court.

VI. Average Weekly Wage (AWW)

- A. General Rule: Divide the year's earnings (52 weeks) of the petitioner by the number of weeks worked during the year.
 - 1. e.g., Sum of wages for 52 weeks prior to the accident = \$40,000.
 - $\$40,000/52 = \769.23 .
- B. If petitioner lost five or more calendar days during a 52-week period prior to the accident, then divide the annual earnings by the number of weeks and portions of weeks the petitioner actually worked.
 - 1. e.g., Sum of wages for 52 weeks prior to the accident = \$30,000 but petitioner missed 10 days = $\$30,000/50 = \600.00 .
- C. If petitioner worked less than 52 weeks with the employer prior to the injury, divide amount earned during employment by number of weeks worked.
 - 1. e.g., Petitioner worked 30 weeks and earned \$20,000 during this time $\$20,000/30 = \666.66 .
- D. If due to shortness of the employment, or for any other reason it is impractical to compute the average weekly wage using the general rule, average weekly wage will be computed by taking the average weekly wage of a similar employee doing the same job.
- E. Overtime—Overtime is excluded from AWW computation unless it is regular or mandatory.
 - 1. If overtime is regularly worked, it is factored into AWW but at straight time rate.
 - 2. Overtime is considered regularly worked on a case by case basis, but it has been determined that it is regular when:
 - a. Claimant worked overtime in 40 out of 52 weeks
 - b. Working more than 40 hours 60% of time
 - c. Working overtime in 7 out of 11 weeks prior to an injury

3. If overtime is infrequently worked but it is mandatory it must be considered in AWW computation.
- F. When calculating a truck driver's AWW, the only funds to be considered are those that represent a "real economic gain" for the driver. *Swearingen v. Industrial Commission*, 699 N.E.2d 237, 240 (Ill. App. 5th Dist. 1998).
1. Petitioner's gross earnings for the 52 weeks prior to the date of loss including all earnings made per mile are divided by 52 to determine the AWW. However, any monies that the driver uses to pay for taxes, fees, etc., are not included in the gross earnings, as they do not represent real economic gain.

VII. Benefits and Calculations

- A. **Medical Treatment**—Pre-2011 Amendments: Petitioner chooses the health care provider, and the employer/insurer is liable for payment of:
1. First Aid and emergency treatment.
 2. Medical and surgical services provided by a physician initially chosen by the petitioner or any subsequent provider of medical services on the chain of referrals from the initial service provider.
 3. Medical and surgical services provided by a second physician selected by the petitioner (2nd Chain of Referral).
 4. If employee still feels as if he needs to be treated by a different doctor other than the first two doctors selected by the petitioner (and referrals by these doctors), the employer selects the doctor.
 5. When injury results in amputation of an arm, hand, leg or foot, or loss of an eye or any natural teeth, employer must furnish a prosthetic and maintain it during life of the petitioner.
 6. If injury results in damage to denture, glasses or contact lenses, the employer shall replace or repair the damaged item.
 7. Furnishing of a prosthetic or repairing damage to dentures, glasses or contacts is not an admission of liability and is not deemed the payment of compensation.
- B. **2011 Amendments** (In effect for injuries on or after September 1, 2011)
1. Section 8(4) of the Act now allows employers to establish Preferred Provider Programs (PPP) consisting of medical providers approved by the Department of Insurance.
 - The PPP only applies in cases where the PPP was already approved and in place at the time of the injury. Petitioners must be notified of the program on a form promulgated by the Illinois Workers' Compensation Commission (IWCC).
 2. Under the PPP, petitioners have 2 choices of treatment providers from within the employer's network. If the Commission finds that the second choice of

physician within the network has not provided adequate treatment, then the petitioner may choose a physician from outside the network.

3. Petitioners may opt out of the PPP in writing, at any time, but this choice counts as one of the employee's two choices of physicians.
4. If a petitioner chooses non-emergency treatment prior to the report of an injury, that also constitutes one of the petitioner's two choices of physicians.

C. Medical Fee Schedule—Illinois Legislature created a Medical Fee Schedule that enumerates the maximum allowable payment for medical treatment and procedures.

1. Maximum fee is the lesser of the health care provider's actual charges or the fee set for the schedule.
2. The fee schedule sets fees at 90th percentile of the actual charges within a geographic area based on zip code.
3. The 2011 Amendments to Section 8.2(a) of the Act reduces all current fee schedules by 30% for all treatment performed after September 1, 2011.
4. Out-of-state treatment shall be paid at the lesser rate of that state's medical fee schedule, or the fee schedule in effect for the Petitioner's residence.
5. In the event that a bill does not contain sufficient information, the employer must inform the provider, in writing, the basis for the denial and describe the additional information needed within 30 days of receipt of the bill. Payment made more than 30 days after the required information is received is subject to a 1% monthly interest fee. (Prior to the Amendments, this fee accrued after 60 days, now it accrues after 30 days.)

D. Temporary Total Disability (TTD)

1. 2/3 of AWW
2. If temporary total disability lasts more than three (3) working days, weekly compensation shall be paid beginning on the 4th day of such temporary total incapacity. If the temporary total incapacity lasts for 14 days or more, compensation shall begin on the day after the accident.
3. Minimum TTD rate is 2/3 (subject to 10% increase for each dependent) of Illinois minimum wage or Federal minimum wage, whichever is higher.
 - For the minimum and maximum rates for various dates.

E. Temporary Partial Disability (TPD)

1. 2/3 of the difference between the average amount the petitioner is earning at the time of the accident and the average gross amount the employee is earning on the modified job.
2. Normally applicable in light duty situations.

F. Permanent Partial Disability (PPD)

1. 60% of AWW

2. See MVP rate card for value of body parts
3. Minimum PPD rate is 2/3 (subject to 10% increase for each dependent) of Illinois minimum wage or Federal minimum wage, whichever is higher—as of 01/01/16 the Illinois minimum wage is higher (\$8.25/hour).

G. Person as a whole—Maximum of 500 weeks

1. General rule if injury is not listed on rate card, it is a person as a whole injury.
2. Common for back injuries.

H. Level of the hand for carpal tunnel claims = 190 weeks

1. For claims arising after September 1, 2011, the 2011 Amendments return the maximum award for the loss of the use of a hand for carpal tunnel cases to the pre-2006 level of 190 weeks. The maximum award for the loss of the use of a hand in carpal tunnel cases was previously 205 weeks. For all hand injuries not involving carpal tunnel syndrome, the maximum award for the loss of the use of a hand remains at 205 weeks.

I. Carpal Tunnel Syndrome

1. The 2011 Amendments to Section 8(e)9 cap repetitive Carpal Tunnel Syndrome awards at 15% permanent partial disability of the hand, unless the Petitioner is able to prove greater disability by clear and convincing evidence.
2. If the petitioner is able to prove by clear and convincing evidence greater disability than 15% of the hand, then the award is capped at 30% loss of use of the hand.
3. The 2011 Amendments apply to injuries arising after September 1, 2011, and only apply to cases involving *repetitive* Carpal Tunnel Syndrome. The cap of 15% or 30% does not apply to cases involving Carpal Tunnel Syndrome brought on by an acute trauma.

J. Disfigurement

1. Usually scarring.
2. Must be to hand, head, face, neck, arm, leg (only below knee), or chest above the armpit line.
3. Maximum amount is 150 weeks if the accident occurred before 07/20/05 or between 11/16/05 and 01/31/06.
4. Maximum amount is 162 weeks if accident occurred between 07/20/05 and 11/15/05 or on or after 02/01/06.
5. Disfigurement rate is calculated at 60% of AWW.
6. A petitioner is entitled to *either* disfigurement or permanent partial disability for a specific body part, not both.

K. Death

1. Maximum that can be received can't exceed the greater of \$500,000 or 25 years of benefits.

L. Permanent Total Disability

1. Only arises when the petitioner is completely disabled which means the petitioner is permanently incapable of work.
2. Statutory PTD
 - a. Statutory PTD arises when: loss of both hands, arms, feet, legs, or eyes.
 - b. Employee receives weekly compensation rate for life, or a lump sum (based on life expectancy)
 - c. PTD payments are adjustable annually at the same percentage increase as that which the state's average weekly wage increased, but this is capped at the maximum rate.
3. Odd-Lot PTD
 - a. A petitioner who has disability that is limited in nature such that he or she is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the petitioner may fall into the odd-lot category of permanent total disability.
 - b. The petitioner must establish the unavailability of employment to a person in his or her circumstances.
 - c. The petitioner must show diligent but unsuccessful attempts to find work, or that by virtue of the petitioner's medical condition, age, training, education, and experience the petitioner is unfit to perform any but the most menial task for which no stable labor market exists.
 - d. Once the petitioner establishes that he or she falls into this odd-lot category, then the burden of proof shifts to the respondent to show the availability of suitable work.

M. Vocational Rehabilitation

1. Employer must prepare a vocational rehabilitation plan when both parties determine the injured worker will, as a result of the injury, be unable to resume the regular duties in which he was engaged at the time of the injury, or when the period of total incapacity for work exceeds 120 continuous days.
2. If employer and petitioner do not agree on a course of rehabilitation, the Commission uses the following factors to determine if rehabilitation is appropriate:
 - a. Proof that the injury has caused a reduction in earning power.
 - b. Evidence that rehabilitation would increase the earning capacity, to restore the petitioner to his previous earning level.
 - c. Likelihood that the petitioner would be able to obtain employment upon completion of his training.
 - d. Petitioner's work-life expectancy.

- e. Evidence that the petitioner has received training under a prior rehabilitation program that would enable the petitioner to resume employment.
 - f. Whether the petitioner has sufficient skills to obtain employment without further training or education.
3. Employer is responsible for payment of vocational rehabilitation services.

N. Maintenance

- 1. Not technically TTD.
- 2. A component of vocational rehabilitation.
- 3. Maintenance is paid once claimant at MMI, and undergoing vocational rehabilitation.
- 4. Two common situations:
 - a. When petitioner is undergoing vocational rehabilitation and has been placed at MMI, maintenance picks up where TTD ceases (at the TTD rate) –similar to a continuation of TTD.
 - b. When employee has completed a vocational rehabilitation program and has yet to be placed in the labor market.

O. Wage Differential

- 1. Compensates for future wage loss
- 2. To qualify for wage differential, claimant must show:
 - a. A partial incapacity that prevents him from pursuing his or her “usual and customary line of employment.”
 - b. Earnings are impaired.
- 3. Employee receives 2/3 of the difference between the average amount he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident.
- 4. The 2011 Amendment to Section 8(d)(1) now provides that for accidents on or after September 1, 2011, wage differential awards shall be effective only until the Petitioner reaches age 67, or five years from the date that the award becomes final, whichever occurs later.

P. Ratings

- 1. The 2011 Amendments to Section 8.1b of the Act provide that physicians may now submit an impairment report using the most recent American Medical Association (AMA) guidelines.
- 2. In determining the level of permanent partial disability, the Act states that the Commission shall base its determination on the reported level of impairment, along with other factors such as the age of the Petitioner, the occupation of

the Petitioner, and evidence of disability corroborated by the treating medical records.

3. The relevance and weight of any factor used in addition to the level of impairment as reported by the physician must be explained in a written order by the Commission.

VIII. Preferred Provider Program

- A. The 2011 Amendments to the Workers' Compensation Act amended Section 8(4) of the Act to allow employers to establish preferred provider programs (PPP) consisting of medical providers approved by the Department of Insurance.
 - The PPP only applies in cases where the PPP was already approved and in place at the time of the injury.
 - Petitioners must be notified of the program on a form promulgated by the Illinois Workers' Compensation Commission.
- B. Under the Act, petitioners have 2 choices of treating providers from within the employer's network.
 - If the Commission finds that the second choice of physician within the network has not provided adequate treatment, the employee may choose a physician from outside of the network.
- C. A petitioner may opt out of the PPP in writing at any time, but the decision to opt out of the PPP counts as one of the petitioner's two choices of physicians.
- D. Under the Section 8(4), if the petitioner chooses non-emergency treatment prior to the report of an injury, that constitutes one of the petitioner's two choices of physicians.

IX. Illinois Workers' Compensation Procedure

- A. **Steps of a Workers' Compensation Claim and Appellate Procedure:**
 1. Petitioner files an Application of Adjustment of Claim with the Illinois Workers' Compensation Commission. The Application for Benefits must contain:
 - a. Description of how the accident occurred
 - b. Part of body injured
 - c. Geographical location of the accident
 - d. How notice of the accident was given to or acquired by the employer
 2. After Application is filed, the claim is assigned to an Arbitrator. The claim will appear on the Arbitrator's status call docket every three months unless it is motioned up for trial pursuant to 19(b) or 19(b-1).

- a. Three arbitrators are assigned to each docket location. These three arbitrators rotate to three different docket locations on a monthly basis.
 - b. One of the three arbitrators assigned to a particular docket location will be assigned the case. If a party requests a 19(b) hearing, the hearing will be held before the assigned arbitrator, even if that arbitrator is not at the docket where the case is located.
3. If no settlement is reached, the case can be tried before the Arbitrator for a final hearing.
 - a. Arbitrator is the finder of fact and law, and issues a decision.

B. Pretrial Procedure

1. Depositions - cannot take the petitioner's deposition.
2. Subpoenas - easy to get, normally Arbitrator has signed in advance
3. Records of Prior Claims - determine if a credit allowed
 - No credits for person as a whole injuries (including shoulders, which are now treated as person as a whole injuries)
4. Section 12 Medical Examination - petitioner must comply
 - a. Used to avoid penalties
 - b. Used to investigate petitioner's prior treatment and diagnoses
 - c. Can be scheduled at reasonable intervals
 - d. Must pay mileage
5. Settlement

C. Arbitration Procedure

1. When the Application for Adjustment of Claim is filed, the Commission assigns the docket location (normally within the vicinity of where the injury occurred).
2. Cases appear on the call docket on three-month intervals until the case has been on file for three years, at which point it is set for trial unless a written request has been made to continue the case for good cause. (This request must be received within 15 days of the status call date).
 - a. Cases that are more than three years old are referred to as "above the red line," and red line cases are available on the call sheet at the Illinois Workers' Compensation Commission website.
 - b. If no one for the petitioner appears on a red line case at the status conference, the case can be dismissed by the arbitrator for failure to prosecute.
3. If a case is coming up on the call docket, a party can request a trial.
 - This request must be served on opposing counsel 15 days before the status call.
 - At the status call, the attorneys will select a time to try the case.

4. If both parties are in agreement, they may request a trial at the monthly call docket.
5. If a case is not coming up on the call docket, and a party has a need for an immediate hearing, the party can file a motion to schedule the case for a 19(b) hearing.
 - a. The party requesting the 19(b) hearing must only give the other party 15-days notice.
 - b. A 19(b) hearing is not proper where the employee has returned to work and the only benefit in dispute amounts to less than 12 weeks of temporary total disability.
6. A pretrial conference can be requested by either party prior to the start of a trial.
 - The benefit of a pretrial conference is that the same arbitrator over a pretrial conference will hear the actual trial, so the parties will have a good idea how the arbitrator feels about the case or a particular issue.
 - Both parties must consent to a pretrial conference.
7. Emergency Hearings under Section 19(b-1)
 - a. Petitioner not receiving medical services or other compensation.
 - b. Petitioner can file a petition for an emergency hearing to determine if he is entitled to receive payment or medical services.
 - c. Similar to hardship hearings in Missouri
 - d. Effectively serves the same purposes as a 19(b) hearing but affixes deadlines.
8. If a case is tried by an arbitrator and the arbitrator's award resolves the case (*i.e.*, the parties do not reach a settlement) medical benefits will remain open.
 - Future medical benefits can only be closed through a settlement agreement.
 - Modification of permanency benefits under 19(h) can only be closed through a settlement agreement.

D. Appellate Procedure

1. Arbitrator's decision can be appealed to a panel of three Commissioners of the Illinois Workers' Compensation Commission (ten members appointed by Governor—no more than six members of the same political party).
 - a. Must file a petition for review within 30 days of receipt of Arbitrator's award.
2. Decision of the Commissioners can be appealed to the Circuit Court.
3. Circuit Court Decision can be appealed to the Illinois Appellate Court's Industrial Commission Panel.
4. If Appellate Panel finds case significant enough, it will submit it to the Illinois Supreme Court.

X. Penalties Relating to Actions of Employer/Insurer

A. 19(k) Penalty for Delay—PPD, TTD and/or Medical

1. When there has been unreasonably delayed payment or intentionally underpaid compensation.
2. Penalty is 50% of compensation additional to that otherwise payable under the Act.
3. This section is invoked when the delay is a result of bad faith.
4. Amount of penalty is based on amount of benefits which have accrued.
5. Commission will use Utilization Review as a factor in determining the reasonableness and necessity of medical bills or treatment.
 - Utilization review can also be utilized to avoid penalties.

B. 19(l) Penalty for Delay—TTD

1. If employer or insurance carrier fails to make payment “without good and just cause”
2. The arbitrator can add compensation in the amount of \$30/day not to exceed \$10,000.
3. This section invoked even if the payment is not a result of bad faith
4. Generally penalties are not awarded if the employer has relied on a qualified medical opinion to deny payment of benefits.

C. Employer’s Violation of a Health and Safety Act

1. If it is found that an employer willfully violated a health/safety standard, the arbitrator can allow additional compensation in the amount of 25% of the award.

XI. Penalties Relating to Actions of the Petitioner

A. Intoxication

- For accidents before September 1, 2011, if the court finds that accident occurred because of intoxication then injury is not compensable.
1. Intoxication not per se bar to workers’ compensation benefits.
 2. Intoxication will preclude recovery if it is the sole cause of the accident, or is so excessive that it constitutes a departure from employment.
 - For accidents on or after September 1, 2011, the Amended Section 11 of the Act provides that no compensation shall be payable if:
 3. The petitioner’s intoxication is the proximate cause of the petitioner’s accidental injury.
 4. At the time of the accident, the petitioner was so intoxicated that the intoxication constituted a departure from the employment.

- The 2011 Amendment provides that if at the time of the accidental injuries, there was a 0.08% or more by weight of alcohol in the petitioner's blood, breath, or urine, or if there is any evidence of impairment due to the unlawful or unauthorized use of cannabis or a controlled substance listed in the Illinois Controlled Substances Act, or if the petitioner refuses to submit to testing of blood, breath, or urine, there shall be a *rebuttable presumption* that the petitioner was intoxicated and that the intoxication was the proximate cause of the petitioner's injury.
- The petitioner can rebut the presumption by proving by a preponderance of the evidence that the intoxication was not the proximate cause of the accidental injuries.

B. Unreasonable/Unnecessary Risk

1. If the petitioner voluntarily engages in an unreasonable risk (which increases risk of injury), then any injuries suffered do not arise out of the employment.

C. Fraud

1. The 2011 Amendments provide the Department of Insurance with authority to subpoena medical records pursuant to an investigation of fraud.
2. The 2011 Amendments eliminate the requirement that a report of fraud be forwarded to the alleged wrongdoer with the verified name and address of the complainant.
3. The 2011 Amendments provide for penalties for fraud, based on the amount of money involved. These penalties begin at a Class A misdemeanor (less than \$300) to a Class I felony (more than \$100,000). The Amendments also require restitution be ordered in cases of fraud.

XII. Workers' Occupational Diseases Act - Covers slowly developing diseases that do not arise out of an identifiable accident or occurrence but not repetitive trauma.

- Occupational Disease** – “A disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment.”
- Exposure can be for any length of time (even if very brief).
- The employer that provided the last exposure is liable for compensation no matter the length of the last exposure (unless claim is based on asbestosis or silicosis - must be exposed for at least 60 days by an employer for it to be liable).
- Petitioner must prove he was exposed to a risk beyond that which the general public experiences.
- Applies only to diseases that are “slow and insidious”

1. e.g., kidney ailment cause from repetitive exposure to liquid coolant.
2. e.g., asthma aggravated by white oxide dust.

XIII. Repetitive Trauma - Covered Under the Workers' Compensation Act

A. Date of Injury for Repetitive Trauma

1. Date of injury is the date on which the injury “manifests itself.”
2. “Manifests itself” - General Standard - the date on which both the fact of the injury and the causal relationship of the injury to the claimant’s employment would have become plainly apparent to a reasonable person—Landmark case: *Peoria County Belwood Nursing Home v. Indus. Commn.*, 505 N.E.2d 1026 (Ill. App. 1987).
3. The *Belwood* Standard has been expanded slightly over the years.
4. Courts have found date of injury to be:
 - a. Date injury became apparent to a reasonable person.
 - b. Last date of work at the employer prior to the disablement (time at which employee can no longer perform his job).

XIV. Third-Party Recovery

- A. Workers’ Compensation Act prohibits petitioners from bringing tort actions against their employers
- B. An injured petitioner may pursue tort action against a third party.
- C. The third party has a right to contribution from the employer which is limited to its liability under the Workers’ Compensation Acts.
- D. Typically respondents can recovery around 70 to 75% of what was paid out in benefits.

XV. Assaults

- A. If subject matter causing altercation is related to work then injuries from an assault are compensable.
- B. Exception: If the aggressor is injured = no compensation.
e.g., Waitresses arguing over tables and the argument turns physical when one waitress strikes the other—this is compensable.

XVI. Minors (under 16 years of age)

- A. Receive a 50% increase in benefits even if they fraudulently misrepresent their age.
- B. Minors may elect within six months after accident to reject the Workers' Compensation Remedies and sue in civil court (potentially high payout).

XVII. Voluntary Recreational Programs

- A. Injuries incurred while participating in voluntary recreational programs do not arise out of and in the course of the employment even though the employer pays some or all of the cost.
- B. If the employer orders the employee to participate then the recreational injury is compensable.

XVIII. Second Injury Fund

- A. Only pays when employee has previously lost an arm, leg, etc. and subsequently loses another arm, leg, etc. in an independent work accident that results in the employee being totally disabled.
- B. Present employer liable only for amount payable for the loss in the second accident.

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RECENTLY ASKED QUESTIONS IN ILLINOIS

FROM ISSUES ADDRESSED IN RECENT ILLINOIS CASES

Q: Is a petitioner entitled to TTD benefits when an employer offers transitional, light-duty work at another entity within the petitioner's restrictions?

A: No, as long as the petitioner's earnings remain the same and remains an employee of Respondent.

In *Stegan v. Reladyne, LLC*, the Commission reversed the arbitrator's ruling and held that a petitioner was not entitled to TTD benefits during a period when Respondent enrolled the petitioner in its transitional work program, matching the petitioner with a position within his restrictions. The petitioner sustained a compensable injury to his shoulder, which precluded him from working his normal and usual tasks as a forklift operator. However, the authorized treating physician allowed him to return to work in a light-duty capacity. Unable to accommodate the petitioner's work restrictions, Respondent placed the petitioner in its Transitional Work Program, specifically with Habitat for Humanity, where his work activities included sorting of donations and customer service – within his restrictions. The petitioner refused to participate in the program and did not report to Habitat for Humanity on the day he was scheduled to work because he testified that Respondent, and not Habitat for Humanity, was his employer.

The Commission determined that because the petitioner remained an employee of Respondent, was to be paid his regular salary and subject to Respondent's human resources and attendance policies, his refusal to report for the assigned, transitional work disqualified him from entitlement to TTD benefits. The Commission noted the petitioner is not entitled to TTD benefits if work within the prescribed restrictions can be found regardless of with whom and is not otherwise shown to be unreasonable. The petitioner in this case could not demonstrate that he was unable to work, given that the transitional light-duty position offered by Respondent fell within his restrictions. As such, the Commission held that the petitioner was not entitled to TTD benefits during the period of time Respondent provided light-duty, transitional work and the petitioner refused to show up for the same.

Gary Stegan, Petitioner, 17 IL. W.C. 07749 (Ill. Indus. Com'n Mar. 21, 2019)

Q: Is a petitioner entitled to maintenance benefits when s/he is not undergoing a self-directed job search or formal vocational rehabilitation after being asked to apply for a permanent, light duty job within his restrictions following termination by the employer?

A: No, likely not.

In *Beverage v. Illinois Workers' Compensation Commission*, the appellate court held that a petitioner was not entitled to over three years of maintenance benefits because did not participate in a self-directed job search or vocational rehabilitation program after being

terminated from Respondent and put on 15-pound lifting restriction. The petitioner injured his low back while working for the employer. While undergoing treatment, Respondent terminated the petitioner but later asked the petitioner to interview for a different job with work restrictions in a supervisory capacity, but the petitioner did not apply because he did not think he was qualified. Respondent paid TTD benefits from the date of termination through the date he was given a 15-pound lifting restriction by his treating physician. Instead of looking for other work, the petitioner did not look for work following his termination and began receiving Social Security Disability benefits shortly after the date he was provided light-duty work restrictions. The petitioner underwent a vocational evaluation approximately three years later, and the vocational counselor opined the work injury reduced his earnings capacity.

The appellate court found that, because the petitioner never showed an intention to return to work, although he was capable of returning to work within a 15-pound lifting restriction, vocational rehabilitation was neither mandatory nor appropriate. Further, the petitioner did not engage in a vocational rehabilitation program or self-directed job search following his termination, so he was not entitled to maintenance benefits. In fact, the appellate court noted the Commission found the petitioner abandoned the job market on the date TTD benefits were terminated by Respondent, as he did not seek alternative employment within his restrictions and began receiving Social Security Disability benefits. Therefore, the appellate court held the petitioner was not entitled to maintenance benefits. The court also found the petitioner did not sustain a reduction in earnings capacity due to the work injury because the vocational counselor's opinions were based on insufficient knowledge about the petitioner's prior employment history. Therefore, the appellate court held the petitioner was not entitled to wage differential benefits either.

Beverage v. Illinois Workers' Comp. Comm'n, 2019 IL App (2d) 180090WC

Q: Is an injury that occurs going up/down stairs compensable when the stairs present no defective or hazardous conditions and the petitioner was walking to clock in for his shift?

A: No, it is not compensable because no defective conditions were present.

In *Ashby v. Illinois Workers' Compensation Commission*, the appellate court held in an unpublished decision that a petitioner did not sustain an accident that arose out of employment when he fell down stairs as he was going to clock in for his work shift. The petitioner injured his neck, back, and head when he fell up the stairs at Respondent while going to clock in. The petitioner testified that the stairs were wet from the rainfall outside, but conceded was not carrying anything or in a rush. The petitioner also testified he was "instructed" to use the front stairway to clock in and clock out. However, Respondent's witness testified the stairs were dry, and that there was no company rule that required employees to take the stairs to clock in or clock out. Respondent's witnesses also testified the petitioner's boots were untied when they approached him shortly after the fall. The petitioner also testified the general public was not allowed to use the stairwell where he

fell, but Respondent's witnesses testified customers regularly go upstairs for various reasons.

The appellate court held that the petitioner's injury was "in the course of" employment because he was on Respondent's premises just after he entered the workplace to clock in. However, the court held the injury did not "arise out of" employment because traversing stairs was not an employment risk and the stairs where he fell were not defective, noting the Commission rejected the petitioner's testimony that the stairs were wet. As such, the appellate court held this was a neutral risk where the petitioner was not exposed to a risk to a greater degree than the general public because he was not carrying anything or in a rush when he fell. In short, the court found no evidence the petitioner was more likely to slip and fall while traversing the front staircase on Respondent's premises than he or any other member of the public would be likely to fall while traversing any other stairway.

Ashby v. Illinois Workers' Comp. Comm'n, 2019 IL App (3d) 180319WC-U

Q: Is an injury compensable when the petitioner was involved in a motor vehicle accident while traveling to her doctor's appointment for authorized treatment related to a compensable injury – but at her own chosen treating doctor's facility?

A: Probably not, especially because the petitioner chose her own treating doctor.

In *Gaytan v. Illinois Workers' Compensation Commission*, the appellate court held in an unpublished decision that the petitioner's injury did not arise out of employment when she was injured in a motor vehicle accident traveling to a doctor's appointment for her work injury. The petitioner injured her elbow and received treatment authorized by Respondent. The petitioner did not speak English and Respondent provided a translator for her during her medical appointments. The petitioner scheduled her own follow-up appointment at her own selected provider for the work injury, and while driving to the appointment following the translator, the petitioner was involved in a vehicular accident in which she sustained injuries. The petitioner attempted to argue that her injury was a condition of her employment because the translator had "instructed" her to follow her and the translator was also provided by Respondent, but the appellate court found no merit in that argument.

Instead, the appellate court determined Respondent did not require the petitioner to attend the appointment and found that the petitioner's act of following the translator to the appointment was not a condition of her actual employment. Therefore, the employee was not injured as a condition of her employment merely because she was following the Respondent-provided translator to a follow up appointment for which her employer was unaware. The appellate court further held that Respondent did not require or demand the petitioner to receive medical treatment from this particular provider, but merely suggested this provider out of a list of many providers. As such, the court held the petitioner's motor vehicle accident did not arise out of employment.

Gaytan v. Illinois Workers' Comp. Comm'n, 2019 IL App (3d) 180141WC-U

Q: Is an injury compensable when the petitioner slipped and fell on ice in an employer-owned parking lot regardless of the fact the general public is exposed to that same risk of falling on ice?

A: Yes, regardless of that fact.

In *Smith v. Illinois Workers' Compensation Commission*, the appellate court held in an unpublished decision that the petitioner's injury did arise out of employment when he slipped and fell on ice in Respondent's parking lot. The petitioner sustained injuries while walking out to her car parked in Respondent's parking lot after her shift had ended. It had been snowing that day and Respondent had previously plowed the lot and salted it. The parking lot where the petitioner fell was used by both employees of Respondent and the general public, such as visitors. The arbitrator originally awarded compensation, but this decision was reversed by the Commission because it held the petitioner was not exposed to any greater risk than members of the general public due to the lot being used by both groups. The circuit court then reversed the Commission and reinstated the arbitrator's award. However, the appellate court held that the petitioner's injuries did arise out of employment and awarded benefits, upholding the circuit court's decision.

The appellate court used a two-prong analysis for this slip-and-fall on ice case where the petitioner injured herself on Respondent's parking lot. The first inquiry was whether the petitioner's injury occurred on Respondent's parking lot, which it did. Given this, the court then turned to its second inquiry, which was whether the injury was due to some hazardous or defective condition on Respondent's premises. The appellate court found the ice and snow on Respondent's premises did constitute a hazardous condition. Given these two prongs being satisfied, the court held the injury arose out of employment and gave no further consideration as to whether the petitioner was exposed to a risk beyond that of the general public. As such, the court generally held that snow or ice in Respondent's parking lot constitutes a hazard or defective condition, creating an increased risk.

Smith v. Illinois Workers' Comp. Comm'n, 2019 IL App (3d) 180251WC-U

Q: Is an employer required to maintain workers' compensation insurance, and considered an "employer" under the Act when they hired the petitioner, a subcontractor, to remodel a home, provided him with materials and directed him how to perform his job duties?

A: Yes, all of these factors constitute "control" over the petitioner's job duties.

In *Tomasz Maj v. Chris Home Remodeling, Inc. & Krzysztof Cholko*, the Commission held that Respondent, a home remodeling business, violated the Illinois Workers' Compensation Act by not purchasing and maintaining workers' compensation insurance when the petitioner sustained injuries in an explosion at a job site. The petitioner sustained injuries to multiple body parts while working with a welding torch on a job site that involved remodeling. Respondent provided the equipment used by the petitioner,

assigned the work for the petitioner to perform and determined what days he would work. Respondent could terminate the petitioner from the project at any time. Respondent was hired as a general contractor to perform remodeling work on the site where the explosion occurred. Respondent knew that it was required to carry workers' compensation insurance if he had any employees but decided not to purchase any because he thought everyone working on the project was a subcontractor, including the petitioner. Respondent paid the petitioner in cash and the petitioner only came in when Respondent instructed him to do work.

The Commission found that Respondent was engaged in an extra hazardous business, namely, the remodeling of any structure and, therefore was subject to the Act's requirement to provide workers' compensation insurance to its employees. The Commission further found that the petitioner was an employee of Respondent because it provided the tools, materials, supplies, and transportation to the job site, assigned the work the petitioner was to perform, determined what days he could work, and could fire him from the project at any time. All of these factors evidenced an employment relationship between the parties. Because Respondent knowingly failed to provide workers' compensation insurance, it could not be afforded the benefits and protections under the Illinois Workers' Compensation Act and can be sued in civil court.

Tomasz Maj, Petitioner, 18 IL. W.C. 03176 (Ill. Indus. Com'n Jan. 4, 2019)

Q: Is an alleged injury compensable when the petitioner cannot recall the date of injury or what caused his current condition of ill-being despite having consistent symptoms of ongoing shoulder pain following the alleged injury date?

A: Probably not.

In *Daniel Johnson v. Southern Illinois University*, the Commission held that the petitioner's alleged injury did not arise out of employment. The petitioner sustained an alleged work injury while working as a temporary employee on September 15, 2014. He reported to the University's workers' compensation coordinator on September 18, 2014 that he had shoulder surgery and bicep repair 2 years prior and, although he was uncertain what happened, he had right shoulder pain three days prior on September 15, 2014. He worked the following day on September 19, 2014. He completed an Employee's Notice of Injury on September 22, 2014 listing a date of injury of September 9, 2014, but the Supervisor's Report of Injury completed on the same date listed a date of injury of September 15, 2014.

The Commission affirmed the arbitrator's decision denying that the petitioner's injury arose out of employment because petitioner put forth several date of injury on various forms and in the medical records. Furthermore, the petitioner told the University's workers' compensation coordinator he was not certain what caused his right shoulder pain. There were also inconsistent mechanisms of injury reported by the petitioner in the medical records. However, at trial, the petitioner could pinpoint the exact moment of the accident, although he couldn't say whether it occurred on September 9, 2014 or September 15, 2014. The petitioner also testified he could not lift his shoulder but

continued to work for 4-10 days for the University after both dates of injury. As such, the Commission affirmed the arbitrator's decision to deny benefits citing an inconsistent timelines and descriptions of the accident by the petitioner. The arbitrator also noted that the petitioner failed to provide a causation opinion to support its claim because the treating physician could not say whether he actually re-injured his shoulder from the prior surgery performed before the alleged work injury.

Daniel Johnson, Petitioner, 15 IL. W.C. 16270 (Ill. Indus. Com'n Jan. 14, 2019)

Q: Is an injury compensable when no mention of the nail alleged to have caused the injury is documented until 18 months after the date of injury?

A: Likely not, especially in light of the medical records and preexisting history of petitioner's uncontrolled diabetes.

In *Jorge Torres Pineda v. Trinity Labor Services*, the Commission reversed the arbitrator's decision and held that the petitioner did not sustain an accident that arose out of employment and did not sustain a compensable injury. The petitioner alleged an injury to his right foot after he stepped on a nail while working for Respondent.

However, the Commission noted that the petitioner provided conflicting testimony about the timeline when he noticed the nail in his shoe, as the medical records' first mention of a nail occurs 18 months after the date of injury. The Commission also found no evidence the petitioner actually injured his foot while working at Respondent because the only employment history provided by the petitioner was at a different employer. The medical records also do not support the proposition that a puncture wound occurred, contrary to the petitioner's testimony that this mechanism of injury happened. The Commission also found it significant that the petitioner had a long history of uncontrolled diabetes. As such, the Commission held the petitioner did not sustain an accident that arose out of employment and that his condition of ill-being was not causally-connected to his alleged accident.

Jorge Torres Pinedo, Petitioner, 13 IL. W.C. 40561 (Ill. Indus. Com'n Jan. 10, 2019)

Q: Is an injury compensable when the petitioner continues to work a very physically demanding job after an undisputed work accident, then later receives treatment?

A. Yes, as long as the work accident caused the need for treatment.

In *Johnie Downey v. Village of Palatine*, the Commission affirmed the arbitrator's finding that the Petitioner sustained a compensable injury to his left shoulder. The Petitioner, a firefighter/paramedic, sustained an undisputed work accident on April 3, 2014, during a realistic training exercise, which involved hanging outside a window. While hanging, the Petitioner felt a popping and burning in his left shoulder and reported the injury that day. The Petitioner finished his shift and continued working his regular shift, which he described as "very physically demanding," until August 6, 2014. The Petitioner was eventually diagnosed with a SLAP tear, among other things, and underwent surgery,

consisting of a SLAP debridement and repair with biceps tenodesis. The Respondent did not dispute the accident but did dispute that the work accident caused the need for the shoulder surgery and associated benefits.

The arbitrator found adequate evidence that the Petitioner experienced pain from the date of injury continuously from that date on, based on the histories in the medical records, report of injury, and co-worker testimony that he continued to ice his left shoulder after the date of injury. Although Respondent presented evidence showing the Petitioner participated in a “Rugged Maniac” race on August 2, 2014, which involved strenuous overhead activities, the Petitioner denied he was able to engage in those types of strenuous activities during the race. And, although the Petitioner did not report his participation to any of the medical providers, the arbitrator noted the Petitioner worked two shifts after this race and the requirements of the race were no more strenuous than his duties as a firefighter/paramedic. The Respondent also presented the Petitioner’s Facebook page, on which he posted multiple comments noting his rigorous physical fitness program, including doing multiple pushups and pull-ups, though he indicated he was doing it while accommodating his injury. However, the arbitrator did not find this persuasive. The arbitrator also found the opinion of the Petitioner’s treating surgeon more credible than the Respondent’s Section 12 IME doctor. Thus, the Commission affirmed the arbitrator’s decision that the work injury caused his condition of ill-being and awarded benefits, including medical, TTD, and 16% BAW for PPD.

Johnie M. Downey, Petitioner, 14 IL. W.C. 28250 (Ill. Indus. Com’n Nov. 21, 2018).

Q. Is an injury compensable if a petitioner gets a hand caught in a door with no defects, resulting in a crush injury.

A. Yes, since the door weighed as much as 400 pounds and was an employment-rated risk.

In *Christie Robinson v. State of Illinois / Vienna Correctional Center*, the Commission affirmed the arbitrator’s finding that the Petitioner sustained a compensable injury because it was incidental to employment. The Petitioner, a correctional officer, injured her left hand on September 15, 2017, when a steel door slammed shut on her left hand while leaving a room after relieving the visiting room officer of their duties. The Petitioner was diagnosed with a crush injury and x-rays revealed fractures of the terminal tufts of the third and fourth fingers. Of note, the door-in-question is where the general public enters and exits the prison and no defects were present in the door or area, but the heavy door does weigh as much as 400 pounds.

The arbitrator found that an accident arose out of employment because it was incidental to employment and an employment-related risk, as the prison doors are not the types of doors that are used by the general public. Although the arbitrator found this was not a risk to which the general public is exposed (i.e., not a neutral risk), she went on to state that it would still be a compensable case even under the neutral risk analysis because the sheer weight of that type of steel door would have constituted a qualitative increased risk

and the Petitioner's job repeatedly exposed her to this type of door throughout her work day, which would have constituted a quantitative increased risk. Thus, the Commission affirmed the arbitrator's award of benefits.

Christie Robinson, Petitioner, 17 IL. W.C. 30770 (Ill. Indus. Com'n Nov. 21, 2018).

Q. Does an injury have to be reported in a timely fashion to be compensable?

A. In most cases, yes

In *Willie Young v. Chicago Transit Authority*, the Commission affirmed the arbitrator's finding that the Petitioner failed to provide timely notice of an accident and failed to prove he sustained an accident that arose out of and in the course of employment. The Petitioner, a bus servicer, alleged he sustained a work-related accident on July 10, 2015, while moving a 55-60 gallon antifreeze jug and allegedly felt a pulling sensation in his low back. An MRI of the lumbar spine showed degenerative changes most significant at L5-S1 with moderate to severe bilateral neural foraminal narrowing. The Petitioner underwent physical therapy and an epidural steroid injection. After obtaining a second opinion and a diagnosis of a lumbar herniated disc, he underwent spinal decompression surgery.

The arbitrator found the Petitioner failed to give notice of his accident to the Employer or Insurer. The Petitioner initially testified he gave notice to his manager when he asked for help to move the antifreeze jug. However, he later contradicted that testimony by specifically denying he actually told his manager he injured his back during his shift and, instead, conceded he only asked for help to move it. The arbitrator found significant that the manager was not called to testify at trial. The Petitioner then testified he notified the Employer on July 11, 2015, when he called another manager on duty "to let him know he wouldn't be able to come in." However, the Petitioner testified specifically that he merely said he wouldn't be able to come in because he "was sick" as opposed to reporting he was having back problems or that he sustained an injury.

The arbitrator found compelling that the Petitioner testified more than once that he did not notify his managers specifically about the alleged accident when he had ample opportunity to do so – especially at the time he was working alongside his manager on the date of injury. Additionally, the Petitioner never presented any testimony that he told his manager(s) about why he needed help or could not come into work the following day, or an explanation as to why he failed to report this injury. As such, this diminished the Petitioner's credibility and showed he did not report the accident in a timely fashion, thus, barring benefits under Section 6(C) of the Act. The arbitrator also noted glaring inconsistencies in the medical records regarding the accident, mechanism of injury, etc. that casted further doubt an accident occurred at all.

Willie Young, Petitioner, 15 IL. W.C. 31771 (Ill. Indus. Com'n Nov. 30, 2018).

Q. Does an employer have to have workers' compensation insurance?

A. Yes

In *Insurance Compliance Division v. Chain-O-Lakes Dental Laboratory, Inc.*, the Commission assessed penalties totaling \$850,033.28 against Chain-O-Lakes (the Employer) for failing to have workers' compensation insurance for its 18 employees for a period of 1,717 days between August 24, 2007 and April 25, 2012. Of note, the Commission found the Employer had workers' compensation insurance both prior to and after this period, thereby complying with Section 4(a) of the Act during those times, but that it failed to have workers' compensation during the specified 1,717-day period. The Employer had also previously entered into a compromised settlement agreement with the Insurance Compliance Department regarding its non-compliance but failed to comply with its terms despite being contacted several times by the Department.

Citing Section 4 of the Act, the Commission held the Employer's actions constituted a "willful failure or refusal" to comply with the Act (i.e., maintaining or having worker's compensation insurance) and assessed a \$500-per-day penalty for each day they failed or refused to have insurance during that 1,717 day period. Based on the factors to be considered in assessing penalties, the Commission put significant weight on the length of time (1,717 days) that Employer failed to maintain workers' compensation insurance for its up-to 18 employees and the fact it was aware of its obligation to do so, which was shown by its having insurance before and after this specific time period.

Ins. Compliance Div., Petitioner, 11 IL. INC. 504 (Ill. Indus. Com'n Oct. 30, 2018).

Q. Can a workers' compensation case be active after 5 years of "no action"?

A. Probably, if the petitioner can prove they are showing good cause for a continuance.

In *Kazimierz Malik v. MP Trailer Repair, Ltd.*, the Commission reversed an arbitrator's decision to deny the Petitioner's Petition for Reinstatement, and reinstated the workers' compensation case. The Petitioner filed an Application for Adjustment of Claim on May 13, 2009 against MP Trailer Repair and the Illinois Workers' Benefit Fund. From 2009 to 2014, no significant action was taken in the case. On March 14, 2014, the arbitrator dismissed the case for want of prosecution, after denying the Petitioner's request for a continuance, noting the Petitioner showed no evidence it attempted to provide locate or proper notice to MP Trailer Repair in the almost-5 years since the Application was filed. Thus, the Arbitrator found that "good cause" was not shown to allow for a continuance of the case because practically no activity had taken place in nearly 5 years.

However, the Commission reversed and found that "good cause" was shown to necessitate the continuance of the case against an uninsured employer due to the added difficulties involving the same. Specifically, the added difficulties included the inclusion of the Attorney General's office, the need to obtain a certificate of no insurance from the Commission's Non-Compliance Department, and serving notice to "oftentimes

uncooperative and/or AWOL party opponents.” The Commission disagreed with the arbitrator and determined the evidence showed the Petitioner had been proactive on most, if not all, of these fronts and reinstated the case.

Kazimierz Malik, Petitioner, 09 IL. W.C. 20637 (Ill. Indus. Com'n Oct. 23, 2018).

Q. Can a petitioner request a subpoena for files from the defendant just because they want them?

A. No, documents may only be subpoenaed to be produced at the time and place set for hearing of the cause.

In *Nicole St. Pierre v. La Leche League International*, the arbitrator denied Petitioner's subpoena requesting “all non-privileged materials in the [Insurer's] claim file regarding this petitioner,” specifically communications between the claims adjuster at the Insurer and the Petitioner. The arbitrator found the “subpoena plainly failed to comply with the applicable Section 9030.50, Subpoena Practice at the Commission” and that “[t]he subpoena was fatally invalid and defective at the moment it was drafted.” Specifically, Rule 9030.50 of the Rules Governing Practice Before the Workers' Compensation Commission provides that witnesses or documents may only be subpoenaed to appear or be produced at the time and place set for hearing of the cause. The Respondent also asserted that there had been no personal service or payment of statutory fee and travel expenses in conjunction with the subpoena. As such, the Petitioner's subpoena request was denied and the Commission ruled it lacked jurisdiction to make a ruling on that issue thereafter.

Nicole St. Pierre, Petitioner, 16 IL. W.C. 00205 (Ill. Indus. Com'n Nov. 21, 2018)

Q. Is employer A liable for an employee who originally had a compensable claim with employer A, but then sustained additional injuries while working for employer B?

A. Yes, as long as the additional injuries did not break the chain of causation and the additional injuries would not have occurred but for the original injury.

In *Par Electric v. Illinois Workers' Compensation Commission*, the Appellate Court of the Third District affirmed the Commission's finding that an intervening accident did not break the chain of causation or constitute an independent intervening cause of the Petitioner's original injuries. The Petitioner injured his right arm on June 16, 2014, while working for Par Electric. He was diagnosed with a right shoulder tear due to dislocation and surgery was performed. He was allowed to return to work full duty, without restrictions on March 11, 2015, but was asked to follow-up in 4 weeks, so he was not placed at MMI. On April 1, 2015, and April 3, 2015, the Petitioner injured his right shoulder while working for a different employer, Henkels & McCoy. He was diagnosed with a SLAP tear and underwent another surgery to repair the same – although the treating surgeon also removed a loose anchor from the first operation during this operation. Three separate Applications for Adjustment of Claim were filed for the accident dates.

The arbitrator found Par Electric was liable for medical and TTD benefits through March 11, 2015 (i.e., for the initial date of injury), but that Henkels & McCoy was liable for medical and TTD benefits after April 1, 2015 (i.e., for the subsequent dates of injury). Although the Commission agreed with the arbitrator, holding that the Petitioner sustained three distinct accidents, it disagreed with the arbitrator in its own determination that the two subsequent accidents in April 2015 failed to constitute independent intervening accidents sufficient to break the causal connection from the initial June 16, 2014 accident. Thus, the Commission determined that the Petitioner's current condition of ill-being was causally related to the original June 16, 2014 accident and held that Par Electric was liable for all medical and TTD benefits resulting from the Petitioner's injuries.

The appellate court agreed with the Commission and determined that the subsequent April 2015 accidents did not break the causal connection from the June 2014 accident and did not constitute intervening accidents. The court noted that, under the Act, an employer is only relieved of liability if the intervening event completely breaks the causal chain between the original work injury and the ensuing condition of ill-being. In other words, when an employee's condition is weakened by a work-related accident, a subsequent accident, whether work related or not, that aggravates the condition does not break the causal chain and is not an intervening accident sufficient to break the chain of causation from the original work injury. So long as the Petitioner's condition of ill-being would not have resulted "but for" the original injury, the first employer remains liable. Here, the appellate court found the Petitioner's original injury made the Petitioner more susceptible to dislocation (which is what occurred in April 2015) and that the Petitioner had not completely healed from the first surgery. The subsequent injuries caused a condition (a SLAP tear) that was an extension or a natural consequence of the initial injury and condition (labral tear) caused by the June 2014 accident. This opinion was in line with the Petitioner's treating surgeon and in contrast the Respondent's Section 12 IME doctor. In other words, the appellate court found that the Petitioner's dislocation and resultant SLAP tear in April 2015 would not have occurred "but for" the June 2014 accident, which caused the Petitioner to be more susceptible to these types of injuries and conditions.

Par Elec. v. Illinois Workers' Comp. Comm'n, 2018 IL App (3d) 170656WC.

Q. Does an injury arise out of employment if the petitioner slips and falls on a sidewalk while on break?

A. Yes, if there is a hazardous condition on the employer's owned and maintained premise, the injury is work related.

In *Lori Crowder v. Illinois Workers' Compensation Commission*, the Appellate Court of the Fourth District reversed the Commission's decision in holding that the Petitioner did sustain an accident that arose out of employment. The Petitioner, an administrative zone secretary, injured her right ankle on May 1, 2014, when she slipped and fell on a City-owned snow-covered walkway while on her break. The Petitioner was allowed two 15-

minute breaks, which allowed for walking around outside, getting a snack, or purchasing coffee from a nearby Starbucks. The Employer's building had two entrances – one that was open to and commonly used by the general public and another that did not necessarily prohibit the general public from using, but would only open if it was held open or an employee-badge was swiped. On the date of injury, the Petitioner exited the “front door” commonly used by the general public and slipped on the snow-covered walkway connecting the main entrance and the main sidewalk.

The appellate court found that, because the Petitioner's injury was caused by a hazardous condition (i.e., snow) on the Employer's premises, it was immaterial whether this walkway was used by or accessible to the general public. Instead, the appellate court found the injury arose out of employment simply because the injury occurred on the employer's owned-and-maintained premises and was caused by a dangerous or hazardous condition or defect. The appellate court did, however, reject the Petitioner's argument that getting coffee on a lunch break was an act of “personal comfort” that was incidental to her employment, but still awarded benefits because of the foregoing analysis.

Crowder v. Illinois Workers' Comp. Comm'n, 2018 IL App (4th) 180037WC-U.

Q: Does the Illinois Workers' Compensation Act immunize both a borrower employer and a lender employer from further claims?

A: Yes. In *Holten v. Syncreon North America, Inc.* a temporary worker who was employed by a staffing agency filed a personal injury action against Android Industries-Belvidere, LLC (Android). The trial court granted summary judgment for Android (the defendant), as the claimant's claims were barred by the exclusive-remedy provision of the Illinois Workers' Compensation Act. The claimant was hired by Staff on Site and was assigned to the Android site as a forklift operator. The claimant fell from the forklift about two months into his time on the site and filed a claim against Android for workers' compensation benefits. Android told the claimant to file the claim against Staff on Site instead, and the claimant did so, and received workers' compensation benefits as a result. However, after the claimant filed his compensation claim against Staff on Site, the claimant filed a personal injury claim against Android—leading to the case at hand.

The trial court concluded that since the claimant had already received workers' compensation benefits from Staff on Site, he could not also seek benefits from Android. It was also concluded that Android was a “borrowing employer,” which meant that it was entitled to immunity under the Act's exclusive-remedy provision. The Court concludes that either the loaning employer or the borrowing employer can be the entity that pays workers' compensation premiums and benefits. Furthermore, the liability between the two parties is joint and several, unless the contract between the two specifies otherwise. Also, the loaning employer may be entitled to reimbursement from the borrowing employer, again, if the contract specifies as such.

The claimant in this case contended that in order for the exclusive remedy provision to apply, there must be a reimbursement requirement within the contract between the two

employers. The court rejects this argument, stating that Section 1(a)(4) explicitly states the reimbursement right already. The loaning employer is “entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph,” absent an “agreement to the contrary.” The court also concluded that the claimant had an implied contract between himself and Android, thus making him a joint employee. The court concluded, as such, that summary judgment was properly granted, and the exclusive-recovery provision bars the claimant from further claims.

Holten v. Syncreon N. Am., Inc., 2019 IL App (2d) 180537.

Q: Does an injury incurred by a janitor jumping off of a platform stem from any employment requirement?

A: No. The claimant in *Benson v. Illinois Workers' Comp. Comm'n* was injured when he jumped off of a loading dock because he was told by his supervisor to hurry. When the claimant jumped off of the platform, his foot and leg hit a hydraulic lift, resulting in his foot being fractured. The claimant alleged that jumping off the dock was his routine way of leaving work, and that multiple supervisors had seen him do this.

The primary issue on appeal was whether or not this injury had an origin “in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury.” It was held that the risk of jumping off of a platform was a neutral risk, because it was not reasonably expected to be performed in connection with the claimant’s duties as a janitor. As such, the court of appeals affirmed the Commission’s finding denying compensation.

Benson v. Illinois Workers' Comp. Comm'n, 2019 IL App (4th) 180702WC-U.

Q: Must an appeal bond be filed in order for the circuit court to have subject-matter jurisdiction review a Workers' Compensation decision?

A: Yes. In *Meijer v. Illinois Workers' Comp. Comm'n*, the appellate court held that an employer must fully comply with the jurisdictional requirements of the Workers' Compensation Act in order for a circuit court to have jurisdiction over the matter. It is held that both the claimant and respondent must strictly comply with “. . .the bond requirements of section 19(f)(2) in order to confer jurisdiction upon the circuit court to review of decision of the commission.”

In this case, the employer did not file an appeal bond within the 20-day review period. The employer claims that it received the Commission decision on April 20, 2018, and the court notes that the request for summons and notice of intent were filed on May 9, 2018, which was a timely filing. However, the appeal bond was dated May 3, 2018—but it was not placed in the mail until May 11, 2018, the day after the 20-day review period expired. The court concludes that the employer failed to strictly comply with 19(f)(2), and as such, the claim was dismissed.

Meijer v. Illinois Workers' Comp. Comm'n, 2019 IL App (2d) 180857WC-U.

Q: Does an employer who owns the land where an employee suffered a work-related injury retain the protections of the exclusive remedy provision of the Workers' Compensation Act?

A: Yes. In *Rivera v. Vivit*, the claimant was injured when she slipped and fell in a parking lot owned by her employer. The claimant alleged in a civil action that the employer permitted an “unnatural accumulation of ice and snow” in the lot, and that their failure to maintain the lot in a reasonable safe position caused her injuries. At the circuit court level, the complaint was dismissed because of the exclusive remedy provision of the Workers' Compensation Act.

The claimant alleged that she should be able to sue her employer in his capacity as the owner of the parking lot—however, it was found that the employer's duties as an employer did not differ enough from his duties as the owner of the lot for the dual capacity doctrine to apply. The court cites *Reynolds v. Clarkson*, in which a plaintiff worked for an employer and suffered an injury on their land, then recovered Workers' Compensation benefits. 263 Ill. App. 3d 432 (1994). Then, the plaintiff attempted to bring a civil suit against the boss—however, the *Reynolds* court found that “As an agent of Clarkson, defendant's duties as plaintiff's boss were to furnish him with a safe place to work which is related to the common law duty of the landowner to provide safe premises and does not cause loss of immunity from suit.”

The court applied the same reasoning as *Reynolds* here, stating that the claimant has a duty to keep his premises reasonably safe, and also has duties to furnish a safe workplace for his employees. The court finds that these two obligations are so closely related as to bar liability under the dual capacity doctrine. As such, dismissal of the complaint was appropriate.

Rivera v. Vivit, 2019 IL App (1st) 182196-U.

Q: Can an employer be sanctioned for failing to pay benefits to a deceased claimant's child who has been adopted by his ex-wife and her new husband as well as for failing to acknowledge that the claimant was an employee?

A: Yes. In *Ravenwood Disposal Services*, the claimant, Raul Laguna, died while working. He was pinned between two vehicles while at work. Raul's minor son, Sergio Lagunas (now Sergio Delgado), was found by the Commission to qualify as a dependent. Because Sergio was found to be a dependent, he was awarded death benefits and weekly benefits until the age of 18, or 25 if he goes to college. Additionally, the Commission found that the claimant was an employee of the employer, and that the employer had to pay the claimant's medical fees.

At the Commission's hearing, Sergio testified that he viewed Maria (his mother) and Isidro (Maria's new husband) as his parents. Sergio stated that he did not see Raul often, but that Raul did pick him up from school a few days per week and gave him money. The arbitrator found that the employer had been unreasonable in arguing that no employment

relationship existed, because the president of the company considered him to be an employee, and the company exerted control over the claimant's work. The arbitrator also concluded that because Sergio was the claimant's dependent when the claimant died, the claimant was legally required to support him—additionally, it was noted that the claimant would regularly pay child support. The arbitrator ordered the claimant to pay the claimant's medical bills, awarded Sergio death benefits and weekly benefits, and imposed penalties pursuant to 19(k) and 19(l) of the Illinois Workers' Compensation Act, for attorney fees and costs.

The appellate court concluded that Sergio's adoption by Isidro may have prevented Sergio from getting certain benefits on the basis that Raul was "legally obligated" to support him, but this did not prevent Sergio from claiming benefits on different grounds. Also, the Workers' Compensation Act does not have any language that terminates Sergio's right to benefits simply because he was adopted.

Given all of this, the appellate court agreed with the commission that sanctions were appropriate. The court states that 19(l) penalties are like late fees, and that the assessment of such a penalty is mandatory if payment is late and the employer cannot justify the delay in payment. Here, the court decided not to disturb the Commission's decision, as it was a factual determination. On the other hand, 19(k) of the Act allows penalties for "any unreasonable or vexatious delay of payment or intentional underpayment of compensation." Essentially, payments are awarded under 19(k) for instances of bad faith. In this instance, the court found it unreasonable that the employer challenged the claimant's status as an employee and also failed to pay the claimant's medical expenses. As such, the court concluded that the failure to pay the medical expenses was in bad faith, and that as such, sanctions were appropriate.

RAVENSWOOD DISPOSAL SERVICES, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION et al. (Sergio Lagunas, n/k/a Sergio Delgado, by His Parent/Guardian Maria Diaz, Next of Kin of Raul Lagunas, Deceased, Appellee)., 2019 IL App (1st) 181449WC.

Q: Does the presence of a preexisting scaphoid nonunion make a workplace injury noncompensable?

A: It depends. In *Sarah Hedtkamp, Petitioner*, the claimant had been diagnosed with scaphoid nonunion at the age of 16, but had been largely asymptomatic until her injury in 2013. Several different doctors testified, and even the doctor who was testifying on behalf of the employer conceded that there was no evidence that the claimant experienced symptoms prior to the injury at work. There was no debate as to whether or not the work accident aggravated her condition—it was conceded by the employer that it did. The accident in question occurred when the claimant was pushing a box onto a conveyer belt (which she was instructed to do by her employer) and the box got stuck, causing her wrist

to hyperextend. One doctor opined that the aggravation was persistent, and the other doctor opined that it was temporary.

Ultimately, the Commission concluded that the doctor who testified that the claimant's condition was best characterized as a persistent aggravation. This conclusion was reached because the claimant alleged multiple ongoing complaints, and the medical records also pointed toward this being the case. As such, it was established that the claimant's condition was causally related to the work accident.

The Commission determined that Section 8.1b(b) of the Workers' Compensation Act applied when determining the level of disability for the claimant. This meant that "Section 8.1b(b) requires permanent partial disability be determined following consideration of five factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability." The commission notes that the claimant was terminated shortly after her work incident, and did not seek out another job as a line worker. The commission also notes that the claimant was 24 years old at the time of injury, and will face disability for a longer period of time than an individual who is older than her.

Ultimately, the Commission overturned the decision of the arbitrator, and found that the claimant sustained permanent partial disability of 35% to her right hand, and awarded the claimant with compensation. This was based on findings that the claimant's wrist range of motion was largely reduced, and that her wrist regularly throbs when the weather is cold and damp. She also stated that she has difficulty lifting her youngest child, and can't play sports with her children either.

Sarah Hedtkamp, Petitioner, 13 IL. W.C. 37697 (Ill. Indus. Com'n Jan. 18, 2019).

Q: Is compensation proper for a claimant who worked for 23 years in the finish department at an auto shop?

A: Yes. The claimant in *William Black, Sr., Petitioner* worked in the finish department of a Firestone auto shop. The petition's job was to trim, buff, and repair tires. The arbitrator found that the claimant was not entitled to compensation. However, the Commission reversed, finding that the claimant had proven that he sustained accidental, repetitive trauma-type injuries to his right shoulder.

The claimant testified regarding repetitive and forceful activities that he had to conduct as a result of his 23 years of employment, and stated that his shoulder condition manifested in 2012 while "...performing extensive buffing activity." The Commission also relied on the opinions of two doctors who examined the claimant.

The claimant was awarded temporary disability from April 2013 to February 2015, and also found that the claimant was entitled to medical expenses. Furthermore, the claimant was also awarded a credit for money paid on account of his injuries. The Commission

also noted that the claimant currently works a light duty job for the employer, and that he was unable to return to his prior job following his injury.

William Black, Sr., Petitioner, 13 IL. W.C. 19986 (Ill. Indus. Com'n Jan. 23, 2019)

Q: Is a claimant who has to go up and down stairs that are in poor condition and are not open to the general public exposed to a qualitatively greater risk than the general public?

A: Yes. The claimant in *Mima Castillo, Petitioner*, worked for a healthcare facility, in the kitchen. For her job, she had to cook, clean the kitchen, restock the kitchen, and prepare food. Many of her supplies were located in the basement, and as such, she had to regularly go downstairs in order to get different supplies. The claimant's foot got stuck on a rubber mat that was placed on the step, and fell forward. The claimant testified that the railing was loose, and that she couldn't stop herself from falling.

One of the key issues in this case was whether or not the claimant's injury arose out of the course of employment. Nothing in the record suggested that the claimant had prior medical conditions related to her injuries. The stairs were found to be not open to the general public, and were found to be in an old and deteriorated condition. Furthermore, the stairs are steep and narrow, and the stairway is not well lit. The Commission found that the claimant was exposed to a qualitatively greater risk than the general public at large after viewing the photographs of the stairway. It concluded that the stairway poses a hazard greater than that which is posed to the general public. Additionally, the Commission noted that many of the supplies which the employees of the employer had to get to complete their job duties were in the basement. Based on these findings, the Commission concluded that the claimant's injuries arose out of her employment.

Mima Castillo, Petitioner, 16 IL. W.C. 25665 (Ill. Indus. Com'n May 29, 2019).

Q: Is an employer unfairly prejudiced if a claimant does not provide notice to them until after treatment is completed and the claimant is back at work at full duty?

A: Potentially, yes. In *Richard Holley, Petitioner*, the claimant had an NCV in 2011 which was consistent with carpal tunnel, and a doctor treated the condition conservatively. Then, in 2015, the same doctor performed surgery on the claimant without performing any additional nerve conduction studies. The Commission concluded that the employer was prejudiced because it was not granted the opportunity to order testing in order to confirm the diagnosis of this one doctor.

The Commission notes that the claimant's first surgeries were performed more than 45 days before the claimant provided his employer with notice, but a second set of surgeries were within the 45 day requirement set out by the Workers' Compensation Act. The Commission found that the second set of surgeries did not prejudice the employer, but the first did. As such, the Commission affirmed the arbitrator's awards associated with

the second set of surgeries, but reversed the awards associated with the first set of surgeries.

Richard Holley, Petitioner, 16 IL. W.C. 20685 (Ill. Indus. Com'n May 28, 2019).

Q: Should a claimant's spoliation claim succeed when they have failed to issue a subpoena seeking employment records for over 10 years?

A: No. In *Raisa Ader, Petitioner* the claimant was injured in 2006. However, she did not file a subpoena for her employment file until 10 years later. Under both federal and Illinois law, employers are only required to keep employment records for three years. The Commission compares this case to the *Chidichimo* case, in which it was concluded that a claimant is not entitled to a favorable presumption, and the employer is not subjects to sanctions, based on the destruction of documents. See *Chidichimo v. Indus. Comm'n*, 278 Ill. App. 3d 369, 374, 662 N.E.2d 611, 614 (1996). Furthermore, *Chidichimo* also states that claimant need to take some steps in order to protect documents from routine deletion. *Id.*

The Commission concludes that like in *Chidichimo*, the claimant failed to take steps in order to protect the documents. The Commission states that it is "ludicrous" to argue that there should be a presumption against the employer for the claimant's own failure to secure records.

The claimant also tries to argue that the missing evidence rule applies. According to the commission, "The missing evidence rule holds where a party fails to produce evidence in its control, a presumption arises that evidence would be adverse to that party." This, as well, was found to not apply, because the employer had a reasonable excuse for failure to produce the evidence, and that, furthermore, the evidence was equally available to the claimant as well. The claimant, according to the Commission, could have easily obtained that records via a Commission subpoena. However, the claimant elected to wait for 10 year and issue a subpoena. The Commission concludes by stating that it was unreasonable to expect the employer to hold onto their records indefinitely, and that as such, the claimant's spoliation claim failed, and compensation was denied.

Raisa Ader, Petitioner, 09 IL. W.C. 37078 (Ill. Indus. Com'n May 28, 2019).

Q: Can a claimant be awarded the charges billed by a doctor who drafts a standard report and charges the claimant for it?

A: No. In *Joseph Edwards, Petitioner* one of the claimant's doctors charged the claimant an additional fee for writing a standard report that would normally be generated in the course of treatment. The Commission finds that it is permissible for a provider to charge an additional fee for a special report, but that it is impermissible for a provider to charge an additional fee for a standard one. The arbitrator found that the medical reports that were admitted into evidence for one of the doctors were merely standard reports, and that as such, the employer was not liable to pay them.

Joseph Edwards, Petitioner, 16 IL. W.C. 24420 (Ill. Indus. Com'n May 22, 2019).

Q: Does the development of a torn meniscus as a result of going up and down stairs and ladders regularly at work rise to the level of a compensable injury?

A: Sometimes, yes. In *Nathan Williams, Petitioner*, the claimant would regularly have to climb ladders and stairs, as well as climb and descend spherical tanks with a spiral and angled staircase. In 2013, the claimant was descending one of the tanks, and the claimant felt weakness in his knee—this caused him to feel as if he needed to go down the stairs sideways. The Commission found that the claimant sustained an accident while coming down the staircase and pivoting down these steps.

The claimant confirmed that the work area was not accessible to the public, and that even employees of the respondent had to get permission to climb to the top of the tank. Following the claimant's shift on the date of the injury, he felt pain and stiffness. It was found that the claimant had a torn meniscus, and one doctor testified that all of the ". . . climbing, twisting, pivoting, squatting, [and] awkward positions" could cause such an injury.

The arbitrator previously held that the injury was not work-related, but the Commission reversed this decision. The claimant underwent surgery, but he missed a very small amount of work, and he was compensated through short-term disability while he recovered. The Commission found that the claimant was able to complete his job duties prior to the date of the injury, and then was unable to do so—as such, a causal relationship existed between the accident in question and his meniscal tear. The respondent was ordered to pay temporary total disability benefits for the dates which the claimant was unable to work, and also the Commission found that the claimant sustained a 12.5% loss of use of his right leg.

Nathan Williams, Petitioner, 14 IL. W.C. 3224 (Ill. Indus. Com'n May 22, 2019).

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ILLINOIS WORKERS' COMPENSATION 201

I. A Closer Look at Some Procedural Aspects of Workers' Compensation

- Docket Sites & Arbitrators
 - Once an Application of Adjustment of Claim is filed with the Commission, the case is assigned to a docket site and an arbitrator.
 - The docket site is usually within the vicinity of where the injury occurred.
 - Cases appear on the docket call on three-month intervals until the case has been on file for three years, at which time it is considered above the "redline."
 - When cases are above the "red line," they will be set for trial or dismissed for want of prosecution unless the petitioner requests a continuance for good cause prior to the docket call date.
 - If a case is dismissed for want of prosecution, the petitioner has 60 days upon receipt of the notice of dismissal to file a Petitioner for Reinstatement.
 - Three arbitrators are assigned to a particular zone and they rotate between the three dockets within that zone on a monthly basis.
 - If a party requests a 19(b) hearing, the hearing will be held before the assigned arbitrator, even if that arbitrator is not at the docket where the case is located.
 - A 19(b) hearing request must be filed and provided to the other party at least 15 days before the date of the docket call.
- Pro Ses
 - Once the petitioner indicates a willingness to settle their case, the insurer/employer can request a Case Number to be assigned.
 - The petitioner and insurer/employer will receive a Notice of Settlement Filed indicating which arbitrator and docket site the case is assigned.
 - The Notice will also contain the date the case first appears on the assigned arbitrator's docket call.
 - The petitioner and insurer/employer's attorney can usually appear at any of the docket sites within the assigned zone or at any of the docket sites where the arbitrator will be presiding that month for settlement approval.
 - This expedites the settlement process and allows the parties to obtain settlement approval before the date the case first appears on the assigned arbitrator's docket call, which is usually about 3 months after the case is assigned a Case Number.
- Settlement vs. Arbitration
 - If a trial occurs, the petitioner's rights to future medical treatment under Section 8(a) and greater disability under 19(h) automatically remain open.
 - These rights can only be closed by way of settlement agreement.

II. Understanding & Avoiding Penalties for Non-Payment of Benefits

Penalties can be assessed against an insurer/employer who unreasonably delays or refuses to pay benefits to the petitioner.

- Section 19(k) Penalties
 - May be assessed when there is an unreasonable or vexatious delay or an intentional underpayment of TTD and PPD benefits as well as medical bills.
 - The Commission can award 19(k) penalties at up to 50% of the total amount of benefits due and payable.
 - A delay in payment of benefits greater than 14 days shall be considered “unreasonable,” but 19(k) penalties are discretionary rather than mandatory.
 - 19(k) penalties will not be awarded against an employer for not authorizing medical treatment – especially if the employer has a qualified IME or Utilization Review recommending against that prospective medical treatment.
- Section 19(l) Penalties
 - May be assessed when TTD benefits are withheld “without good and just cause.”
 - The Commission can award \$30-per-day up to \$10,000 for nonpayment of TTD benefits.
 - When the petitioner makes a written demand for TTD benefits, the insurer/employer must respond in writing within 14 days, setting forth the reason for delay.
 - A delay in payment of benefits greater than 14 days creates a rebuttable presumption of an “unreasonable” delay, which can be overcome by reliance on a qualified IME opinion.
 - When the petitioner makes a demand for payment of medical bills, the insurer/employer must respond in writing within 60 days after receiving the outstanding bill if it contains the necessary elements needed to submit the bill the basis for nonpayment or underpayment.
 - The bills likely must be provided to the insurer/employer by the petitioner with the appropriate HCFA or UB-04 form to the insurer/employer.
 - Interest begins accruing at the rate of 1% per month in favor of the healthcare provider if no basis for nonpayment or underpayment is provided by the insurer/employer within the 60-day period.
 - 19(l) penalties usually will not be awarded against an employer if the employer has relied upon a qualified IME opinion.
- Section 16 Attorneys’ Fees
 - May be assessed when there is an unreasonable or vexatious delay or intentional underpayment of TTD or PPD benefits or medical bills, or the

insurer/employer engages in frivolous defenses which to not present a real controversy.

- The Commission can award all or any part of the attorney's fees and costs against the insurer/employer.
 - However, typically the Commission will award 20% of the penalties awarded under Section 19(k) above.
- Strategies to Avoid Penalties
 - Pay the undisputed portions of an arbitrator or Commission award promptly and immediately upon receipt.
 - Pay a settlement promptly and immediately upon approval.
 - Section 19(g) allows the petitioner to file a civil court action against the insurer/employer for a delay in payment of the award.
 - The court can require the insurer/employer to pay attorneys' fees (usually 20% of the award) as well as the costs incurred by the petitioner for the arbitration and court proceedings.
 - Notify the petitioner in writing generally providing a basis for denial of benefits when they are suspended, terminated, or in dispute or when a written demand is made by the petitioner.
 - Obtain a qualified IME or Utilization Review opinion to rely on for denying benefits or medical treatment.

III. Utilizing the Limited Discovery & Investigation Tools

- Section 12 IMEs
 - The IME doctor can ask about the history/mechanism of injury, review medical records, and provide opinions on causation, additional treatment, restrictions, etc.
 - The IME doctor can also provide an impairment rating.
 - The Act requires the impairment rating be based on the most recent (e.g., Sixth Edition) AMA Guidelines.
 - An impairment rating will be one of several factors considered by an arbitrator and Commission when awarding compensation for permanent disability.
 - Can be used to avoid penalties (see above).
 - Can also be used to ask the petitioner about his prior treatment, diagnosis, current complaints, etc.
 - The insurer/employer must provide reimbursement for travel or travel arrangements prior to the IME date, otherwise the petitioner can refuse to appear for the IME.
 - The insurer/employer must provide missed work wages as well.
- Subpoenas
 - Forms can be found on the Commission website and can be tailored to your Case Number, body parts injured, and dates of treatment requested.

- Can help show a more complete picture of the petitioner's post- and pre-injury medical treatment for body parts allegedly injured as a result of the work injury.
- Prior claims filed by Petitioner
 - Request prior settlements and claims previously received and filed by the petitioner.
 - Credits can generally be taken by the insurer/employer for prior work injuries to scheduled body parts but not for unscheduled (e.g., body as whole) body parts.
 - The Commission website allows the general public to research the database containing this information – although it is limited.
- Pre-Trial Conferences
 - These are similar to civil mediations, but they are completely voluntary.
 - Can either be scheduled for the docket call date or another available trial date during the week(s) of the docket call.
 - Allows the parties to argue their positions and obtain the arbitrator's opinion about issues, including causation, nature and extent, additional medical treatment, etc.
 - Pre-Trials occur in front of the arbitrator assigned to the case, who will preside at trial if the parties are unable to resolve the case before then.
- Depositions
 - Cannot take the petitioner's deposition.
 - Can take the deposition of the IME doctor to help explain and elaborate on his opinions provided in the IME report.
 - Required to take the deposition of the IME doctor unless petitioner's attorney stipulates to the admission of the IME report.
 - If the petitioner is unrepresented and voluntarily consents, the insurer can ask the petitioner to provide a recorded statement about important facts of the case, such as the mechanism of injury, identity of medical providers, etc.

IV. Handling Cases Where a Petitioner Cannot Return to Former Job at the Employer

- Transitional Light Duty
 - The Commission recently decided (in March 2019), in *Stegan*, that the petitioner was not entitled to TTD benefits when he refused transitional, light-duty work at a different entity made available by his employer.
 - The *Stegan* employer offered the petitioner light-duty work at Habitat for Humanity that fell within his restrictions, but the petitioner refused to attend because Habitat for Humanity was not his employer.
 - The Commission determined the petitioner was not entitled to TTD after his refusal to attend the transitional, light-duty work assignment because he was still to be paid by the employer, remained under the same policies of the employer, and was by all accounts still

considered an “employee” of the employer at the time of the light-duty work.

- The *Stegan* Commission decision seemingly allows employers to terminate TTD benefits when they can offer transitional, light-duty work within the petitioner’s restrictions at another employer so long as remain an employee of the employer (e.g., subject to the employer’s policies, is paid by the employer, etc.).
- Loss of Occupation
 - If the petitioner is unable to return to their former line of work, the arbitrator and/or Commission will likely award an increased PPD percentage to account for that.
 - Typically, arbitrators will award 40-50% BAW for loss of occupation cases, but this can vary based on the significance of the permanent restrictions, the petitioner’s age, etc.
- Wage Differential
 - If the petitioner is unable to return to their former line of work and is only capable of obtaining employment at a lower wage, they can be entitled to a wage differential.
 - The insurer/employer is required to provide weekly payments totaling 2/3 of the difference between their pre- and post-injury earnings capacity until they are 67 years old or 5 years from the date of the award, whichever is greater.
 - Example: The petitioner earned \$1000/week before the work injury, but now the petitioner can only earn \$700/week after the work injury. The petitioner is entitled to \$200/week until they reach 67 years old or 5 years after the date of the award, whichever is greater.
- PTD & Odd Lot PTD
 - Arises only when the petitioner is completely disabled and/or unable to find any suitable employment anywhere.
 - Petitioner is entitled to 2/3 of his AWW for the rest of their life.
 - Odd Lot PTD is different from PTD, as it only arises when the petitioner has a disability that is limited in nature such that they are not obviously employable, but can prove employment is unavailable to a person in their circumstances.
 - The petitioner must show diligent but unsuccessful attempts to find work, or that they are unfit to perform any certain tasks for which no stable labor market exists because of their medical condition, age, training, education, and experience.
 - The insurer/employer can overcome this situation by showing availability of suitable work.
- Vocational Rehabilitation
 - When there is no dispute that the petitioner is unable to return to his prior job because of the work injury or the period of total incapacity exceeds 120

continuous days, the employer must prepare a written vocational rehabilitation plan.

- If there is a dispute, the arbitrator and/or Commission will look at whether: the injury caused a reduction in earnings capacity; vocational rehabilitation will increase their earnings capacity and the likelihood the petitioner will find suitable employment; the petitioner has sufficient skills to obtain employment without further training or education or has undergone similar rehabilitation program(s) in the past; and the petitioner's work-life expectancy.
- The insurer/employer must pay maintenance benefits when the petitioner is engaged in vocational rehabilitation or undergoing a self-directed job search and cannot return to his prior job or the employer cannot accommodate their restrictions.
 - Maintenance is similar to TTD benefits, but is a component of vocational rehabilitation and paid after the petitioner reaches MMI.
 - The petitioner is not automatically entitled to maintenance benefits in situations where they cannot return to their prior job but do not undergo a self-directed job search or vocational rehabilitation program.
- Labor Market Survey
 - Helps overcome an allegation of PTD, Odd Lot PTD, and Wage Differential cases by showing the petitioner can return to work at another employer – and possibly that their earnings capacity has not been reduced by the work injury.
 - Performed by a certified vocational counselor who reviews the medical records and attempts to find suitable employment within the petitioner's restrictions.
- Vocational Assessment
 - Helps further overcome allegations of PTD, Odd Lot PTD, and Wage Differential.
 - The vocational counselor will meet with the petitioner to interview them about their experience, education, training, etc. to better identify certain available job openings at potential employers.

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IOWA WORKERS' COMPENSATION

I. PERSONAL INJURY

A. Accident/Injury – *Almquist v. Shenandoah*, 218 Iowa 724, 254 N.W. 35 (1934)

1. Personal injury:

a. An injury to the body, the impairment of health, or a disease, which comes about not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. The injury to the human body must be something that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

b. Repetitive trauma:

i. The injury to the body in repetitive trauma cases occurs when pain or physical inability prevents the employee from continuing to work.

2. An injury, to be compensable, must arise out of and in the course of the employment:

a. “Arise out of” – requires proof of a causal connection between the conditions of the employment and the injury. The injury may not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of the employment.

i. Special Cases—

(1). *Actual risk*: an injury is compensable if the employment subjected the claimant to the actual risk that caused the injury, i.e. some causative contribution by the employment must exist.

(2). *Idiopathic causes*: compensable only if caused or precipitated in part by some employment-related factor, or that the effects of the injury were worsened by the employment.

(3). *Horseplay*: non compensable when an employee of his or her own volition initiates or actively takes part in an activity that results in injury. Victim/nonparticipant will be compensated.

(4). *Assault*: generally compensable if it arises from an actual risk of the employment. If the assault is a willful act of a third party directed against the employee for reasons personal to the employee, then it will not be compensable.

b. “In the course of” – the injury must take place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in activities incidental thereto.

i. *Coming and going*: an accident that occurs while an employee is going to or coming from work does not arise out of and in the course of employment.

ii. *Exceptions*:

- (1). *Employer-supplied transportation*: when an employer controls the situation, i.e. route and operation of the vehicle, the employee is being transported to an intended place of employment, injuries sustained are generally compensable.
- (2). *Dual purpose trips*: If a trip is both personal and for services to the employer, an injury will only be compensable if canceling the trip would have caused the employer to send someone else.
- (3). *Special errand*: a trip that would not be covered under the usual going and coming rule may be brought within the course of employment if the trip to and from the employer's premises were a special trip made in response to a special request, agreement, or instructions.
- (4). *Parking lots*: employer parking lots are generally considered part of the employer's premises, but the injury must also occur within a reasonable time limitation related to, or occasion by, the employment.
- (5). *Sole mission*: a plaintiff incurs the risk of injury while solely on a mission for his or her own convenience if there is no connection between plaintiff's work and his or her injury.

B. Occupational Disease – Defined by Statute, chapter 85A

1. Occupational disease § 85A.8
 - a. An occupational disease means a disease which;
 - i. arises out of and in the course of employee's employment,
 - ii. is the result of a direct causal connection with the employment and;
 - iii. follows as a natural incident thereto from an injurious exposure it occasioned by the nature of the employment
 - b. The disease must be incidental to the character of the business and not independent of the employment.
 - c. Contraction of the disease must have an origin connected with the employment
 - d. Hazards to which the employee would have been exposed to outside of the occupation are not compensable as an occupational disease.
2. Applicable to all "employers" and "employees" as defined by the Iowa Workers' Compensation Act.
3. Relates to the last occupation in which the employee was injuriously exposed to the hazards of the occupational disease. § 85A.10
 - a. Limitations on Disablement or Death from Occupational Disease
 - i. No recovery shall be had under Iowa Occupational Disease statute for any condition which is compensable as an "injury" under Iowa Workers' Compensation Act. § 85A.14
 - ii. Compliance with the findings and orders of the Commissioner or Court shall discharge the employer and carrier for all future obligations under the Iowa Occupational Disease statute. § 85A.15

- iii. An employer shall not be liable for compensation for an occupational disease unless:
 - (1).Disablement or death results within three years in the case of pneumoconiosis.
 - (2).Employee makes a claim within 90 days after employee knew, or should have known, of disablement or death for exposure caused by X-rays, radium, radioactive substances or machines, or ionizing radiation.
 - (3).Disablement or death results within 1 year for all other occupational diseases.
 - (4).Death from an occupational disease results within seven years after an exposure following continuous disablement which started within one of the aforementioned periods.
 - (5).“Disablement “ – § 85A.4
 - (a).is the occurrence of an event or condition which causes the employee to become actually incapacitated from performing work or from earning equal wages and other suitable employment as a result of the occupational disease.
- 4. Compensation – IA § 85A.5
 - a. Employees who become disabled because of an injurious exposure are entitled to receive “compensation” and reasonable medical treatment. § 85A.17
 - i. Compensation is payable to all “dependants” as defined by the Iowa Workers' Compensation Act.- § 85A.6.
 - b. Employees that incur occupational disease, but are able to continue in employment, are not entitled to compensation but are entitled to reasonable medical treatment.
- 5. Apportionment – § 85A.7(4)
 - a. Where an occupational disease is aggravated by a non-compensable disease or infirmity, or, a non-compensable disease or infirmity is aggravated by an occupational disease, compensation shall be in proportion to the amount that is solely caused by the occupational disease.
 - b. Either the number of weekly payments, or the amount of such payments, may be reduced as determined by the Commissioner.
- 6. Exclusions – § 85A.7
 - a. Employees are not entitled compensation if they misrepresent, in writing, that they had not been previously disabled, terminated, compensated, or missed work because of an occupational disease.
 - b. Compensation for existing diseases shall be barred if the employer can prove the disease existed prior to the employment.
 - i. The employer shall have the right to have an employee examined prior to employment and may require a waiver, in writing, of any and all compensation due to an occupational disease. § 85A.25

- c. Compensation for death shall not be payable to any dependent whose relationship to the deceased employee was created after the beginning of the first compensable disability.
 - i. This rule does not apply to children born after the first compensable disability to a marriage existing at the beginning of such disability.
- d. Miscellaneous exclusions: no compensation shall be allowed if the occupational disease:
 - i. is the result of an employee intentionally exposing themselves to the occupational disease;
 - ii. is the result of the employees intoxication;
 - iii. is the result of employees addiction to narcotics;
 - iv. as a result of the employees commission of a misdemeanor or felony;
 - v. as a result of employees refusal to use the safety appliance or protective device;
 - vi. as a result of employees refusal to obey a reasonable written rule, made by the employer, and posted in a conspicuous position in the workplace;
 - vii. as a result of the employees of failure or refusal to perform or obey a statutory duty;
 - viii. The employer bears the burden of establishing these defenses.

C. Hearing Loss – Defined by Statute, § 85B.5

- 1. Occupational Hearing Loss is the portion of permanent hearing loss that exceeds average hearing levels that arises out of and in the course of employment and is causally related to excessive noise exposure.
 - a. 25 decibels in either ear is equivalent to a 0% hearing loss.
 - b. An average of 92 decibels in either ear is equivalent to a 100% hearing loss.
- 2. Applicable to all "employers" and "employees" as defined by the Iowa Workers' Compensation Act.
- 3. Limitations:
 - a. Occupation Hearing Loss does not include loss of hearing attributable to age or any other condition or exposure not arising out of and in the scope and course of employment.
 - b. Compliance with the findings and orders of the Commissioner or Court shall discharge the employer and carrier for all future obligations under the Iowa Occupational Hearing Loss statute. § 86B.13
- 4. Compensation
 - a. A claim for compensation for hearing loss may not be made unless and until there is a change in the claimant's employment situation generally as the result of the occurrence of any one of the following events:
 - i. Transfer from excessive noise exposure employment by an employer;
 - ii. Retirement;
 - iii. Termination of the employer-employee relationship, which may include simply a change in ownership of the business

- b. Compensation for Occupational Hearing Loss is calculated using 175 weeks for total loss, and a proportional period of weeks relating to partial hearing loss.
 - c. Determination of hearing loss shall be made by the employer's regular or consulting physician or a licensed, trained, and experienced audiologist.
 - d. If the employee disputes the assessment, he or she may select a physician or licensed, trained, and experienced audiologist to provide an assessment.
- 5. Apportionment
 - a. Any amounts paid under this section by a previous employer, or under a previous claim, shall be apportioned and the employer is only liable for the increase in hearing loss sustained in the scope and course of employment.
- 6. Employer/Employee Duty:
 - a. Employees have an affirmative obligation to submit to periodic testing of their hearing.
 - b. If, after testing, the employer learns that the employee's hearing level is in excess of 25 decibels, the employer must inform the employee as soon as practicable after the examination.
 - c. Employers have an affirmative obligation to inform employees if they are being subjected to sound levels and duration in excess of the acceptable limits as indicated in IA § 85B.5.
 - d. An employer liable for an employee's occupational hearing loss under this section must provide the employee with a hearing aid, unless the hearing aid will not materially improve the employee's ability to communicate. § 85B.12
- 7. Notice
 - a. An employee may file a claim for Occupational Hearing Loss, at the earliest, one month after separation of the employment which caused the hearing loss with a two year statute of limitations.
 - b. The date used for calculating the "date of the injury" shall be the date the employee:
 - i. Was transferred from the environment causing the hearing loss;
 - ii. Retired;
 - iii. Was terminated from employment.
 - c. In the event an employee is laid off for longer than one year, the Occupational Hearing Loss must be reported within six months after the date of the layoff.
- 8. Exclusions
 - a. If an employee fails to use, or refuses, employer-provided hearing protective devices, as long as the opportunity and requirement are communicated to the employee in writing.
 - b. An employee's failure to submit to period testing in accordance with IA 85B.7 precludes recovery under this section.

- c. If an employee's prior hearing loss is tested and documented, and the employee sustained a prior hearing loss, the employer is only liable for the increase in hearing loss under the Occupational Hearing Loss Act.
- D. Mental claims – compensable where the injury arose out of and in the scope and course of employment
 - 1. Employee has the burden of proving cause in fact and legal causation.
 - a. Cause in Fact – Supported by competent medical evidence.
 - b. Legal Causation –
 - i. whether the stress is greater than that experienced by similarly situated employees. *Dunlavey v. Economy Fire*.
 - ii. manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain. *Brown v. Quik Trip*.
 - 2. When a scheduled physical injury aggravates or causes a compensable psychological injury, the psychological injury is compensable as an unscheduled injury. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 1993 Iowa Sup. LEXIS 146 (Iowa 1993).

II. JURISDICTION - IA Code §85.3, §85.71

A. Act will apply where:

- 1. The injuries occurred or occupational disease was contracted in Iowa while in the scope and course of employment.
- 2. Employer is a resident of Iowa.
- 3. Employer is a nonresident of Iowa, but for whom services are performed within Iowa by any employee.
- 4. The employer corporation, individual, personal representative, partnership, or association has the necessary minimum contact with Iowa.
- 5. The injury occurred outside of the territorial limitations of Iowa, if:
 - a. The employer has a place of business in Iowa, and;
 - i. The employee regularly works from that place of business, or;
 - ii. The employee is working under a contract which selects Iowa as the forum state.
 - b. The employee is working under a contract of hire made in Iowa, and the employee;
 - i. Regularly works in Iowa, or;
 - ii. Sustains an injury for which compensation is unavailable in the other possible jurisdictions, or;
 - iii. Works outside of the United States.

B. Act will not apply where:

- 1. Injured worker is covered by a federal compensation statute. *Isle of Capri Casino v. Wilson*, 2009 Iowa App. LEXIS 1446 (Iowa Ct. App. Sept. 2, 2009)
- 2. The employee is engaged in service in a private dwelling and earned more than

\$1500 in the previous 12 consecutive months before the injury, provided that the employee is not a relative of the employer. IA 85.1

3. The employer engages in agricultural operations, as long as the employee earned more than \$1500 in the previous 12 consecutive months before the injury. This exclusion always applies to relatives of the employer, officers of a family farm Corporation, and owners of agricultural land. IA 85.1

C. Dual jurisdiction claims:

1. Any action filed in Iowa shall be stayed if an employee or employee's dependents initiate a workers' compensation case for the same injury in a separate jurisdiction, but no order, settlement, judgment, or award has been had, pending the resolution of the out-of-state claim for benefits. IA § 85.72
 - a. The employer/insurer must file for a stay of proceedings for the stay to be granted.
2. If the employee or employee's dependents have initiated another workers' compensation case in a separate jurisdiction and benefits have been paid pursuant to a final settlement, judgment, or award, the employee or employee's dependents may not also seek benefits in Iowa. § 85.72

III. NOTICE – § 85.23

- A. Notice of an injury is required within 90 days from the date of the "occurrence" of the injury.
 1. For purposes of the statute, "date of the occurrence of the injury" means the date that the employee knew or should have known that the injury was work-related.
- B. If an employer has actual knowledge of the injury there is no need to give notice.
- C. The employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf may provide notice
- D. Payment of compensation shall be conclusive evidence of notice of an employee's alleged work-related injury.

IV. REPORTING REQUIREMENTS § 86.11

- A. FROI – First Report of Injury
 1. The employer or insurance carrier must electronically file a First Report of Injury:
 - a. Within four days of receiving notice or knowledge of an injury, if:
 - i. The injury results in temporary disability for a period longer than three days, or;
 - ii. The injury results in permanent total disability, permanent partial disability, or death.

- b. If the Commission sends a written request to the employer or insurance carrier.
 - 2. The time period for calculation excludes Sundays and legal holidays.
 - 3. A First Report of Injury is required even if liability is denied—it is not considered an admission of liability.
 - 4. An Agency file number will not be assigned and the claim cannot be settled if the FROI has not been filed. The FROI must be filed through EDI. The Agency will not accept a paper FROI.
 - 5. A \$1,000 fine will be imposed if FROI is not filed within 30 days of notification from the Commissioner that a FROI must be filed.
- B. SROI – Subsequent Report of Injury
- 1. Following the filing of a First Report of Injury, a Subsequent Report of Injury must be filed in the event:
 - a. A claim is denied (in addition to a denial of liability letter);
 - b. weekly compensation benefits are paid (filed 30 days after the date of the first payment);
 - c. Whenever weekly compensation payments are terminated or interrupted;
 - d. Whenever a claim is open on June 30 of each calendar year;
 - e. When a claim is closed;
 - f. Whenever “other” benefits are paid, ie medical, mileage, burial, interest, vocational rehabilitation, and penalties.
- C. Medical reports must be filed if the injury exceeds thirteen weeks of temporary total disability or when there is permanent partial disability.
- D. Final Reports must be filed showing the date of last payment in the employee's last known address.

V. LIMITATION OF ACTIONS § 85.26

- A. An employee must file an Original Notice and Petition with the Commission;
 - 1. Within two years of the occurrence of the accident or injury under the Workers' Compensation Act,
 - a. Begins running the date the claimant knows they have sustained a work-related injury. For purposes of the statute, “date of the occurrence of the injury” means the date that the employee knew or should have known that the injury was work-related.
 - 2. Within three years of the date of last payment if weekly benefits are paid pursuant to § 86.13.
 - 3. Within three years of approval of a settlement or issuance of an award.
- B. In an original proceeding, all issues subject to dispute are before the Commission. In a proceeding to reopen an award or settlement, the inquiry will be limited to whether

or not the employee's condition warrants an end to, diminishment of, or increase of compensation awarded or agreed upon.

VI. ANSWER TO PETITION – IA Administrative Code § 876.4.9(1)

- A. Upon receipt of Notice of a Contested Case, the Employer shall answer or file a motion within 20 days.
- B. All medical records and reports in possession of the Employer/Insurer must be served on all opposing parties within 20 days of filing the Answer and on a continuing basis within 10 days of receipt of the records.
- C. Failure to do either of the above could lead to possible penalties including preclusion of evidence, sanctions, or judgment by default.

VII. MEDICAL TREATMENT – § 85.27

- A. Employer is responsible for all reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies, plus reasonable and necessary transportation expenses incurred for such services.
 - 1. If compensability is admitted, employer is not responsible for unauthorized care, unless the employee shows that the unauthorized care was successful and beneficial toward improving the employee's condition in a way that benefits the employer as well as the employee.
- B. The employer's obligation to provide reasonable and necessary medical care carries with it the right to select the treating physician, provided that the care is offered promptly and is reasonable suited to treat the injury without undue inconvenience to the employee. *McKim v. Meritor Auto., Inc.*, 158 F. Supp. 2d 944 (S.D. Iowa 2001).
 - 1. Exceptions - The employer is not entitled to select the provider when:
 - a. Emergency care is necessary because of an actual work-related event.
 - b. The employee notifies the employer in writing of his or her dissatisfaction with the employer's provider and provide reasonable proofs of the necessity of alternate care.
 - c. The employer denies the claim.
- C. If the employer pays medical benefits under a group plan, the amounts paid by the group plan shall be deducted from the amounts paid under the Workers' Compensation Act.
- D. If the employer believes the charges of a medical provider are excessive, the employer has the right to have the issue decided by the Commission.

- E. The employer, insurance carrier, or employee waive any claim of privilege by virtue of filing or defending a workers' compensation claim. Failure of a medical provider to provide medical records may result in a Court order imposing penalties or sanctions on the provider.

VIII. VOCATIONAL REHABILITATION – § 85.70

- A. To be entitled to vocational rehabilitation benefits, an employee must be unable to return to gainful employment because of a job-induced disability and must have permanent partial or permanent total disability.
- B. For injuries sustained after September 8, 2004, benefits may be available from the employer in the form of:
 - 1. \$100 per week for 13 weeks,
 - 2. An additional \$100 for 13 weeks if the employee can show that the continuation of benefits will accomplish rehabilitation.
- C. For injuries sustained prior to September 8, 2004, benefits may be available from the employer in the form of:
 - 1. \$20 per week for 13 weeks,
 - 2. An additional \$20 for 13 weeks if the employee can show that the continuation of benefits will accomplish rehabilitation.
- D. Benefits are paid in addition to any other indemnity owed.

IX. CAREER VOCATIONAL TRAINING AND EDUCATION PROGRAM – § 85.70

- A. If an employee sustains a shoulder injury and cannot return to gainful employment, a vocational expert is required to evaluate whether the employee would benefit from vocational training or an education program offered through a surrounding community college.
 - 1. If it is determined that the employee would benefit from this training, the employee will be referred to a nearby community college for enrollment in a program that will result in (a minimum) of an associate degree or certificate program which would allow the employee to return to the work force.
 - 2. The employee has six months from the date of the referral to enroll in this program; otherwise, they will lose their eligibility to participate.
 - 3. The employee is entitled to financial support from the employer and/or insurance provider, not to exceed \$15,000.00 for tuition, fees and supplies.
 - 4. The employer and/or insurance carrier may request progress reports each semester to assure the employee has a passing grade and regularly attends.
 - 5. If the employee is not complying with these requirements, eligibility for participation can be terminated.

X. AVERAGE WEEKLY WAGE/COMPENSATION RATE – § 85.36 & § 85.37

A. Average Weekly Wage (AKA Gross Weekly Earnings)

1. The weekly earnings of the employee are computed by averaging the total spendable earnings in the thirteen weeks prior to the injury. § 85.36. However:
 - a. If the employee's wage is reduced because of reasons personal to the employee, i.e. sickness or vacation, the employee's weekly earnings shall be based on the amount the employee would have earned.
 - b. If a week "does not fairly reflect the employee's customary earnings" the week shall be replaced by the closest previous week which fairly represent the employee's earnings.
 - c. The overtime rate is not included. Overtime hours are computed at straight time.
 - i. Exception for part time employees.
 - d. Irregular bonuses, expense allowances, and employer's contributions to benefit plans are not included in the average weekly wage.
2. Special Cases –
 - a. *Part-time employees*: If the employee earns less than the usual weekly earnings of a regular full-time adult laborer in the same industry and locality, then the weekly earnings are 1/50th of the total earnings which the employee has earned in the prior 12 calendar months, including premium pay, shift differential, and overtime pay from all employment.
 - b. *Employees with indeterminate earnings*: In situations where the employee's earnings can not be determined, the gross weekly earnings are based on the usual earnings for similar services rendered by paid employees.
 - c. *Volunteer Firefighter, EMT, and Reserve Peace Officers*: Any compensation earned by a volunteer firefighter, emergency medical care provider, or reserve peace officer shall be disregarded for purposes of calculating gross weekly earnings in the event of a compensable injury. The gross weekly earnings are calculated from the *greater* of:
 - i. The amount the employee would receive if injured in the scope and course of his or her regular job.
 - ii. 140% of the state average weekly wage.
 - d. *Apprentice or Trainee*: Gross weekly earnings may be augmented if the apprentice or trainee's wages would have increased absent the work-related injury.
 - e. *Inmates § 85.59*: Inmates are due the minimum compensation rates under 85.34 in the event of injury or death.
 - f. *Elected or Appointed Official*: An elected or appointed official has the option of choosing between:
 - i. Their rate of pay as an elected official, or:
 - ii. 140% of the state average weekly wage.

3. The employer has an affirmative obligation to produce wage information to the employee following a workers' compensation claim. Failure to produce the information is a simple misdemeanor.

B. Compensation Rate

1. 80% of the employee's weekly spendable earnings, subject to maximums set by the Division of Workers' Compensation
 - a. No calculations are necessary—Consult the charts available at www.iowaworkforce.org/wc to determine the correct rate once weekly spendable earnings, marital status, and number of exemptions have been established.
 - b. Charts are updated yearly by Division, consult chart which corresponds to the date of accident.
 - c. Rate stays the same through pendency of claim.
2. Minimum rate shall be the lesser of:
 - a. The weekly benefit amount of a person whose gross weekly earnings are 35% of the statewide average weekly wage (calculated and published by the Division) OR
 - b. The spendable weekly earnings of the employee

XI. DISABILITY BENEFITS - § 85.33, 85.34

A. Temporary Total Disability (TTD)

1. Payable when employee is unable to return to gainful employment because of a work related injury which *will not* result in permanent disability.
 - a. Terminated when:
 - i. The employee returns to work, or:
 - ii. There is a finding that the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury.
2. Temporary total disability payment shall start on the fourth day of disability. Benefits must be paid for those days if the employee is disabled for more than 14 days. § 85.32.
3. Can be owed for scheduled as well as whole body injuries.
4. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary total disability during the period of the refusal.

B. Temporary Partial Disability (TPD) § 85.33(2)

1. Compensation is 2/3rds of the difference between the employee's weekly earnings at the time of the injury and the employee's actual gross weekly income during the period of temporary disability. § 85.33(4)
2. Payable when the employee is temporarily disabled, but is able to work light duty for the employer or an alternative employer.

3. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial disability during the period of the refusal.

C. Permanent Partial Disability (PPD) – § 85.34

1. Scheduled Member Injuries – “Loss of Use”
 - a. Payable when the employee sustains a permanent impairment causally related to an injury in the scope and course of employment.
 - b. Compensation for permanent partial disability shall begin when it is medically indicated that the employee has reached maximum medical improvement from the injury or percentage of permanent impairment can be determined by use of the AMA Guidelines.
 - c. Based upon a statutory schedule codified in § 85.34
 - i. Iowa subscribes to the 5th Edition of the AMA Guidelines for permanent impairment, but adherence to these guidelines is not compulsory.
 - d. The amount payable for specific injuries contemplates both the impairment and payment for the reduced capacity to perform labor.
2. Body as a Whole Injuries – “Loss of Earning Capacity”
 - a. Compensation is 80% of employee’s weekly spendable earnings up to the statutory maximum, multiplied by the industrial disability rating, multiplied by 500 weeks.
 - b. Applies to all injuries causing permanent impairment not specifically mentioned in § 85.34
 - c. Industrial Disability (claimant’s lost earning capacity) is determined by considering:
 - i. The employee’s age, education, qualifications, and experience;
 - ii. Employee’s inability, because of the injury, to engage in employment for which he or she is fitted;
(1).The inability can be caused by a physical or emotional condition.
 - iii. Failure of the employer to provide employment after an employee suffers an injury;
 - iv. A change in the employee’s status at his or her employment following a return to work;
 - v. Employee’s mitigation of his or her industrial disability.
3. If an overpayment of temporary total or healing period benefits occurs, a credit may be given against permanent disability benefits.

D. Permanent Total Disability – (PTD) § 85.34

1. Where employee has lost access to the labor market based on personal factors coupled with the employee’s permanent physical condition caused by the work-related injury, and the employer has failed to carry its burden of producing evidence of available suitable employment.
2. The benefits are paid for the employee’s life.

E. Healing Period of Permanent Disabilities § 85.34

1. Compensation will start when employee is unable to return to gainful employment because of a work related injury which will result in permanent disability.
 - a. Benefits terminate when:
 - i. The employee returns to work, or;
 - ii. It is medically indicated that significant improvement from the injury is not anticipated or;
 - iii. The employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, or;
 - b. To terminate healing period benefits, the employer/carrier must provide the employee 30 days written notice ("Auxier letter") prior to the termination of benefits, and inform the claimant he has the right to file a claim with the Division unless the employee's healing period terminates by a return to work. Failure to provide proper notice of termination, delay or denial of benefits will result in penalties. *Auxier v. Woodward State Hospital-School*, 266 N.W.2d 139 (Iowa 1978).
2. If an overpayment of temporary total or healing period benefits occurs, a credit may be given against permanent disability benefits.
3. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with healing period benefits during the period of the refusal.

F. Interest

1. Interest should be volunteered when any late payments are made. Penalties will not be assessed on late interest payments, but interest will continue to accrue
2. If delay in payment of benefits is due to neglect of the claimant, interest is not payable
3. Interest is calculated in a 3 step process as follows:
 - a. Step 1:
 - i. Locate the number of weeks during which benefits are payable in column A of the 10% interest table contained in the Division's manual for the year corresponding to the late payments
 - ii. Locate the interest multiplier from that line from the same table in column B
 - iii. Multiple the weekly benefit amount by the interest multiplier to determine interest payable
 - b. Step 2:
 - i. Compute the interest from the end of the period during which benefits are payable until date benefits are actually paid using the following formula: $I = P \times R \times T$

- (1).I = Interest
- (2).P = principal (the total # of weeks/days to 3 decimal points of compensation due x compensation rate)
- (3).R = rate of interest (10%)
- (4).T = time (# of weeks from end of period during which benefits are payable until date of payment, divided by 52)

c. Step 3:

- i. Add result from Step 1 to result from Step 2

G. Offering Temporary, Light Duty Work

- 1. The employer must communicate the offer of a light duty position in writing. If the employee refuses the position, the employee must communicate the refusal in writing including the reason for the refusal.
- 2. If an employee was traveling for 50 percent or more of their work time prior to their injury, light duty positions at the employer's principal place of business are acceptable, accommodated positions.

H. Duplicate Benefits

- 1. An employee may not receive both permanent partial disability benefits at the same time the employee is receiving permanent total disability benefits. On the date the employee begins receiving permanent total disability benefits, the permanent partial benefits will terminate.

XII. DEATH BENEFITS - § 85.31

- A. Reasonable burial expenses are payable, not to exceed 12 times the statewide average weekly wage paid employees as determined and published by the Division in effect at the time of death.
- B. Death benefits are payable to the dependents who are wholly dependent on the earnings of the employee for support at the time of the injury.
- C. A dependent spouse shall receive weekly payments, commencing from the date of death, for the life of the dependent spouse, provided that that the spouse does not remarry. In the event of remarriage, two years of death benefits shall be paid to the surviving spouse in a lump sum if there are no children entitled to benefits.
- D. Dependent children shall receive a proportional share of weekly benefits commencing from the date of death until the age of 18, unless dependency extends beyond the age of 18 if actual dependency continues. Full-time enrollment in any accredited educational institution shall be a conclusive showing of actual dependency.
- E. Dependent children who are physically or mentally incapacitated from earning at the time of the injury causing death shall receive a proportional share of weekly benefits for life, or until they shall cease to be physically or mentally incapacitated from earning.

XIII. DEFENSES

- A. Statutory:

1. *Willful injury/Intoxication.* § 85.16. No compensation under this chapter shall be allowed for an injury caused:
 - a. By the employee's willful intent to injure the employee's self or to willfully injure another;
 - b. By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.
 - c. By the willful act of a third party directed against the employee for reasons personal to such employee.
2. *Statute of Limitations.* § 86.13. An action must be filed:
 - a. Within two years of the occurrence of the accident or injury under the Workers' Compensation Act, or
 - b. Within three years of the date of last payment if weekly benefits are paid pursuant to § 86.13.
3. *Notice.* Notice of an injury is required within 90 days from the date of the "occurrence" of the injury.

XIV. PENALTIES

- A. In order to deny any benefits due and owing under the Iowa Workers' Compensation Act, the employer must have a reasonable or probable cause or excuse for the delay, denial, or termination of payments.
- B. The employer must show the following:
 1. The employer or insurance carrier conducted an investigation and evaluation of whether benefits were due and owing to the employee;
 2. The results of the investigation or evaluation were the contemporaneous basis of the denial, delay, or termination of benefits;
 3. The employer or insurance carrier contemporaneously communicated the basis for the denial, delay, or termination of benefits to the employee.
- C. The employer or insurance carrier must provide the employee thirty days notice stating the reason for the termination of benefits and advising the employee of their right to file a claim with the Commission.
- D. If the Commission finds that the basis for the denial was unreasonable or without probable cause, a penalty, up to 50% of the benefits that were denied, delayed, or terminated.
- E. Practical tips regarding penalties:
 1. The employer/insurer should assume that if the initial weekly payment will not be made when it is due, the facts of the investigation and delay should be communicated in writing to the employee no later than the date the initial payment would otherwise be due

2. At the outset of the claim, communicate with the employee that the claim report is acknowledged and an investigation is required. Also inform employee that because it takes time to obtain relevant information, weekly benefits may be delayed until the investigation is complete.
3. Communication with the employee should indicate that employee's cooperation is required in the investigation.
4. The statute does not require that communication to the employee be in writing, but it be from an evidentiary standpoint.
5. Investigate promptly. This may include:
 - a. Obtain recorded statement as soon as possible
 - b. Write for medical records as soon as a list of providers and Patient's Authorization are available
 - c. Medical evaluations/testing should be scheduled as soon as available.
6. If there is a delay in the investigation (i.e. slow response from medical providers), this should be communicated to the employee in writing
7. If employee fails or refuses to cooperate in the investigation the failure/refusal should be communicated to employee in writing explaining the delay or refusal is preventing the investigation and delaying payment of benefits.
8. If the investigation proves the claim is valid this should be communicated to the employee in writing and all accrued benefits plus interest should be paid.
9. If the investigation reveals information that supports a denial of the claim, this should be communicated to the claimant in writing with explanation as to the reason and basis for denial.
10. The duty to investigate continues beyond the initial determination and all results and consequences of the investigation should be communicated in writing to the employee.
11. Once the claim is referred to counsel be sure to provide all of the above communication to defense counsel in the event the claim becomes litigated.

XV. SETTLEMENTS - § 85.35

A. Types of Settlements:

1. Agreement for Settlement
 - a. Parties may enter into an agreement as to the amount and extent of compensation due and file with the Commissioner.
 - b. This type of settlement will not end future rights or medical benefits
2. Compromise Settlement (AKA Special Case Settlement or Closed File)
 - a. When there is a dispute as to whether or not the employee is entitled to benefits, parties may enter into a compromise settlement
 - i. There must be at least one issue in dispute and it must be clear what the dispute is. Nature and extent of the injury are generally not sufficient without supporting medical to clearly describe the dispute.
 - b. This type of settlement ends the employee's future rights to any benefits

B. General Settlement Information:

1. Full Commutation:
 - a. Lump sum payment of all remaining future benefits
 - b. Must be at least 10 weeks of benefits remaining from date of the end of the healing period or temporary total disability period. If less than 10 weeks are remaining full commutation will not be allowed.
 - c. Once approved this will end all of employee's future rights to any additional benefits including medical
 - d. To be approved, parties must show the employee has a specific need and the lump sum is in the best interest
 - i. Pro se employees must complete a Claimant's Statement expressing that need
2. Partial Commutation:
 - a. Lump sum payment of a portion of the remaining benefits
 - b. Establishes the employee's entitlement to disability benefits but it does not end future rights.
3. Settlement language may not include "any and all injuries" or "other states or jurisdictions."

XVI. PROCEDURE

- A. Filing of Original Notice and Petition or Petition for Alternate Care begins the litigation process
 1. Answer or other responsive motion must be filed within 20 days
 2. Discovery may commence via Interrogatories, Request for Production, Request for Admission, Depositions
 3. Notice of Service of Medical Records (NOS) served on opposing party on a continuing basis
 - a. NOS of all medical records in a party's possession must be served within 20 days of filing an Answer and within 10 days of receipt of records for the remainder of the claim. Failure to properly serve records could prevent admission of the records into evidence.
 4. Alternative Dispute Resolution is encouraged through the Division or through private mediation
 5. Hearings:
 - a. If claim has not been resolved through settlement a hearing will be held and a Deputy Commissioner will determine Claimant's rights and issue an award.
 - b. All evidence must be submitted at the time of the hearing – the record will be closed at the conclusion of the hearing.
 - c. Case is left open following a hearing and award for lifetime medical and Review & Reopening for a period of 3 years from the date of the last weekly benefits paid.
 - d. Continuances generally are not granted even if a claimant has not reached MMI

- e. Appeal to Commissioner must be filed within 20 days of Deputy's decision.
- f. Appeal to District Court within 30 days of final agency decision
 - i. District Court is bound by the factual determinations made by the Agency unless a different result is required as a matter of law – if the agency decision is “irrational, illogical or wholly unjustifiable.”
 - ii. If a decision is supported by substantial evidence the decision will not be overturned.
- g. Appeal to Iowa Supreme Court within 30 days of the District Court's final judgment

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RECENTLY ASKED QUESTIONS IN IOWA FROM ISSUES ADDRESSED IN RECENT IOWA CASES

Q: Is an idiopathic fall compensable when the claimant hit his or her head on a surface that is commonplace?

A: Potentially, depending on the facts of the case and if the claimant meets his or her burden of proof. In this case, the claimant fell on the floor at work due to a seizure and hit the back of his head.

The claimant has the burden and the opportunity in idiopathic-fall cases to meet the increased-risk test. This means that there is no blanket rule in Iowa that idiopathic falls onto level floors are *never* compensable. There is also no blanket rule that idiopathic falls are *always* compensable. Instead, the claimant can recover if he or she proves that a condition of his or her employment increased the risk of injury. The commissioner can factually determine on a case-by-case basis whether the conditions of employment shown by the claimant caused an increased risk of injury in the workplace. The court emphasized that the workers' compensation statute was to be applied broadly and liberally in maintaining its objective: the benefit of the worker and the worker's dependents.

In response to this case, Senate File 507, relating to Workers' Compensation § 85.61, subsection 7, Code 2019, added in 7(c), which states:

“Personal injuries due to idiopathic or unexplained falls from a level surface onto the same level surface do not arise out of and in the course of employment and are not compensable under this chapter.”

Thus, the Iowa legislature has essentially rendered the outcome of the *Bluml* case invalid under Iowa law.

Bluml v. Dee Jay's Inc., 920 N.W.2d 82 (Iowa 2018).

Q: Can a claimant impose civil liability on an employer's workers' compensation insurance carrier for negligently conducting an insurance inspection when the claimant claims that serious health problems occurred as a result of the negligent inspection?

A: No. Iowa Code § 517.5 states that insurance inspections done for the purpose of insuring a company cannot be the basis for the imposition of civil liability upon the inspector or the insurance company.

In this case, the claimants alleged that in the course of manufacturing wind blades at the TPI manufacturing facility, they experienced horrific injuries from hazardous chemicals, including rashes, skin ruptures, and respiratory congestion, among other various maladies. TPI's insurer claimed it had statutory immunity from negligent inspections under Iowa Code § 517.5. The claimants responded that § 517.5 was unconstitutional under equal protection, due process, and the inalienable rights clauses of the Iowa Constitution.

The court discussed the role of voluntary undertakings and the scope of the grand bargain that exists in workers' compensation claims. . It determined that it was rational and reasonable for the legislature to determine via statute that workers' compensation carriers' inspections are immunity to civil liability. The court state that the insurer is tied to the employer, so the insurer has this civil liability immunity as well. Therefore, the court determined that because no valid claim existed against the carriers' inspections, the claimants had no right to a jury trial

Clark v. Ins. Co. Pa., No. 17-2068, 2019 Iowa Sup. LEXIS 50 (May 3, 2019).

Q: In order for penalty benefits to be unjustified, what must the respondent prove?

A: Under Iowa § 86.13(4)(a), the commissioner can award additional benefits if (1) the employee demonstrated a denial, delay in payment, or termination of benefits. (2) The employer failed to prove a reasonable or probable cause or excuse for the denial, delay, or termination.

Further, under Iowa § 86.13(4)(b), the defendant must prove that the excuse was (1) preceded by a reasonable investigation as to whether the employee was entitled to benefits; (2) the benefits were denied, delayed, or terminated as a result of the investigation; and (3) the reason for the denial, delay, or termination was conveyed contemporaneously to the employee.

In *Baccam v. ACH Food Cos., Inc.*, thirteen months passed between the beginning of the defendant's investigation and the date of a doctor's impairment rating. No communication was sent to the claimant to explain the reason for the delay. No finding of fact showed that the doctor was the reason for the delay. Because of this and the respondent company's failure to object, the court awarded the claimant an additional five percent plus interest on his claim.

Baccam v. ACH Food Cos., Inc., No. 18-1002, 2019 Iowa App. LEXIS 260 (Ct. App. Mar. 6, 2019).

Q: Is a claimant barred from reopening a prior workers' compensation settlement agreement?

A: No. If the claimant's physical condition worsens or the claimant experiences a reduction in earning capacity, the claim may reopen. The claimant must then prove by a preponderance of the evidence that the employee's current condition is proximately caused by the original injury.

However, if the claimant knew of a condition at the time of the settlement and did not disclose it, the claimant cannot reopen the case later based on that known condition. The issue could have been litigated at the time of the settlement; therefore, the claim would be barred from reopening.

In this case, the claimant, a health professional, injured himself by tripping and hitting his head. After settling his workers' compensation claim as a permanent partial disability for 50% loss and 250 weeks of compensation, the claimant tried to reopen the case years later. He claimed that his injury caused him further temporary disability and additional permanent disability. However, the court determined that the claimant could not prove that his further injury was a result of the original accident. He also knew of that injury at the time of the original claim yet chose not to litigate it, thereby barring the further-disability claim.

Brinck v. Siouxland Mental Health Ctr., 924 N.W.2d 536 (Iowa Ct. App. 2018).

Q: Fact-finding is vested in the discretion of the commissioner, so is the appellate court bound by the fact-findings upon review?

A: Yes, so long as the commissioner's fact-finding is supported by substantial evidence. Evidence is substantial if a reasonable mind would find it adequate to reach the same conclusion.

In this case, the claimant requested an Arabic translator at her arbitration hearing. The translator was provided; nonetheless, the claimant had a difficult time understanding the Arabic her translator spoke, so the claimant waived her right to her interpreter and proceeded in English. The deputy commissioner ultimately determined that the claimant failed to prove that she sustained an injury as the result of her fall at work. The commissioner affirmed the order, denying the claimant's application for rehearing. The claimant challenged the fact-findings of the agency, claiming that the determinations were affected by implicit bias.

When a commissioner is accused of implicit bias, the appellate court will determine whether the commissioner's opinion was based on substantial evidence supported by the record and proceedings as a whole. The court in *Cerwick* ultimately determined that the claimant's cry of implicit bias was unsupported by the evidence and that the deputy's attention to the evidence and the conclusions drawn directly conflicted with the claimant's perception of the evidence.

Cerwick v. Tyson Fresh Meats, Inc., No. 18-0152, 2019 Iowa App. LEXIS 133 (Ct. App. Feb. 6, 2019).

Q: Can an employment application constitute a contract? Secondly, how does an exculpatory clause in a contract with a temporary employment agency affect the agency's customers and the claimant's potential remedies?

A: Not by itself. A valid contract must have an offer, acceptance, and consideration. A job application itself is the solicitation of an offer. Once the employer offers the job to the employee and the employee accepts, all that remains is consideration. Because job offers are conditioned upon terms and conditions written in the agreement, a valid contract subsequently exists when the employee accepts employment.

In *Cupps v. S & J Tube, Inc.*, the claimant (Cupps) worked for a temporary employment agency (TSS), which then found temporary employment for Cupps at S & J Tube, Inc (S & J). When Cupps signed his employment agreement with TSS, the employment contract stated that any work-related injury claims had to go through TSS's workers' compensation insurance and that Cupps could not seek damages against S & J.

Cupps was injured upon leaving S & J and subsequently attempted to file for workers' compensation through S & J. The court determined that while the application itself was not a valid contract, the subsequent job offer was a valid contract when Cupps accepted employment.

Secondly, the court discussed the crucial nature of the contract's exculpatory clause. It was key that the exculpatory clause had clear language stating that by signing the application, all claims relating to future acts or omissions of negligence toward the customer company (S & J Tube, Inc.) were void. The existence of the valid exculpatory clause in the contract exonerating S & J from any future liability prohibited Cupps from taking action against S & J as a result of Cupps's injury. As a result of the valid and unequivocal exculpatory clause, Cupps's only remedy was through TSS, his temporary employment agency.

Cupps v. S & J Tube, Inc., No. 17-1922, 2019 Iowa App. LEXIS 26 (Ct. App. Jan. 9, 2019).

Q: Can purely mental injuries be compensable in the absence of an accompanying physical injury? Alternatively, can the claimant prove legal causation under a modified standard?

A: Yes, purely mental injuries can be compensable, so long as the employee can show that the mental injury was caused by workplace stress of a greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs. Alternatively, the claimant can prove legal causation under a modified standard so long as the mental injury arises out of an instance where the employee witnesses a gruesome injury or the death of another or is personally physically threatened.

Dubinovic v. Des Moines Pub. Sch., No. 18-0194, 2019 Iowa App. LEXIS 523 (Ct. App. May 15, 2019).

Q: Can a claimant in a civil action successfully assert claims of bad faith against his or her employer's workers' compensation insurance carriers, relating to the handling of his workers' compensation claims?

A: Yes. An example of a successful claim of bad faith includes when the insurer fails to give an expert all the relevant facts. The insurer can rely on reasonable opinions to successfully defeat claim of bad faith, but only if the "expert's report is objectively prepared and the insurer's reliance on the report is reasonable." Insurers should retain qualified experts who have the opportunity to review all relevant records, diagnostic tests, and expert reports, even if the expert has already issued an opinion.

Dunlap v. AIG, Inc., No. 17-1503, 2019 Iowa App. LEXIS 50 (Ct. App. Jan. 9, 2019).

Q: If precluded by the statute of limitations, can a claimant recover by way of a cumulative-injury claim for an increase in functional disability?

A: Yes. In this case, the claimant fractured her right ankle. Once she was at maximum medical improvement, she was given a 17% impairment rating for the ankle. She was given PPD benefits and returned to work without restrictions. Six years later, the claimant filed a cumulative injury claim as a result of the original incident.

If a claimant is precluded by the statute of limitations from bringing an original proceeding or review-reopening, the claimant may recover by way of a cumulative-injury claim for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the original injury. The claimant can do so without having to show he or she suffered a “distinct and discreet” disability attributable to the post-original-trauma work activities.

The court ultimately determined that because the claimant could only show that her daily work activities may have aggravated the ankle injury in later years, this alone was not enough to establish a cumulative injury, as her ankle had never fully healed. Thus, the claimant failed to prove that her injury was “distinct and discreet,” attributable to her work activities after the original ankle injury.

Gumm v. Easter Seal Soc’y of Iowa, Inc., No. 18-1051, 2019 Iowa App. LEXIS 501 (Ct. App. May 15, 2019).

Q: Must the commissioner of a case provide a “logical pathway” outlining the commissioner’s industrial-disability determination?

A: Yes. In this case, the claimant argued that the commissioner did not provide a “logical pathway” explaining the industrial-disability determination. The claimant stated that “the agency pulled its industrial-disability finding ‘out of thin air, with no explanation.’”

The commissioner has a duty to state the evidence relied upon and to detail the reasons for the conclusions reached. The commissioner must sufficiently detail his or her decision to show the path taken through conflicting evidence. These requirements are satisfied if the reviewing court is able to determine with reasonable certainty the factual basis on which the administrative officer acted. Even if the decision does not refer to all evidence in the case, the losing party cannot claim that the decision was made irrationally.

The court of appeals emphasized the commissioner’s reliance on medical testimony and that the court could logically follow the commissioner’s decision to a reasonable conclusion. Thus, the court found that the commissioner’s determination was reasonable, even though the claimant was dissatisfied with the commissioner’s precision.

Harper v. Lensing, Ltd., 922 N.W.2d 106 (Iowa Ct. App. 2018).

Q: Is the absence of medical evidence a bar to the claimant to request alternate medical care?

A: No. In this case, claimant Huff worked for CRST as a truck driver, living out of and using his truck for personal transportation. He was involved in a trucking accident and sustained numerous serious injuries. As a result of the accident, Huff submitted three unsuccessful requests with the agency for alternate care, asking for an ADA-compliant living arrangement, a handicap van, plus an in-home and community-assistance healthcare provider. The agency denied the requests because no medical personnel had stated Huff needed these accommodations.

Claimants can make successful requests for alternate medical care or claims that the care provided through the employer was unreasonable without introducing medical evidence. The appellate court found that though medical evidence is normally provided to the agency, it is not necessary to show the effect of undeniable injuries or to prove that the requested care would replace lost function as a result of the sustained injuries. Therefore, the court remanded the case to determine factually what available care best fit Huff.

Huff v. CRST Expedited, Inc., No. 18-0336, 2019 Iowa App. LEXIS 254 (Ct. App. Mar. 6, 2019).

Q: When there is conflicting medical testimony regarding whether ongoing work contributed to the severity of an injury, what standard does the court follow?

A: The commissioner is the fact finder. Therefore, though the appellate court will not rubberstamp the commissioner's decision regarding the facts, it will only reverse the decision if the decision was based on insubstantial evidence. If different conclusions may reasonably be drawn from the same evidence, this does not create immediate reversible error.

In this case, the claimant had two doctors examine her, each making very different medical determinations. One independent medical examination found that due to performing her work for 30 years, the claimant had a cumulative injury to her knees. A different independent medical examination found that while the work could have aggravated her developing arthritis, the claimant's systemic risk factors were the far-greater contributors to the knee issues. The court found that, while there was conflicting evidence that could have led to a different outcome, the commissioner's determination that there was no cumulative injury arose from substantial evidence, ultimately affirming the district court's decision.

Keeran v. Quaker Oats Co., 924 N.W.2d 535 (Iowa Ct. App. 2018).

Q: In order for a claimant to be granted alternate medical care by the commissioner, what determination must the commissioner make?

A: Generally, when alternate medical care is granted by the employer, the employer must fund it. However, when a claimant seeks alternate medical care, and the employer denies

it, the claimant is responsible for payment. However, a claimant can get funding from the employer for that care if the employer can prove the care is reasonable and beneficial under the totality of the circumstances to the treatment of the work injury.

In this case, the claimant injured his ankle and ultimately sought and received alternate medical care that was unauthorized. Because of this unauthorized treatment, the claimant was responsible for the costs of that treatment unless he could prove the treatment was reasonable and beneficial. The court found that the employer cannot be held liable for payment of alternate medical care when the employer resisted the care, the care was unauthorized, and no evidence was shown to prove the alternate medical care was reasonable and beneficial to the treatment of the injury.

Lynch Livestock, Inc. v. Bursell, No. 17-1629, 2019 Iowa App. LEXIS 235 (Ct. App. Mar. 6, 2019).

Q: How does the court determine in which state a contract of hire is made?

A: Contracts are made in the state in which the offer is accepted or where the last act necessary to a meeting of the minds or to complete the making of the contract is performed. The place of contract is where the acceptance is made. If a resident of one state places a letter in the mail making an offer to a person who resides in another state, the contract is completed where the acceptance is mailed.

In this case, the claimant was an Iowa resident who began working as a truck driver for a Wisconsin trucking company operating in 48 states. The claimant was injured while working on a drive for the company in Kentucky. The claimant filed for workers' compensation benefits in Iowa. The company argued that there was no jurisdiction in Iowa because neither the injury, contract, nor the company's place of business were in Iowa.

However, under Iowa Code § 85.71(b), an employee is entitled to benefits, even if his or her injury occurs outside of Iowa if (1) he was working under a contract of hire in Iowa at the time of the injury and (2) he regularly worked in Iowa. There was no dispute that the claimant regularly worked in Iowa. The court found that because the claimant mailed his acceptance of the contract from Iowa to the company's headquarters, his contract of hire was in Iowa.

Niday v. Roehl Transp., Inc., No. 18-0712, 2019 Iowa App. LEXIS 360 (Ct. App. Apr. 3, 2019).

Q: Does Iowa Code Section 17A.19(2) (2017) have a jurisdictional requirement that the petitioner asking for judicial review must mail a copy of the petition to attorneys for all parties in the case?

A: Not necessarily. Service requirements are met under Section 17A.19(2) when a lawyer emails a copy of the petition to opposing counsel.

Ortiz v. Loyd Roling Constr., No. 18-0047, 2019 WL 2236111 (Iowa May 24, 2019).

Q: Is an award of solely medical benefits sufficient to allow for the filing of a review-reopening petition?

A: Yes. Review re-opening must be filed within three years of the date of the award or settlement if the award is limited to medical benefits. If no indemnity benefits have been paid and a case has not gone to award or settlement, the statute of limitations for filing an original petition is two years from the date of the accident.

In this case, the claimant was injured in August 2008 and filed for workers' compensation benefits in December 2008. In the January 2010 hearing report, neither party stipulated that TTD or PPD benefits were in dispute, so the agency did not consider either. The agency thus awarded medical benefits only, which was affirmed by the court of appeals. Three years later in September 2013, the claimant filed for a review-reopening seeking disability for her August 2008 injury. This proceeding was approved in March 2015, and the agency awarded PTD and penalty benefits. The agency's decision was affirmed in October 2016 upon intra-agency review. Pella ultimately appealed, claiming that the review-reopening petition was untimely and that the claimant was not entitled to PTD or penalty benefits.

Under prior case law, the court found that an award of solely medical benefits is eligible for review-reopening. To have a successful petition for a review-reopening, the claimant must prove by a preponderance of the evidence that after the date of the award under review, he suffered an impairment or lessened earning capacity caused by the original injury and that this change was not taken into account at the time of the award. *Pella Corp. v. Winn*, No. 17-1545, 2019 Iowa App. LEXIS 44 (Ct. App. Jan. 9, 2019).

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Notes Pages

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KANSAS WORKERS' COMPENSATION

Applies to injuries occurring on or after May 15, 2011.

I. JURISDICTION - K.S.A. 44-506

A. Act will apply if:

1. Accident occurs in Kansas.
2. Contract of employment was made within Kansas, unless the contract specifically provides otherwise.
3. Employee's principal place of employment is Kansas.

II. ACCIDENTS

A. Traumatic Accidental Injury

1. "Undesigned, sudden, and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force."
2. "An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift."
3. "The accident must be the prevailing factor in causing the injury."
4. Deemed to arise out of employment only if:
 - a. There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
 - b. The accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

B. Repetitive Use, Cumulative Traumas or Microtraumas— K.S.A. 44-508(e)

1. "The repetitive nature of injury must be demonstrated by diagnostic or clinical tests."
2. "The repetitive trauma must be the prevailing factor in causing the injury."
3. Date of accident shall be the earliest of:
 - a. Date the employee is taken off work by a physician due to the diagnosed repetitive trauma;
 - b. Date the employee is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
 - c. Date the employee is advised by a physician that the condition is work related; OR
 - d. Last day worked, if the employee no longer works for the employer.

- e. In no case shall the date of accident be later than the last date worked.
- 4. Deemed to arise out of employment only if:
 - a. Employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
 - b. The increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
 - c. The repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
- C. Prevailing Factor**
 - 1. Primary factor in relation to any other factor.
 - 2. Judge considers all relevant evidence submitted by the parties.
- D. Exclusions**
 - 1. Triggering/precipitating factors
 - 2. Aggravations, accelerations, exacerbations
 - 3. Pre-existing condition rendered symptomatic
 - 4. Natural aging process or normal activities of daily living
 - 5. Neutral risks, including direct or indirect results of idiopathic causes
 - 6. Personal risks

III. NOTICE OF ACCIDENT - K.S.A. 44-520

- A.** Notice requirements depend on the date of accident.
- B.** For accidents after April 25, 2013:
 - 1. Notice must be given by the earliest of the following days:
 - a. 20 calendar days from the date of accident or injury by repetitive trauma;
 - b. 20 calendar days from the date the employee seeks medical treatment for the injury; or
 - c. 10 calendar days from the employee's last day of actual work for the employer.
- C.** For accidents between May 15, 2011, and April 25, 2013:
 - 1. Notice must be given by the earliest of the following days:
 - a. 30 calendar days from the date of accident or injury by repetitive trauma;
 - b. 20 calendar days from the date the employee seeks medical treatment for the injury; or

- c. 20 calendar days from the employee's last day of actual work for the employer.
- D. For accidents before May 15, 2011:
 - 1. Notice must be given within 10 days of the accident unless the employer had actual knowledge of the accident.
 - 2. If an employee does not provide notice within 10 days, his claim will not be barred if his failure to provide notice was due to just cause, provided that:
 - a. Notice was given within 75 days; or
 - b. The employer had actual knowledge of the accident; or
 - c. The employer was unavailable to receive notice; or
 - d. The employee was physically unable to give such notice.
- E. May be oral or in writing
 - 1. "Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager."
 - 2. "Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment." The burden is on the employee to prove that such notice was actually received by the employer.
- F. Notice shall include the time, date, place, person injured and particulars of the injury and it must be apparent the employee is claiming benefits or suffered a work-related injury.
- G. Notice requirement is waived if the employee proves that
 - 1. the employer or employer's duly authorized agent had actual knowledge of the injury;
 - 2. the employer or employer's duly authorized agent was unavailable to receive such notice within the applicable period; or
 - 3. the employee was physically unable to give such notice.

IV. REPORT OF ACCIDENT – K.S.A. 44-557

- A. Employer / carrier must file with the Division of Workers' Compensation within 28 days of obtaining knowledge of any accident that requires an employee to miss more than the remainder of the shift in which the injury occurred.
 - 1. Civil penalties are possible for failure to file.
 - 2. Failure to file within 28 days extends the statute of limitations from 200-days to one year from the date the period begins to run.

3. Accident report cannot be used as evidence.

V. APPLICATION FOR HEARING- K.S.A. 44-534

- A.** The employee must file an application for hearing by the later of:
 1. 3 years after the date of accident; or
 2. 2 years after the last payment of compensation.
- B.** Once Application for Hearing is filed, claim must proceed to hearing or award within three years or be subject to dismissal with prejudice – K.S.A. 44-523(f)

VI. MEDICAL TREATMENT

A. K.S.A. 44-510h

1. Employer has the right to select the treating physician.
2. Employee has \$500 unauthorized medical allowance for treatment.
3. Rebuttable presumption that employer's obligation to provide medical treatment terminates upon the employee reaching maximum medical improvement.
4. Medical treatment does not include home exercise programs or over-the-counter medications.

B. K.S.A. 44-510k

1. After an award, any party can request a hearing for the furnishing, termination or modification of medical treatment.
2. ALJ must make a finding that it is more probably true than not that the injury is the prevailing factor in the need for future medical care
3. If the claimant has not received medical treatment (excluding home exercise programs or over-the-counter medications) from an authorized health care provider within two years from the date of the award or the date the claimant last received medical treatment from an authorized health care provider, there is a rebuttable presumption no further medical care is needed.

C. K.S.A. 44-515

1. All benefits suspended if employee refuses to submit to exam at employer's request.
2. Employee may request that a report from any examination be delivered within a reasonable amount of time (no longer 15 day requirement).

VII. AVERAGE WEEKLY WAGE – K.S.A. 44-511

- A.** Add wages earned during the 26 weeks prior to the accident and divide by the number of weeks worked during that period. No longer a difference between full-time and part-time employees.
- B.** Wages = Money + Additional compensation
 - 1. Money: gross remuneration, including bonuses and gratuities.
 - 2. Additional Compensation: only considered if and when discontinued
 - i. Board and lodging if furnished by the employer
 - ii. Employer paid life insurance, disability insurance, health and accident insurance
 - iii. Employer contributions to pension or profit sharing plan.
- C. Examples**
 - 1. Example One
 - a. 26 weeks worked - \$10,400 earned
 - b. No additional compensation discontinued
 - c. Average weekly wage = \$400
 - 2. Example Two
 - a. 26 weeks worked - \$10,400 earned
 - b. Additional compensation discontinued following injury
 - i. Health insurance-\$200 per week.
 - ii. Pension contribution-\$150 per week.
 - c. Average weekly wage - \$750

VIII. TEMPORARY BENEFITS – K.S.A. 44-510c(b)

- A. Temporary Total Disability**
 - 1. Two-thirds of Average Weekly Wage (AWW) from above, subject to statutory maximum determined by date of injury
 - 2. Seven-day waiting period.
 - *No temporary total disability for first week unless off three consecutive weeks.
 - 3. Exists when the employee is “completely and temporarily incapable of engaging in any type of substantial gainful employment.”
 - 4. Treating physician’s opinion regarding ability to work is presumed to be determinative.
 - 5. employee is entitled to temporary total disability benefits if employer cannot accommodate temporary restrictions of the authorized treating physician.

6. No temporary total disability benefits if the employee is receiving unemployment benefits.
7. Insurer or self-insured employer MUST provide statutorily mandated warning notice on or with the first check for temporary total disability benefits.

B. Temporary Partial Disability

1. Two-thirds of the difference between Average Weekly Wage pre-accident and claimant's actual post-accident weekly wage up to statutory maximum.
2. available for scheduled and non-scheduled injuries

C. Termination of Benefits

1. Maximum medical improvement
2. Return to any type of substantial and gainful employment
3. Employee refuses accommodated work within the temporary restrictions imposed by the authorized treating physician
4. Employee is terminated for cause or voluntarily resigns following a compensable injury, if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

IX. PRELIMINARY HEARINGS – K.S.A. 44-534a

- A. After filing an Application for Hearing pursuant to K.S.A. 44-534, a party may file an Application for Preliminary Hearing.
- B. Seven days before filing Application for Preliminary Hearing the applicant must file written NOTICE OF INTENT stating benefits sought.
- C. An Administrative Law Judge will be assigned
- D. Hearing can be set seven days later. If claim denied at preliminary hearing, failure to proceed to regular hearing within one year and without good faith reason results in dismissal with prejudice.
- E. Benefits to Consider at Preliminary Hearing:
 1. Medical treatment (including change of physician).
 - a. Ongoing or past bills.
 2. Temporary total or temporary partial benefits (including rate).
 - a. Prospective or past benefits.
 3. Medical records and reports are admissible.

4. Witnesses may be necessary.
 5. Opportunity for decision on ultimate compensability issues.
- F. Preliminary Awards are binding unless overruled at a later Preliminary Hearing or Regular Hearing.**
- G. Limited right to review by the Appeals Board.**
1. "whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply"
- H. Penalties – K.S.A. 44-512a**
1. Award must be paid within 20 days of receipt of statutory demand. Penalties can be \$100 per week for late temporary total and \$25 per week per medical bill.
- I. Dismissal of claim denied at Preliminary Hearing – K.S.A. 44-523(f)**
1. Claim dismissed with prejudice, if:
 - a. Case does not proceed to Regular Hearing within one year
 - b. Employer files application for dismissal
 - c. Claimant cannot show good cause for delay
 2. Dismissal considered final disposition for fund reimbursement

X. PRE-HEARING SETTLEMENT CONFERENCES – K.S.A. 44-523(d)

- A.** Must occur before a Regular Hearing can take place.
- B.** Generally after claimant reaches maximum medical improvement.
- C.** Court will clear case for Regular Hearing or enter order for appointment of independent physician to determine permanent impairment of function or restrictions.
- D.** Process varies from Judge to Judge.
- E.** Issues regarding final award or settlement are considered.

XI. PERMANENT DISABILITY – K.S.A. 44-510e

A. Maximum Awards

1. Functional Impairment Only - \$75,000
 - a. Cap now applies even if temporary total or temporary partial disability benefits were paid.

- b. \$75,000 cap does not include temporary total or temporary partial disability benefits paid.
- 2. Permanent Partial Disability - \$130,000
 - a. Cap includes temporary total or temporary partial disability benefits paid
- 3. Permanent Total Disability - \$155,000
 - a. Cap includes temporary total or temporary partial disability benefits paid
- 4. Death benefits - \$300,000
 - a. Includes \$1,000 for appointment of conservator, if required.

B. Reduction for Pre-existing Impairments

- 1. Basis of prior award in Kansas establishes percentage of pre-existing impairment.
- 2. If no prior award in Kansas, pre-existing impairment established by competent evidence.
- 3. If pre-existing injury is due to injury sustained for same employer, employer receives a dollar for dollar credit.
- 4. In all other cases, the employer receives a credit for percentage of pre-existing impairment.

C. Scheduled Injuries

- 1. Includes loss of and loss of use of scheduled members
- 2. Combine and rate multiple injuries in single extremity to highest scheduled member actually impaired
- 3. Formula
 - a. $(\text{scheduled weeks} - \text{weeks TTD paid}) \times \text{rating \%} \times \text{compensation rate}$
- 4. Example
 - a. Arm Injury = 210 weeks
 - b. TTD paid = 10 weeks
 - c. Rating = 10%
 - d. Compensation Rate = \$546
 - i. **$(210 \text{ weeks} - 10 \text{ weeks}) \times 10\% = 20 \text{ weeks} \times \$546.00 = \$10,920.00$**

D. Body as a Whole Injuries

- 1. Presumption is functional impairment
- 2. Includes loss of or loss of use of: (1) bilateral upper extremities, (2) bilateral lower extremities, or (3) both eyes.
- 3. Formula

- a. $(415 \text{ weeks} - \text{weeks TTD paid in excess of 15 weeks}) \times \text{rating \%} \times \text{compensation rate}$

4. Example

- a. TTD paid = 25 weeks
- b. Rating = 15% Body as a Whole
- c. Compensation Rate = \$546.00
 - i. **$(415 \text{ weeks} - 10 \text{ weeks}) \times 15\% = 60.75 \text{ weeks} \times \$546.00 = \$33,169.50$**

5. Work Disability

- a. High end permanent partial disability.
- b. Allows the employee to receive an Award in excess of functional impairment.
- c. Employee eligible if:
 - i. Body as a whole injury; and
 - ii. The percentage of functional impairment caused by the injury exceeds 7 ½% or the overall functional impairment is equal to or exceeds 10% where there is preexisting functional impairment; and
 - iii. Employee sustained a post-injury wage loss of at least 10% which is directly attributable to the work injury.

6. Formula

- a. $((\text{Wage Loss \%} + \text{Task Loss \%}) / 2) \times (415 \text{ weeks} - \text{weeks TTD paid in excess of 15 weeks}) \times \text{compensation rate}$
 - i. **Wage Loss:** “the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is capable of earning after the injury.”
 - (a) Consider all factors to determine the capability of the worker, including age, education and training, prior experience, availability of jobs, and physical capabilities.
 - (b) Legal capacity to enter contract of employment required.
 - (c) Refusal of accommodated work within restrictions and at a comparable wage results in presumption of no wage loss
 - ii. **Task Loss:** “the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury.”

(a) Task loss due to pre-existing permanent restrictions not included

7. Example:

- a. TTD paid = 25 weeks
- b. AWW on date of accident = \$1,000.00
- c. AWW after accident = \$350
- d. Tasks performed during 5 years prior to accident = 25
- e. Tasks capable of performing after the accident = 10
- f. Compensation Rate = \$555.00
 - i. **(65% wage loss + 60% task loss) / 2 = 62.5% work disability x (415 weeks – 10 weeks) = 253.125 weeks x \$555.00 = \$140,484.37**
 - ii. This would be capped at \$130,000.00, and the amount of TTD paid is considered in determining if the maximum has been reached.

E. Permanent Total Disability

- 1. Employee is completely and permanently incapable of engaging in any type of substantial and gainful employment.
- 2. Expert evidence is required to prove permanent total disability
- 3. Can only be permanently and totally disabled once in a lifetime.

F. Death Cases – K.S.A. 44-510b

- 1. Burial Expenses:
 - a. Employer shall pay the reasonable expense of burial not exceeding \$10,000.00 (increase from previous maximum of \$5,000.00).
- 2. Initial Lump sum payment of \$60,000.00 to surviving legal spouse or a wholly dependent child or children or both (increase from previous amount of \$40,000.00).
- 3. Weekly benefits thereafter: 50% to surviving spouse – 50% to surviving children.
 - a. Surviving children will receive weekly benefits until the child becomes 18, unless the child is enrolled in high school. In that event compensation shall continue until May 30th of the child's senior year in high school or until the child becomes 19 years of age, whichever is earlier.
 - b. Surviving child will receive weekly benefits through the age of 23 if one of the following conditions are met:
 - i. Dependent child is not physically or mentally capable of earning wages in any type of substantial and gainful employment; or

- ii. Dependent child is a student enrolled full time in an accredited institution of higher education or vocational education.
- c. Conservatorship required for minor children.
- 4. Cap –
 - a. \$300,000.00 - For surviving spouse and wholly dependent children
 - i. Can exceed as children receive benefits above cap to age 18.
 - b. \$100,000.00 – If no surviving spouse or wholly dependent children (all other dependents)

XII. REGULAR HEARING – FULL TRIAL

A. Hearing

- 1. Claimant generally testifies.
- 2. Each Party has 30 days after the hearing to put on evidence.
 - a. Depositions of any and all witnesses.
 - b. Parties may stipulate records into evidence.
- 3. Administrative Law Judge will enter an Award within thirty days of submission of evidence.
 - a. Review and Modification stays open as a matter of law.
 - b. Future medical treatment only awarded if the claimant proves it is more probable than not that future medical treatment will be required as a result of the work-related injury.
 - c. Penalties again apply per K.S.A. 44-512a.

B. Review:

- 1. Award can be appealed within ten days to Kansas Appeals Board.
- 2. Can appeal Board decisions to Court of Appeals.
 - a. No change at that level if substantial evidence to support Board decision.

C. Post-Award Hearings

- 1. Medical – K.S.A. 44-510k
 - a. Claimant seeking medical treatment.
 - b. Employer/Insurer seeking to modify or terminate award for medical treatment.
 - c. Claimant's attorney can receive hourly attorney fees.
- 2. Review and Modification – K.S.A. 44-528
 - a. Review if change of circumstances; i.e. increase in disability.
 - b. Claimant's attorney can receive fees.

XIII. SETTLEMENTS – K.S.A. 44-531

- A.** Can obtain full and final settlement if claimant agrees.
 - 1. Would close all issues.
- B.** Case can settle on Running Award per law.
 - 1. Leaves future medical open on application to Director.
 - 2. Respondent controls choice of physician.
 - 3. Leaves right to Review and Modification open.
- C.** Most common settlement format is Settlement Hearing before Special Administrative Law Judge with a court reporter present.
 - 1. **FORMAT:**
 - a. Claimant is sworn in.
 - b. Claimant is asked to describe his/her accident(s).
 - c. Judge asks claimant if he/she is receiving any medical bills.
 - i. Court will generally order payment of valid and authorized bills.
 - d. Terms of settlement will be explained and read into record by Employer's attorney.
 - e. Unrepresented claimant will receive explanation from Judge that he/she could hire an attorney.
 - i. Explanation will detail that attorney could send claimant to a rating doctor of his/her choice – or claimant does not have to hire an attorney to get a rating from his/her own doctor.
 - f. Most importantly, in a full and final settlement, the court will explain that claimant is giving up all rights to future medical.
 - i. Additional payment can be made to compromise future medical.
 - g. If claimant is out of state, settlement hearing can occur by telephone or by written joint petition and stipulation.

XIV. DEFENSES

- A.** Drugs and Alcohol – K.S.A. 44-501(b)(1)
 - 1. Employer not liable if the injury was contributed to by the employee's use or consumption of alcohol or drugs.
 - 2. There is a .04 level which will establish a conclusive presumption of impairment due to alcohol. Impairment levels for drugs set by statute.
 - 3. Rebuttable presumption that if the employee was impaired, the accident was contributed to by the impairment.

4. Refusal to submit to chemical test results in forfeiture of benefits if the employer had sufficient cause to suspect the use of alcohol or drugs or the employer's policy clearly authorizes post-injury testing.
5. Results of test admissible if the employer establishes the testing was done under any of the following circumstances
 - a. As a result of an employer mandated drug testing policy in place in writing prior to the date of accident
 - b. In the normal course of medical treatment for reasons related to the health and welfare of the employee and not at the direction of the employer
 - c. Employee voluntarily agrees to submit a chemical test

B. Coming and Going to Work – K.S.A. 44-508

1. Accidents which occur on the way to work or on the way home are generally not compensable.
2. Exceptions:
 - a. On the premises of the employer.
 - b. Injuries on only available route to or from work which involves a special risk or hazard and which is not used by public except in dealing with employer.
 - c. Employer's negligence is the proximate cause
 - d. Employee is a provider of emergency services and the injury occurs while the employee is responding to an emergency.
3. Parking lot cases – key question is whether employer owns or controls the lot.

C. Fighting and Horseplay – K.S.A. 44-501(a)(1)

1. Voluntary participation in fighting or horseplay with a co-employee is not compensable whether related to work or not.

D. Violations of Safety Rules – K.S.A. 44-501(a)(1)

1. Compensation disallowed where injury results from:
 - a. Employee's willful failure to use a guard or protection against accident or injury which is required pursuant to statute and provided for the employee
 - b. Employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer
 - c. Employee's reckless violation of safety rules or regulations.
2. Subparagraphs (a) and (b) do not apply if:
 - a. It was reasonable under the totality of the circumstances to not use such equipment; or
 - b. The employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

XV. OTHER ISSUES

A. Retirement Benefit Offset – K.S.A. 44-510(h)

1. Applies to Work Disability cases only.
2. Can offset payments including Social Security Retirement.

B. Medicare Issues

1. Mandatory reporting requirements
2. Reconciliation of Conditional Payment Lien
3. Consideration of Medicare Set-Aside when closing future medical

XVI. RECENT LEGISLATIVE CHANGES (effective July 1, 2018)

A. K.S.A. 44-510b - Death Benefits:

1. Maximum burial expenses increased from \$5,000.00 to \$10,000.00.
2. Initial lump sum payment increased from \$40,000.00 to \$60,000.00.
3. Surviving children will receive weekly benefits until the child becomes 18, unless the child is enrolled in high school. In that event compensation shall continue until May 30th of the child's senior year in high school or until the child becomes 19 years of age, whichever is earlier.
4. If the employee leaves no legal spouse or dependent children but leaves other dependents wholly dependent upon the employee's earnings, maximum amount payable to such dependents is \$100,000.00 (increase from \$18,500.00).
5. If the employee does not leave any dependents who were wholly dependent upon the employee's earnings but leaves dependent partially dependent on the employee's earnings, maximum amount payable to partial dependents is \$100,000.00. (Increase from \$18,500.00).
6. If an employee does not leave any dependents, a lump sum payment of \$100,000.00 shall be made to the legal heirs of the employee in accordance with Kansas law. (Increase from \$25,000.00).
 - a. However, if the employer procured a life insurance policy with beneficiaries designated by the employee and in an amount not less than \$50,000.00, then the amount paid to the legal heirs under this section shall be reduced by the amount of the life insurance policy up to a maximum deduction of \$100,000.00.

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RECENTLY ASKED QUESTIONS IN KANSAS

FROM ISSUES ADDRESSED IN RECENT KANSAS CASES

Q. May preliminary orders be appealed from the Kansas Workers Compensation Appeals Board to the Kansas Court of Appeals?

- A. No.** K.S.A. 2018 Supp. 44-556(a) provides for the appeal of final orders of the Board to the Court of Appeals, not preliminary orders. K.S.A. 2018 Supp. 44-534(a) states that preliminary hearings are “summary in nature” which provide an opportunity for a “full presentation of the facts” at the “full hearing on the claim.” K.S.A. 2018 Supp. 44-534a(a)(1) and (2).

In this case, employer appealed an ALJ’s order directing claimant be treated by Dr. Eva Henry. Employer claimed that the administrative law judge had denied employer due process by ordering that Dr. Henry provide the treatment without first allowing the employer to submit two names of treatment providers for the judge to choose from under K.S.A. 2018 Supp. 44-510(h).

Employer argues that the Court of Appeals has jurisdiction because the administrative law judge denied it due process by failing to follow a statutory directive (that the employer be allowed to submit the names of two health-care providers for consideration if the administrative law judge decides a change in treatment provider is called for). This is distinguishable from previously decided cases concerning a preliminary order for continued medical treatment after the award of benefits had already been made. *Naff v. Davol, Inc.*, 28 Kan. App. 2d 726, 20 P.3d 738 (2001). Naff was a post award decision wherein a decision on the merits had already been decided after a full presentation of the facts. Naff is distinguishable as the case at point has not been decided in a final hearing.

There's a limited right of review for key issues that are jurisdictional to the workers'-compensation proceeding itself, like whether the injury arose out of the employment and whether the employee suffered an accident. But preliminary orders on those issues are subject to review by the board not a court. K.S.A. 2018 Supp. 44-534a(a)(2). The statute specifically precludes judicial review of preliminary orders even on these key issues. Preliminary orders are still subject to a full hearing on the claim and are not binding in resolving the underlying issues. Employer still has a chance to contest the decision made by the ALJ. Furthermore, if Employer makes payments it should not have made but for the ALJ's preliminary orders, the Employer shall seek compensation from the Fund.

Blakeslee v. Mansel Constr., 440 P.3d 627 (Kan. Ct. App. 2019).

Q. Is a claimant required to request an extension within three years of filing an application of hearing to avoid dismissal?

- A. Yes.** K.S.A. 2011 Supp. 44-523(f)(1) states that if a claim has not proceeded to a regular hearing, settlement hearing or a final award within three years from the filing of an

application for hearing, an ALJ may grant a dismissal unless claimant has moved for an extension within the three years.

In this case claimant filed an application for hearing on December 5, 2012. Employer filed an application for dismissal on January 4, 2016 stating claimant had failed to move the claim toward regular hearing or settlement within three years pursuant to K.S.A. 2011 Supp. 44-523(f). Claimant filed a request for extension of time to schedule depositions and a regular hearing after the application for dismissal was filed. The ALJ dismissed the claim stating K.S.A. 2011 Supp. 44-523(f)(1) required the dismissal because claimant had not moved for an extension within three years of filing his application for hearing.

Glaze petitioned for the court's review of the following issues: (1) whether the panel erred in interpreting K.S.A. 2011 Supp. 44-523(f)(1) and dismissing his claim; (2) whether the panel erred when it held that K.S.A. 2011 Supp. 44-523(f)(1) requires dismissal of a claim when a motion to extend is not filed within three years of filing an application for hearing; and (3) whether the panel's interpretation of K.S.A. 2011 Supp. 44-523(f)(1) deprived him of due process under section 18 of the Bill of Rights of the Kansas Constitution. Review was granted on the first two issues.

The Board has consistently interpreted K.S.A. 2011 Supp. 44-523(f)(1) to mean that when a claim has not proceeded to a regular hearing, settlement hearing or a final award within three years from the filing of an application for hearing, an ALJ may grant an extension only if the claimant moved for an extension within the three years. See *Hackler v. Peninsula Gaming Partners, LLC*, No. 1060758, 2016 WL 858312 (Kan. Work. Comp. App. Bd. February 25, 2016); *Hoffman v. Dental Central*, No. 1058645, 2015 WL 4071473 (Kan. Work. Comp. App. Bd. June 26, 2015); *Ramstad v. U.S.D.* 229, No. 1059881, 2015 WL 5462026 (Kan. Work. Comp. App. Bd. August 31, 2015). The ALJ and the Board interpreted it in the same way here. The Court agrees that K.S.A. 2011 Supp. 44-523(f)(1) unambiguously prohibits an ALJ from granting an extension unless a motion for extension has been filed within three years of filing the application for hearing. Any other interpretation strains the common reading of the statute's ordinary language. This conclusion is confirmed when general rules of grammar and punctuation are applied. The Court of Appeals' conclusion that the statute unambiguously requires a party to move for extension within three years of filing an application for hearing is correct.

Glaze v. J.K. Williams, LLC, 439 P.3d 920 (Kan. 2019).

Q. Is a claim which occurred prior to the 2011 Amendments but which had an application for hearing filed after the 2011 Amendments took effect, subject to the 2011 Amendments?

A. Yes. The Supreme Court concluded that K.S.A. 2011 Supp. 44-523(f)(1) requires the dismissal of a claim if claimant has not filed a motion for extension within three years from the filing of her application for hearing. In addition, the Supreme Court rejected claimant's argument that her claim shall be governed by the 2009 laws, rather than 2011 law, as she had not yet filed her application for hearing when the 2011 laws went into effect.

In this case, Knoll was injured while working for the school district on October 29, 2009. Knoll filed an application for hearing with the Kansas Division of Workers Compensation on November 14, 2011. On February 15, 2015, the school district and its insurer moved to have Knoll's claim dismissed pursuant to K.S.A. 2011 Supp. 44-523(f)(1), because the claim had not proceeded to a final hearing within three years of the filing of an application for hearing. Knoll argued the motion to dismiss should be denied because K.S.A. 2009 Supp. 44-523(f) actually governed her claim and that version of the statute gives a claimant five years from the date of filing an application for hearing to file a motion for extension.

In a worker's compensation cases, the substantive rights between the parties are determined by the law in effect on the date of injury. However, amendments to the compensation act that are merely procedural or remedial in nature and that do not prejudicially affect substantive rights of the parties apply to pending cases. Generally, statutes of limitations are considered procedural. The 2011 amendment is not exactly a statute of limitations, but it is very similar. K.S.A. 2011 Supp. 44-523 establishes a time limit on completing a claim based on the date when the claim was filed. Similar to a statute of limitations, this statute cuts off a remedy and can be waived, lost, or extended by statute. If a workers compensation claimant filed an application for hearing under K.S.A. 44-534 after K.S.A. 2011 Supp. 44-523(f)(1) took effect, the 2011 statute governs the claim.

The Court concluded that K.S.A. 2011 Supp. 44-523(f)(1) applies to any cases that were pending during its enactment when the claimant did not file an application for hearing until after the 2011 amendments took effect. Though Knoll suffered her injury in 2009, she filed her application for hearing six months after the 2011 amendments became effective. Accordingly, K.S.A. 2011 Supp. 44-523(f)(1) controlled her claim. Because Knoll did not file her motion for extension until after the three-year time limit provided for therein, the Court of Appeals was correct when it reversed the Board's decision affirming the ALJ's denial of the school district's motion for dismissal.

Knoll v. Olathe Sch. Dist. No. 233, 439 P.3d 313, 317 (Kan. 2019).

Q. What is an “idiopathic cause” under Kan. Stat. Ann. 44-508(f)(3)(A)(iv)?

- A.** The Kansas Supreme Court defined the term "idiopathic causes" to refer to **medical conditions or medical events of unknown origin that are peculiar to the injured individual** under the Kansas Workers Compensation Act.

In this case, claimant worked as a forklift operator and was required to attend a paid safety meeting at the nearby headquarters. When the meeting ended, claimant walked to a restroom near the stairs and ended up face down on a landing at about the midpoint on the stairway, shattering or breaking three vertebra in his neck. The accident's cause remains a mystery.

Employer argued the fall's cause was unknown, which meant claimant's injuries arose from an idiopathic cause and were not compensable under the 2011 Amendments which excluded compensation for any accident or injury that arose either directly or indirectly from idiopathic causes. The 2011 Amendments however did not define the term idiopathic cause.

The court determined “idiopathic causes” refers to medical conditions or medical events of unknown origin that are peculiar to the injured individual. The court's decision reversed the interpretation given by the Workers Compensation Appeals Board, which denied Graber compensation. The court returned the claim to the board for reconsideration based on the court's definition.

Estate of Graber v. Dillon Companies, 439 P.3d 291, 301 (Kan. 2019).

Q. Is prior authorization required for an employer to be liable for a claimant's medical treatment?

A. Yes. In this case, the claimant sustained a compensable injury to her neck, lower back, and right arm. She then settled her case in 2013, leaving open her right to future medical care and review and modification. After her settlement, she received authorized care from multiple doctors. Her employer had also informed her that any referral from one doctor to another would not be authorized unless either her employer or the Administrative Law Judge preauthorized the treatment with the new doctor. However, the claimant also sought care from a podiatrist in 2014 to treat numbness, burning, and pain in her feet but did not obtain her employer's prior approval. The podiatrist recommended claimant to a neurologist who in turn recommended a biopsy. The biopsy did not determine the cause of her pain, and she was again referred to another doctor who the claimant treated with for seven to nine months before the doctor was designated as an authorized treating physician.

Claimant filed for a post-award medical hearing in September 2016 for reimbursement of her medical mileage. At the hearing, Claimant admitted she knew “no referrals from doctors were authorized unless either [her employer] or the ALJ clarified the orders beforehand.” And that she ran four 5Ks, two 10Ks, one regular triathlon and one short course triathlon, and two half-marathons between November 2014 and June 2016. The Administrative Law Judge held the employer was not responsible for any of the mileage reimbursements for treatment claimant received without prior authorization and that the treatment was not related to her original work injury. Rather, it was related to her athletic activities. This decision was adopted by the Board, which held the treatment was unauthorized but did not address whether claimant's treatment was related to her work injury.

The Court of Appeals also did not determine whether the treatment was related to claimant's work injury or her athletic activities. The court did, however, affirm the Judge's and Board's determination that the treatment claimant was seeking reimbursement for was unauthorized. The court found it persuasive that throughout the period claimant was

seeking unauthorized treatment, her employer had provided her with an authorized treating physician, she had attended appointments with that physician even after her settlement, and she had never received a bill for that treatment. Additionally, the court emphasized that claimant knew she had to seek prior approval of any referrals or medical treatment for it to be authorized and because she failed to do so, the treatment and any related travel expenses was unauthorized, and was not the employer's responsibility to pay.

Christenson v. Home Depot, No. 118,450, 2019 WL 985526 (Kan. Ct. App. Mar. 1, 2019).

Q. If an employer pays for medical compensation, can it revive a workers' compensation claim even though the two-year statute of limitations contained in K.S.A. 44-534 has already run?

A. Yes. Another statute of limitations is contained in K.S.A. 44-534, and this provision was interpreted by the Court of Appeals in *Schneider v. City of Lawrence*, who rendered a decision on the same day as the *Green* case. The statute states:

No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

K.S.A. 44-534(b).

In the *Schneider* case, the claimant had two back injuries, one in 2008 and another in 2010. However, he did not file an application for hearing until 2016, long after the limitation contained in 44-534(b) had run. The claimant argued that although his applications were untimely as the statutes of limitation had passed in 2011 and 2013, respectively, his claim had been revived because the respondent had paid for medical treatment for his work-related injuries in 2015 and 2016. The Court of Appeals accepted this position and held that because the employer had paid compensation, the claimant's claim had been revived and he had two additional years from the dates of those payments to file a claim for compensation. Therefore, because the claimant filed a claim for application in 2016, the court held his claims for both injuries were still timely.

Schneider v. City of Lawrence, No. 119,340, 2019 WL 494486 (Kan. Ct. App. Feb. 8, 2019).

Q. Does the 6th Edition or the 4th Edition AMA Guidelines govern workers' compensation impairment ratings in Kansas?

A. The law is unclear. According to the Court of Appeals, the 6th Edition of the AMA Guidelines is facially unconstitutional because it violates due process.

In order for the Kansas Workers' Compensation Act to satisfy due process, "(1) the changes must be reasonably necessary in the public interest to promote the general

welfare of the people of Kansas, and (2) the Act in its currently modified form must continue to provide an adequate substitute remedy for an injured worker's right to bring a common-law action for the recovery of damages." The Court of Appeals stated that in order for the State to satisfy the first prong of the due process analysis, there can be "any state of facts which reasonably may be conceived to justify" switching from the 4th Edition to the 6th Edition. The court affirmed the State had met this first prong in *Pardo v. United Parcel Service*, by showing the 6th Edition was more medically sound than the 4th Edition.

Where the court took issue is with the second prong of the test. The injured worker, Mr. Howard Johnson, injured his neck and was given a 6% permanent impairment rating under the 6th Edition. His operating doctor opined his impairment rating would have been 25% had Mr. Johnson been rated under the 4th Edition. This impairment rating was also supported by Dr. Koprivica who testified 25% was Mr. Johnson's "true impairment rating given the severity of his injury" and that there was no scientific support for the 6th Edition's 6% rating.

Based on this evidence and after considering the Act as a whole, with the 6th Edition included, the court held the Workers' Compensation Act no longer provided an adequate substitute remedy when considering any worker who suffered permanent impairment after the 6th Edition came into effect on January 1, 2015. The court did not opine on the constitutionality of the 2011 amendments as a whole, but instead limited its ruling to whether the adoption of the 6th Edition was constitutional.

Therefore, after the Court of Appeals opinion, the 6th Edition is unconstitutional and no longer controls. But this is not the end of the matter. The case has been appealed to the Kansas Supreme Court, which has not rendered a decision on the matter. Consequently, until the Kansas Supreme Court issues a decision, the issue remains unclear.

Johnson v. U.S. Food Service, 427 P.3d 996 (Kan. Ct. App. 2018).

Q. Does the dismissal statute contained in K.S.A. 44-523(f) require dismissal of a workers' compensation case if the employee has not proceeded to a regular hearing, settlement hearing, or agreed award within three years from the date of filing an application for hearing?

A. The law is unclear. The most recent decision on this issue was *Green v. General Motors*. This is a decision from the Kansas Court of Appeals and there is a possibility it will be appealed to the Kansas Supreme Court, so this issue may not be decided. However, the case did lay out some general principles to work from. The court first recognized the applicable dismissal statute is K.S.A. 44-523(f), which states:

(f)(1) In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing... the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the

claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution.

(2) In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge.

K.S.A. 44-523(f)(1)–(2).

The court acknowledged the above statute was amended in 2011 and reduced the statute of limitations from five years down to three. In a previous decision *Knoll v. Olathe Sch. Dist. No. 233*, the Court of Appeals held this change was procedural and therefore would have retroactive application. *Knoll*, 398 P.3d 223, 228 (Kan. Ct. App. 2017). However, the Kansas Supreme Court has granted review of the *Knoll* decision and therefore this issue is also in flux.

Regardless, the claimant in the *Green* case had not filed a motion for extension within the three-year period, nor had his claim proceeded to a regular hearing. Therefore, the employer filed a motion to dismiss for lack of prosecution. The court in *Green* further recognized that failure or lack of prosecution is not defined in the Kansas Workers' Compensation Act, and it therefore defined that term as "a party's failure to pursue an action with due diligence and at least suggests indifference approaching abandonment of the cause." *Green*, No. 119,044, 2019 WL 494582, at *5 (Kan. Ct. App. Feb. 8, 2019). The court then held that based upon 44-523(f)(1)'s language the claimant was entitled to a hearing to determine whether there was good cause to grant an extension regardless of whether the employee filed a motion for extension. This marked a change from prior case law, which had interpreted the statute to impose a strict statute of limitations and dismiss any claim where such a motion had not been filed. For example, two recent Court of Appeals cases determined that even if the claimant had not reached maximum medical improvement, if his or her attorney did not file a motion for extension within the three-year time period, the court must dismiss the claim. *Glaze v. J.K. Williams, LLC*, 390 P.3d 116, 117–18 (Kan. Ct. App. 2017); *Garmany v. Casey's Gen. Store*, 390 P.3d 123 (Kan. Ct. App. 2017).

Green v. Gen. Motors Corp., No. 119,044, 2019 WL 494582 (Kan. Ct. App. Feb. 8, 2019).

Q. What is considered “good cause” which would allow a claim to proceed beyond the three-year statute of limitations contained in K.S.A. 44-523(f)(1)?

A. The law is developing. What is considered good cause is also another issue being litigated. K.S.A. 44-523 says that if the claimant has not reached maximum medical improvement, good cause shall be conclusively presumed, if a motion for extension is filed within the three-year time period. Additionally, a panel of the Board recently held that given the recent confusion in Kansas over the constitutionality of the 6th Edition of the AMA Guides, this constitutes good cause to grant an extension. Specifically, the Board in *Terry v. Excelligence* held that the change in the law after *Johnson v. U.S. Foods*—combined with the uncertainty surrounding the 6th Edition’s future while the case is on appeal to the Kansas Supreme Court and the time it will require for the Supreme Court to render a decision—is a legally sufficient reason for an extension. This decision was not appealed and therefore is final, but as it is a Board decision, it is not controlling on future panels.

Terry v. Excelligence, No. Docket No. 1,074,385, 2018 WL 6587510 (Kan. Work. Comp. App. Bd. Nov. 1, 2018).

Q. If an employer pays for medical compensation, can it revive a workers’ compensation claim even though the two-year statute of limitations contained in K.S.A. 44-534 has already run?

A. Yes. Another statute of limitations is contained in K.S.A. 44-534, and this provision was interpreted by the Court of Appeals in *Schneider v. City of Lawrence*, who rendered a decision on the same day as the *Green* case. The statute states:

No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

K.S.A. 44-534(b).

In the *Schneider* case, the claimant had two back injuries, one in 2008 and another in 2010. However, he did not file an application for hearing until 2016, long after the limitation contained in 44-534(b) had run. The claimant argued that although his applications were untimely as the statutes of limitation had passed in 2011 and 2013, respectively, his claim had been revived because the respondent had paid for medical treatment for his work-related injuries in 2015 and 2016. The Court of Appeals accepted this position and held that because the employer had paid compensation, the claimant’s claim had been revived and he had two additional years from the dates of those payments to file a claim for compensation. Therefore, because the claimant filed a claim for application in 2016, the court held his claims for both injuries were still timely.

Schneider v. City of Lawrence, No. 119,340, 2019 WL 494486 (Kan. Ct. App. Feb. 8, 2019).

Q. What are the requirements for a drug or alcohol test to be admissible under K.S.A. 44-501?

- A. This issue was discussed extensively by the Court of Appeals in *Woessner v. Labor Max Staffing*. The court first pointed out that proceedings in workers' compensation are not bound by the technical rules of evidence. And therefore, hearsay can be admitted in workers' compensation proceedings, even though it is inadmissible in civil proceedings, unless it is irrelevant or redundant. The hearsay evidence must still be reliable to be admissible, even in workers' compensation proceedings.

The court then turned to the relevant statutory provision explaining employer defenses based on employee drug and alcohol use—K.S.A. 44-501. Under this section there are various defenses which may apply depending on whether the employee consumed drugs or alcohol, what type of test was administered, and whether the test was performed at the employer's direction or in the ordinary course of treatment. The statute also has what the court deemed an "admissibility" section and an "inadmissibility" section, which are 44-501(b)(2) & (3), respectively. 44-501(b)(2) has more relaxed rules for admissibility if certain factual scenarios arise and 44-501(b)(3) has very strict rules which an employer must meet for a drug test "collected by an employer" to be admissible. However, the court held none of the scenarios laid out in these two sections applied to the case.

The court also held K.A.R. 51-3-5a, which applies to preliminary hearings was inapplicable in this case. The Board had relied upon this regulation to hold the drug test was inadmissible at a regular hearing, but the court stated the regulation did not apply to regular hearings, only preliminary hearings. Therefore, the Court of Appeals concluded that no special statute or regulation precluded the drug test from being admissible and held that as long as the test was supported by foundation showing it was reliable, it should be admissible.

When considering the reliability of the test, the court found it sufficient that the employer had presented evidence regarding how the hospital obtained the sample, tested it and stored it, and then transferred it to a third party for further testing. The court held that this testimony would have been sufficient under the Kansas Rules of Evidence and therefore would also be sufficient under the relaxed workers' compensation evidence standards. The test from the hospital was therefore admissible. The court then turned to the third-party company, whose report was supported by an affidavit from the lab supervisor. This affidavit was also sufficient to allow the third-party's report to be admissible, even though it was hearsay evidence. It was sufficiently reliable because the third-party lab was federally certified, and the lab supervisor had no interest in the outcome of the case. The court therefore held both the hospital and the third-party testing records were admissible.

Woessner v. Labor Max Staffing, No. 119,087, 2019 WL 638290 (Kan. Ct. App. Feb. 15, 2019).

Q. Are fringe benefits included in calculating an employee's average weekly wage for purposes of determining wage loss in a work disability claim?

- A. Yes.** In *Long v. ICL Performance Products*, the employee was seeking work disability and argued he suffered greater than ten percent functional impairment when considering his current and prior injuries and greater than ten percent wage loss. The Court of Appeals agreed that because the employee's permanent partial impairment from his current injury was seven and a half percent to the body as a whole, and his impairment attributed to his former injuries was ten percent to the body as a whole, the employee has a functional impairment of seventeen and a half percent.

However, the Court of Appeals determined the employee did not suffer a ten percent wage loss. The court held that although health insurance and other "additional compensation" is not included in the average weekly wage calculations unless it is discontinued, this provision did not apply to "fringe benefits." The court found it controlling that the provision excluding additional compensation is contained in K.S.A. 44-511(a)(2)(A) & (C), while the provision discussing fringe benefits is contained in 44-510e(a)(2)(E). Under 44-510e, "[t]he actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge." 44-510e(a)(2)(E)(ii). The court further held that while fringe benefits are not defined by the Workers' Compensation Act, they do include insurance. Therefore, it was appropriate to include these benefits when calculating whether the employee had suffered a ten percent wage loss. Consequently, the court found the employee did not suffer a ten percent wage loss and was not entitled to work disability.

Long v. ICL Performance Prod., 432 P.3d 112 (Table) (Kan. Ct. App. 2019) (unpublished)

Q. If an employee is assaulted on the sidewalk outside of his work, does that injury arise out of and in the course of his or her employment?

- A. Maybe, depending on the facts of the specific case.** In *Connolly v. Minsky's City Market*, the claimant was the general manager of a Minsky's Pizza and part of his job duties were to inspect the outdoor coolers and the rest of the area surrounding the restaurant to ensure it was clean and secure. While performing this check, he was assaulted by three customers and suffered permanent injuries from the attack. The employer denied compensability, arguing the connection between the employee's job and the attack was too speculative.

On appeal, the Court of Appeals reiterated that to determine whether an injury arises out of employment, the court must focus on "whether the activity that results in injury is connected to, or is inherent in, the performance of the job." The court then examined two similar cases. One where the employee was installing glass on the roof of a parking garage when he was shot and killed by a sniper. The shooter shot ten victims total, although he had no connection to any of them. In that case, the court held the injuries were compensable because the employee's work on the roof made him a "prime target

for the sniper.” In the other case, the employee was also shot and killed at work while managing the local dairy distribution office. He was found dead in his office, but there were no signs of forced entry and nothing was stolen. The district court found the death was work related and believed the employee had been killed by a burglar. But on appeal, the Kansas Supreme Court reversed and held that conclusion was based on mere conjecture and there was insufficient evidence to connect the death to the employment.

The Court of Appeals in *Connolly* believed the first case was more applicable and held the employee’s injury arose out of and in the course of his employment. The court emphasized that the area outside the restaurant was not well lit, had been vandalized, and the employee regularly walked waitresses to their car for their protection. Therefore, the court concluded that while the restaurant might not be in a “high-crime area,” it subjected the employee to a greater risk of assault than the general public. And because the employee was at a greater risk, his injury was compensable.

Connolly v. Minsky’s City Mkt., 432 P.3d 107 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. If an employee is terminated for cause, does the employer still owe the employee work disability in addition to permanent partial disability?

A. No. In *Garcia v. Tyson Fresh Meats*, the employee suffered a compensable injury to his back and returned to work on light duty. However, he was terminated shortly thereafter due to poor work performance. As part of Tyson’s Alternative Dispute Resolution process, the termination was reversed, and the employee was reinstated and issued a written warning about his work performance. The employer then called the employee and instructed him to return to work on a certain date. However, the employee did not return on that date even though he admitted receiving the employer’s phone call. The employer then sent him a letter summarizing his reinstatement and stating that if he did not report by a certain date, he would be terminated. The employee did return to the facility this time but left shortly after arriving. He returned three days later and was informed that someone from Tyson would contact him about his return. Despite multiple calls and voice messages from Tyson, the employee never returned to the facility and was therefore terminated for failing to return to work. The employee disputed he ever received those phone calls or voice messages.

In deciding whether the employee was owed work disability, in addition to his permanent partial disability, the court turned to K.S.A. 44-510e(a)(2)(E)(i) which states that if an employee is terminated for cause, their wage loss is not directly attributable to the work injury and they are therefore not entitled to work disability. In deciding whether a termination is “for cause,” the court will look to the employee’s good faith attempts to remain employed and whether the employer acted in good faith during the termination or if the termination was “subterfuge to avoid work disability payments.” The court found the employee was terminated for cause based on multiple facts. First, the employer had multiple contacts with the employee including multiple phone calls and at least one letter. Second, when the employee did report, he left the first visit suddenly and during the second visit, the employer verified his contact information and informed the employee

they would be in contact. Therefore, the court found the employer had acted in good faith. However, the court found the employee had not acted in good faith because he failed to return to work on multiple occasions, abruptly left when he did return to work the first time, and although the employee disputed receiving the phone calls and voice messages following his second return to work, he never followed-up with his employer to determine when he was supposed to report. The court consequently held the employee showed no desire to return to work and he was terminated for cause, and therefore the employer was not responsible for work disability benefits in addition to the employee's permanent partial disability benefits.

Garcia v. Tyson Fresh Meats, Inc., 430 P.3d 995 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. If a foreman knows an employee is violating a safety rule but allows him to continue working, does that constitute “approval” of the safety violation by the employer?

A. Yes, under the facts of this case. Under K.S.A. 44-501(a), compensation to a claimant can be denied if the claimant was injured while willfully failing to use reasonable and proper protection furnished by the employer, unless the employer approved of the employee's work without the equipment. In *Anderson v. PAR Electrical Contractors, Inc.* an employee was injured while he was transferring electrical lines from old utility poles to new ones. The employee was working in a lift bucket with another employee. PAR Electrical has a five-foot-rule while requires employees working within five feet of an “energized source” to wear rubber gloves and sleeves. However, the employee did not wear rubber gloves or sleeves because he believed he was more than five feet from an energized source. Instead, he wore regular leather gloves. The jobsite foreman testified he knew the claimant was working without rubber gloves and that he allowed the claimant to continue working because he had worked with the claimant in the past and he was very precise with his movements. The claimant was electrocuted while holding onto the electrical lines while the other employee prepared the cable housing for the transfer. Shortly following the accident, the jobsite foreman was terminated.

The Court of Appeals established that the word “approved” in 44-501(a) had not been defined and turned to Board decisions to construct a definition. The court further recognized that the employer as a whole did not approve of the foreman allowing the claimant to work without rubber gloves. However, the court believed it was important that the foreman stated he had worked with the claimant in the past, knew he was working without rubber gloves, and allowed the claimant to continue working without them on the date in question. From this, the court determined it was possible that the foreman routinely allowed the claimant to work without rubber gloves, rather than this being a one-time incident. And therefore, the court held the foreman approved of the claimant's actions and consequently that the employer approved of the actions as well because the foreman was acting on the employer's behalf.

Anderson v. PAR Electrical Controls, Inc., No. 118,999, 2018 WL 6074279 (Kan. Ct. App. Nov. 21, 2018) (unpublished).

Q. What constitutes a “reckless” violation of an employer’s workplace safety rule?

- A. “Reckless” behavior in Kansas workers’ compensation is not defined, and therefore depends on the facts of the case.** In *Anderson v. PAR Electrical Contractors, Inc.*, the employer also argued the claimant’s violation of the employer’s five-foot safety rule was “reckless.” Under K.S.A. 44-501(a), compensation can be denied if the claimant recklessly violates his or her employer’s workplace safety rule. The court also recognized this lack of a definition but failed to provide one for future cases. Instead, the court reiterated the definitions used in tort and criminal law. These laws require that the person either have known, or should have known, of a high degree of risk of harm, and then acted either deliberately, or in conscious disregard, of this risk. Alternatively, if the claimant knows, or has reason to know, of the high degree of risk of harm and “does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so” then the claimant has also acted recklessly, as judged by an objective standard.

The day of the injury, the employee had training on the proper use of safety equipment during that particular job, including safety around energized sources and the use of rubber gloves and sleeves. The employee even signed a document stating he attended the safety meeting the morning of the accident where these topics were discussed. As stated above, the employer also had a rule requiring employees to wear rubber gloves and sleeves whenever they were within five feet of an energized source. But on the date in question, the claimant was merely wearing leather gloves because he thought he was more than five feet away from the energized source and he believed the rubber gloves would affect his ability to perform his job. Therefore, the Court of Appeals held the claimant had not acted recklessly because he believed he was more than five feet from any energized source. Rather, the court deemed his conduct to be merely negligent.

Anderson v. PAR Electrical Controls, Inc., No. 118,999, 2018 WL 6074279 (Kan. Ct. App. Nov. 21, 2018) (unpublished).

Q. May the Director of Workers’ Compensation make findings of fact, conclusions or law, or enter orders of reimbursement?

- A. No.** In this case, a secretary filed a workers’ compensation claim for repetitive use injuries. The claim alleged these injuries occurred over the course of two years, with two different employers, and multiple insurance companies were involved, namely OneBeacon and Travelers. The Court of Appeals, in a prior action, found the injuries were compensable but remanded to determine whether there was a single injury or multiple injuries. The Board determined there were two injuries but failed to determine which insurance company was financially responsible. This is significant because it was possible OneBeacon paid for benefits which should have been paid for by Travelers, and either Travelers or the Workers Compensation Fund could be responsible for any reimbursement due to OneBeacon.

To resolve the issue, OneBeacon wrote to the Director and asked him to decide who was financially responsible. However, under K.S.A. 44-556(e), the Board must make these types of determinations and the Director may then “certify” the amounts to be reimbursed. Which, as the Court of Appeals noted, did not happen in this case. Rather, the Director made findings of fact, conclusions of law, and entered an order directing Travelers to reimburse OneBeacon. Travelers appealed the decision to the district court and ultimately the Court of Appeals.

The Court held that K.S.A. 44-556(e) requires either an ALJ, the Board, or a court to identify the benefits and the company responsible for them with particularity. Only then, after the order has been entered by the proper authority, can the Director be involved. And the Director’s only possible action is to “certify” that the amounts to be reimbursed are correct, what entity is obligated to make those payments, and to whom. The court noted the Director’s actions should merely be a “rote exercise rather than ones subject to challenge and review” because “certification” involves merely confirming something to be true, not making factual or legal determinations in the first instance.

The Court of Appeals therefore held the Director had exceeded his statutory authority and that his actions were invalid. Hence, the court remanded the case to the Board to make the determination as to who was financially responsible for the benefits and which entity, if any, was entitled to reimbursement and from whom.

Travelers Casualty Ins. v. Karns, ___P.3d___, No. 117, 128, 2018 WL 4841525 (Kan. Ct. App. Oct. 5, 2018), *modifying Travelers Casualty Ins. v. Karns*, No. 117, 128, 2018 WL 4039423 (Kan. Ct. App. Aug. 24, 2018).

Q. To seek reimbursement from the Workers’ Compensation Fund, must the Fund be impleaded?

A. Possibly. A sub-issue in *Travelers Casualty Ins. v. Karns*, was whether the Fund must be impleaded into any case where a party is seeking reimbursement. Although the issue was not definitely decided by the Court of Appeals and was instead remanded to the Board to issue a ruling, the court suggested that the Fund may need to be impleaded. Specifically, the Court of Appeals implied that in order for the Fund to be held liable under K.S.A 44-534a or 44-556(d)–(e), they may need to be impleaded according to 44-566a(c)(1)–(3). The Board has not yet rendered a decision.

Travelers Casualty Ins. v. Karns, ___P.3d___, No. 117, 128, 2018 WL 4841525 (Kan. Ct. App. Oct. 5, 2018), *modifying Travelers Casualty Ins. v. Karns*, No. 117, 128, 2018 WL 4039423 (Kan. Ct. App. Aug. 24, 2018).

Q. Can an employee who was injured during an altercation with another employee suffer a compensable injury, even if he lied to his doctors about how he was injured?

A. Yes. Mr. Billington was assaulted at work by a co-worker who picked him up and threw him onto a pile of rocks. This injured Mr. Billington's ribs and punctured one of his lungs. However, instead of telling his employer and the doctors this was how he was injured, Mr. Billington initially told his boss he was injured when he fell out of the bed of a pickup truck after work and struck the ball hitch. Mr. Billington claimed he initially lied because he was on probation for an assault conviction and did not want to be sent back to prison if his supervision officer thought he had been fighting other co-workers. However, after the doctors told Mr. Billington that this story did not match his injuries, he told the doctors the truth. He then returned to his employer and told his employer the truth as well. In the workers' compensation matter, his employer did not dispute that there was a fight, as there were witnesses to corroborate its occurrence, rather the employer disputed the manner of injury. Mr. Billington's employer argued that both the fight during work and the fall from the truck after work had occurred and Mr. Billington had been injured in the latter, and his injuries were therefore non-compensable.

The Administrative Law Judge sided with the employer. It held the claimant was not a credible witness and had failed to sustain his burden of proof. The Workers' Compensation Board reversed and held Mr. Billington had sustained his burden of proof because it found the testimony of two other corroborating witnesses to be credible, even if Mr. Billington's was not. Both Mr. Billington's roommate and his neighbor testified he was favoring one side and having trouble breathing the night of the altercation. Additionally, the Board found it was significant that the employer did not dispute the fight had occurred in the manner Mr. Billington described it and had terminated the employee who threw Mr. Billington onto the rocks. The Court of Appeals affirmed the Board's determination as it found the decision was supported by substantial evidence, despite Mr. Billington's initial credibility issues.

Billington v. Midwest Minerals, Inc., 423 P.3d 565 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. Does the Board have jurisdiction to set aside a temporary total disability (TTD) award if the award was not challenged at a hearing before the Administrative Law Judge?

A. No. The claimant in this case was injured when he wrecked a truck while hauling a load in icy and snowy weather conditions. The parties stipulated the claimant was injured within the scope of his employment and to the existence of an employee-employer relationship. They did not, however, stipulate to TTD benefits. The claimant filed for a preliminary hearing and at the hearing, the claimant was awarded TTD. The case eventually proceeded to a regular hearing and the ALJ ordered the claimant receive 43.71 weeks of TTD. Neither the employer nor the Fund, both of whom were parties to the action, contested the availability or the amount of TTD at the hearing before the ALJ.

However, on appeal to the Board, the employer contested the TTD award and argued claimant had not presented sufficient evidence to warrant the award. The Board sided with the employer and reversed the award.

On appeal the claimant argued the Board lacked jurisdiction to reverse the TTD award because the issue had not been raised before the ALJ. The Court of Appeals agreed and held that under K.S.A. 44-555c(a), the Board lacked jurisdiction to reverse the TTD award because the issue was not contested before the ALJ and the Board lacks jurisdiction to hear any issues which were not previously raised before the ALJ. Thus the court reinstated the TTD award.

Castaneda v. ALG Transport Services, Inc., 421 P.3d 777 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. Is an aggravation of a pre-existing injury compensable under K.S.A. 44-508(f)(2)?

A. No, but a new injury to an area which was previously injured is compensable.

Compare two claimants: Mr. Keith Bennett and Ms. Patricia Staples. Mr. Bennett sustained a non-compensable aggravation to a preexisting back injury whereas Mr. Staples suffered a compensable injury to both of her wrists, even though she had previously had a similar injury to her left wrist.

In Mr. Bennett's case, he worked for the City of Topeka and while he was driving his truck across a wooden pedestrian bridge in 2015, the bridge collapsed, and the back end of his truck fell to the ground below while the front end remained on the bridge. Mr. Bennett alleged this caused pain in his lower back which radiated into his legs. Of importance is that Mr. Bennett had previously injured his lower back at the L4-5 level in 1996 and again at the L5-S1 level in 2005. The 2005 injury also involved some pain radiating into Mr. Bennett's right leg. Both of these injuries ended in workers' compensation settlements.

Mr. Bennett visited multiple doctors: one opined he suffered a compensable injury, but this doctor did not know about his preexisting injuries; another opined Mr. Bennett did not suffer a compensable injury, but his pain was an aggravation of his preexisting degenerative disc disease; the third doctor also believed the pain was an aggravation of preexisting degenerative disk disease. The Court of Appeals agreed with two of the three doctors and held the claimant failed to prove his injury was compensable. Of note, it stated that although the 2015 incident may have rendered Mr. Bennett's preexisting injuries symptomatic, the injuries were in fact preexisting, and this was merely an aggravation of those injuries. The court held no new injury had been sustained and therefore Mr. Bennett's 2015 accident did not lead to a compensable injury.

While in Ms. Staples's case, she alleged injuries to both wrists in 2013 due to the repetitive nature of her job. She worked at a computer typing most of the day, prepared paperwork, and answered the phone. Similar to Mr. Bennett, Ms. Staples had a previous workers' compensation settlement to her left hand for a similar type of injury, which she suffered around 2004 or 2005. Ms. Staples also visited multiple doctors: one diagnosed her with

osteoarthritis in both hands but did not render a causation opinion; another also diagnosed her with osteoarthritis and opined it was not work related, but this doctor spent less than five minutes with Ms. Staples and did not conduct a thorough analysis; a third doctor diagnosed Mr. Staples' with arthritis and claimed her work advanced the progression of her arthritis and therefor was the prevailing factor of her injuries; finally, the last doctor Mr. Staples saw was Dr. Poppa, who also opined her work was the prevailing factor of her injuries. None of the doctors testified before the ALJ, who found the injury was non-compensable and that those doctors who believed the injuries were non-compensable more credible. However, the Board reversed after making its own credibility determination and found the doctors who believed her injury was compensable were more credible. Of note, the Board found it persuasive that Dr. Poppa examined Ms. Staples on three separate occasions and thus believed his report was the most credible. On appeal, the Court of Appeals deferred to the Board's credibility determination and found it was supported by substantial evidence. It did not give any weight to the ALJ's determination because no doctor testified in person in front of the ALJ, rather only their reports were submitted. Thus, the court found the Board was in the same position to determine credibility as the ALJ.

Although there are many facts which make these two cases different, they both ultimately came down to the credibility of the claimant and the doctors who gave causation opinions. In Mr. Bennett's case, the court found he was not credible because he was a poor historian, and this affected the doctor's opinions who found his injury was compensable. In Ms. Staples's case, on the other hand, the Board found the doctors who opined her injury was compensable to be more credible. This was in part due to one of the doctors who said her injury was non-compensable spent less than five minutes with Ms. Staples, barely reviewed her x-rays, and did not perform any physical tests on her. Whereas Dr. Poppa, who opined her injuries were compensable, observed Ms. Staples on multiple occasions. In both cases, the Court of Appeals deferred to the credibility determinations of the lower courts, therefore showing how important it is to have credible witnesses.

Bennett v. City of Topeka, 422 P.3d 688 (Table) (Kan. Ct. App. 2018) (unpublished);
Staples v. Allstate Insurance Co., 425 P.3d 374 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. Does an employee's injury arise out of her employment if she is injured while playing catch with a football during working hours?

- A. Yes.** Ms. Fishman was a paraprofessional assigned to watch over a particular disabled child. During gym class, the child was riding a specialized bicycle and Ms. Fishman was watching the child while sitting on nearby bleachers. While Ms. Fishman was still sitting on the bleachers, one of the other paraprofessionals began throwing a football around with her. However, one of the throws was too short and when Ms. Fishman dove off of the bleachers after it she severely broke her right pinky finger. The ALJ denied compensability as Ms. Fishman was willingly participating in a "sportive event." However, the Board reversed and held the injury was compensable because "work being performed in a forbidden manner is not prohibited. An employee is still acting in the course of his or

her employment even while performing work in a [forbidden] manner.” After remand and another appeal, the Board affirmed compensability, and the case went to the Court of Appeals.

On appeal, the employer argued Ms. Fishman’s injury was not compensable because it did not arise out of her employment, even though it occurred during the course of her employment. The employer argued that because Ms. Fishman was playing catch instead of performing her job duties when she was injured, her injury was not compensable. However, the Court of Appeals agreed with the Board that although Ms. Fishman may have been performing her job in a forbidden manner, her injury still arose out of her employment. The employer also argued that Ms. Fishman’s injury was due to horseplay, and thus non-compensable under K.S.A. 44-501(a)(1)(E). The Court of Appeals noted a lack of case law surrounding horseplay and that “horseplay” is a nebulous concept with no legal meaning. The Court of Appeals also observed that in the cases where employees had been denied compensation they had either “stepped away from their job duties or had interfered with their coworkers’ abilities to do their jobs,” or had “engaged in potentially hazardous activities.” While in Ms. Fishman’s case she had done neither. Ms. Fishman testified that from the bleachers she could have reached her disabled student in a matter of seconds and the court stated that throwing the football did not affect her ability to watch her student. And likened to other cases the court mentioned such as throwing mortars at coworkers or electrically shocking coworkers, throwing a football appeared tame in comparison.

Thus, the Court of Appeals held Ms. Fishman’s injury was compensable as it arose out of her employment and her throwing the football around did not constitute horseplay.

Fishman v. U.S.D. 229, 422 P.3d 686 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. May parties raise issues for the first time on appeal that were not raised to either the Administrative Law Judge or the Appeals Board?

- A. Generally, no.** The claimant in this case attempted to raise two new issues to the Court of Appeals which had not been raised to either the ALJ or the Board. First, he argued that because he and his employer had stipulated that work was the prevailing factor of his injuries and that his injuries arose out of and in the course of his employment, the ALJ was required to find his claim compensable and erred in denying it. Second, he argued that the ALJ and the Board ignored the plain language of the Workers’ Compensation Act by holding his work was not the prevailing factor of his injuries.

The Court of Appeals stated that it generally will not consider issues raised for the first time on appeal, subject to narrow exceptions. And the claimant failed to even argue that any of these exceptions applied to his case. Additionally, the court noted the claimant had an opportunity to raise his first argument concerning the stipulations to the ALJ as the parties made their stipulations more than a month before they submitted their submissions letters. This was ample time for the claimant to argue that his employer had stipulated to the compensability of his claim, but he failed to do so.

Similarly, the claimant failed to raise his prevailing factor argument below and even admitted to the Court of Appeals he was “advancing a new interpretation of the Act that he did not advance below.” And like the stipulations issue, the claimant failed to provide any valid reason why he had not raised the argument below or argue that any exception to the general rule precluding review of such arguments applied to his claim. Therefore, the Court of Appeals refused to address either argument and dismissed the appeal.

Viet Hoang v. Metal Fab, Inc., 422 P.3d 1206 (Table) (Kan. Ct. App. 2018) (unpublished).

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KANSAS WORKERS' COMPENSATION 201

WORKING WITH THE EMPLOYER, HOW THE EMPLOYER CAN HELP ATTORNEY'S IN WORKERS' COMPENSATION CLAIMS

I. Assist in Preparation of Contested Hearings

Preliminary Hearings

- Witness
- Evidence

Most Common Issues

1. Did accident arise out of an in the course of employment?
 - a. Job duties
 - b. What happened
 - c. Were there any witnesses
 - d. How and why did the accident occur
 - e. When did the accident happen – date and time
 - f. Is there past medical history
2. Notice
 - a. Is there a designated person to receive notice of the accident
 - b. Was notice given
 - i. When
 - ii. To who
 - iii. Where did this take place
 - iv. What was said
 - v. Was treatment authorized and provided
3. Employment
 - a. Was accommodated employment offered
 - b. Detail conversation
 - i. Date of offer
 - ii. Verbal or written
 - iii. Who was present
 - iv. Detail any conversation that occurred regarding employment after
 - c. Was there a resignation
 - i. Written
 - ii. Verbal
 - d. Unemployment
 - e. Other employment
 - f. Termination
 - g. Personnel file
 - i. Date of hire
 - ii. Reviews

Regular Hearings

- Witness
- Evidence

II. Evidence

Personnel file

- Evaluations

Wages

- Calculate Average Weekly Wages
- Temporary Benefits

Other valuable information on employee

III. Witnesses

Questions Regarding Accident:

- Who was/is in charge?
- Who saw accident itself?
- Who was told of accident?
 - o Notice prepared?

Employee's Work Status:

- Able to accommodate restrictions

If No Longer Employed:

Witnesses as to leaving employer and circumstances surrounding

- Voluntarily left
 - o Able to accommodate restrictions
 - o Documented?
- Fired
 - o Occur after Workers' Compensation claim filed
 - o Able to accommodate restrictions
 - o Documented?

IV. Medical Information

Temporary or Permanent Accommodations

- Restrictions
- Maximum medical improvement
- Ratings

Employee's Performance and Communication with Employer

- Different than what they are telling Dr?

Understanding medical and procedures

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MISSOURI WORKERS' COMPENSATION

I. JURISDICTION (RSMo § 287.110.2)

A. Act will apply where:

1. Injuries received and occupational diseases contracted in Missouri; or
2. Contract of employment made in Missouri, unless contract otherwise provides; or
3. Employee's employment was principally localized in Missouri for thirteen calendar weeks prior to injury.

II. ACCIDENTS

A. Traumatic (RSMo § 287.020)

1. An unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.
2. An "injury" is defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the **prevailing factor** in causing both the resulting medical condition and disability.
3. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
4. An injury shall be deemed to arise out of and in the course of the employment only if:
 - a. It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
 - b. It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.
 - c. An injury resulting directly or indirectly from idiopathic causes is not compensable.
 - d. A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition.
5. An injury is not compensable because work was a triggering or precipitating factor.

B. Repetitive Injuries/Occupational Disease (RSMo § 287.067)

1. Occupational disease is an identifiable disease arising with or without human fault out of and in the course of the employment.
2. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section.
3. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.
4. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months, and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.
5. The employer liable for occupational disease is “the employer in whose employment the employee **was last exposed to the hazard of the occupational disease prior to evidence of disability.**”
 - a. For repetitive motion claims, if exposure is for less than three months and exposure with prior employer is prevailing factor in causing the injury, prior employer is liable.
 - b. “Evidence of disability” is a term of art. It is often felt to refer to an impact on an Employee’s earning capacity.

III. NOTICE (RSMo § 287.420)

- A. 30 days to report traumatic accident to Employer.
- B. In repetitive trauma/occupational diseases, Employee has 30 days from the date a causal connection is made between the occupational disease and the employment to report the occupational disease to the employer.
- C. The notice must be written and include the time, place and nature of the injury, and the name and address of the person injured.
- D. Employee can overcome a notice defense by providing Employer was not prejudiced by the failure to provide timely notice.
- E. If Employee can show that Employer had actual notice of the injury, even if the notice was not provided by Employee, the written notice defense may fail.

IV. REPORT OF INJURY (RSMo § 287.380)

- A. A Report of Injury should be filed for all claims that result in lost time or require medical aid other than immediate first aid.
- B. Advise all employers to complete a Report of Injury as soon as possible and file with the Division of Workers' Compensation in Jefferson City, Missouri.
- C. **Failure to file Report of Injury within 30 days of accident results in extension of statute of limitations from two to three years from the date of accident or date of last benefits paid, whichever is later.**
- D. File Report of Injury regardless of whether a claim is being denied. Filing is not an admission of compensability.
- E. Civil and criminal penalties possible for failure to file the Report of Injury.

V. CLAIM FOR COMPENSATION (RSMo § 287.430)

- A. Employee has two years from the date of accident or the last date payment was made for benefits to file a timely Claim for Compensation.
- B. If Employer did not file a Report of Injury within 30 days of accident, Employee has three years from the date of accident or the last date payment was made for benefits to file a timely Claim for Compensation.
- C. On occupational disease claims, Employee has 2 years from the date at which a causal connection is made between the occupational disease and the occupational exposure to file a Claim for Compensation (3 years if Report of Injury was not filed timely).

VI. ANSWER TO CLAIM FOR COMPENSATION

- A. If you receive a Claim for Compensation, assign the claim to counsel ASAP.
- B. Answer must be filed within 30 days of notice from Division of Workers' Compensation.
- C. **Failure to file timely answer results in acceptance of facts in claim, but not legal conclusions.**
- D. Continue investigation and attempt settlement if appropriate.

VII. MEDICAL TREATMENT (RSMo § 287.140)

- A. Employer provides treatment and selects providers.
- B. Change of doctor only when present treatment results in a threat of death or serious injury.
- C. Mileage is only paid when the exam or treatment is outside of the local metropolitan area from the employee's principal place of employment.
- D. **Vocational Rehabilitation**
 - 1. Never mandatory.
 - 2. Used to take a potential permanent total to another vocation.
 - 3. If requested by Employer, Employee must submit to "appropriate vocational testing" and a "vocational rehabilitation assessment."
 - 4. 50 percent reduction in benefits if Employee fails to cooperate with vocational rehabilitation.

VIII. AVERAGE WEEKLY WAGE (RSMo § 287.250)

- A. Need thirteen weeks of wage history in most cases.
- B. Add gross amount of earnings and divide by number of weeks worked.
 - 1. The denominator is reduced by one week for each five full work days missed during the thirteen weeks prior to the date of accident.
 - 2. Compensation rate = $\frac{2}{3}$ average weekly wage up to maximum.
 - 3. Minors: consider increased earning power until age 21.
- C. Part-timers: for permanent partial disability only, use thirty hour rule (30 hours x base rate). The thirty hour rule does not apply to temporary total disability.
- D. Multiple employments: base average weekly wage on wages of Employer where accident occurred only. Do not include wages of other employers.
- E. New employees: if employed less than two weeks, use "same or similar" full-time employee wages, or agreed upon hourly rate multiplied by agreed-upon hours per week.
- F. Gratuity or tips are included in the average weekly wage to the extent they are claimed as income.
- G. EXAMPLES:

1. Full-Time Employee
 - a. Employee earned \$9,600 in gross earnings for 13 weeks prior to injury.
 - b. Employee missed five days of work during the 13 weeks prior to date of injury.
 - c. Average weekly wage is \$800.00 (\$9,600.00/12)
2. Part-Time Employee
 - a. \$10 per hour
 - b. Use 30 hour rule (30 hours X base rate)
 - c. Average weekly wage is \$300 (30 X \$10.00)

IX. DISABILITY BENEFITS

A. Temporary Total Disability (RSMo § 287.170)

1. Compensation rate two-thirds Average Weekly Wage (AWW) up to maximum. (See rate card)
2. Multiple employments
 - a. Base AWW on wages of employer where accident occurred only
 - b. Do not include wages of other employers
3. Waiting period – three days of business operation with benefits paid for those three days if claimant is off fourteen days.
4. May not owe temporary total disability benefits if claimant is terminated for post-injury misconduct (RSMO § 287.170.4).
5. For accidents before August 28, 2017:
 - a. A claimant may receive Temporary Total Disability benefits “throughout the rehabilitative process” regardless of whether the claimant has reached maximum medical improvement.
6. For accidents occurring on or after August 28, 2017:
 - a. A claimant cannot receive Temporary Total Disability benefits after the claimant reaches maximum medical improvement.
7. If Employee voluntarily separates from employment when Employer offered light duty work in compliance with medical restrictions, neither TTD nor TPD shall be payable (RSMo § 287.170.5)

B. Temporary Partial Disability (RSMo § 287.180)

1. Two-thirds of difference between pre-accident wage and wage employee should be able to earn post-accident.
2. For accidents before July 28, 2017:

- a. A claimant may receive Temporary Partial Disability benefits “throughout the rehabilitative process” regardless of whether the claimant has reached maximum medical improvement.
3. For accidents occurring on or after July 28, 2017:
 - a. A claimant cannot receive Temporary Partial Disability benefits after the claimant reaches maximum medical improvement.

C. Permanent Partial Disability (RSMo § 287.190)

1. "Permanent partial disability" means a disability that is permanent in nature and partial in degree.
2. Permanent partial disability or permanent total disability must be demonstrated and certified by a physician and based upon a reasonable degree of medical certainty.
3. On minor injury claims, the Administrative Law Judge (ALJ) may allow settlement without a formal rating report.
4. Part-time employees must use “same or similar” full-time employees wage. (For PPD only)
5. No credit for temporary total disability benefits paid.
6. There are no caps for benefits.
7. Disfigurement:
 - a. Applicable to head, neck, hands or arms (RSMo § 287.190.4)
 - b. Maximum is forty weeks.
8. If a claimant sustains severance or complete loss of use of a scheduled body part, the number of weeks of compensation allowed in the schedule for such disability shall be increased by 10 percent.
9. When dealing with minors, you must consider increased earning power for PPD (not TTD).
10. Calculation of Permanent Partial Disability
 - a. Claimant has a rating of 10 percent permanent partial disability to the body as a whole.
 - b. Claimant qualifies for the maximum compensation rate for his date of accident of \$422.97.
 - c. Value of rating would be \$16,918.80. (400 wks X 10% X \$422.97)

D. Permanent Total Disability (RSMo § 287.190)

1. Definition: inability to return to any employment, not merely the employment in which Employee was engaged at the time of the accident.
2. Benefits are paid weekly over Employee’s lifetime.

3. Law does allow lump sum settlements based on a present value of a permanent total award.
4. If Employee is permanently and totally disabled as a result of the work accident in combination with Employee's preexisting disabilities, and not as a result of the work accident considered in isolation, the Second Injury Fund is liable for PTD benefits.

E. Death (RSMo § 287.240)

1. Accidents before August 28, 2017:
 - a. Death resulting from accident/injury.
 - i. Total dependents (spouse and children) receive lifetime benefits.
 - ii. If spouse remarries, he/she receives only two additional years of benefits from remarriage date.
 - iii. Children receive benefits until the age of 18, or 22 if they continue their education full-time at an accredited school.
 - iv. Total dependents take benefits to the exclusion of partial dependents.
 - v. Partial dependents take based on the percentage of dependency.
 - vi. Lump sum settlements are allowed.
2. Accidents on or after August 28, 2017:
 - a. Total dependents now includes claimable stepchildren by the deceased on his or her federal income tax return at the time of the injury
 - b. Partial dependents no longer entitled to benefits
3. Death unrelated to accident.
 - a. Any compensation accrued but unpaid at the time of death is paid to dependents.
 - b. General Rule: if Employee was not at MMI at the time of death, no PPD is appropriate.
 - c. Benefits may continue to the dependents of Employee if Employee dies from unrelated causes.

X. PROCEDURE

A. Walk-In Settlement Conference

1. Scheduled at Division on a first come, first serve basis. Depending on venue, backlog generally two weeks to two months.
2. Settlement cannot be completed without Employee sitting before Administrative Law Judge with explanation of rights and benefits.

3. Settlement values can vary 3-7 percent between venues.
4. If Employee has scarring to upper extremities, head, neck or face, ALJ will assign disfigurement and the amount will be added to the amount of agreed settlement.

B. Conference

1. Set by the Division of Workers Compensation or at the request of Employer's counsel.
2. Purpose is to see if Employee is in need of treatment or is ready to settle the claim.
3. Claims need to be assigned to counsel.
4. Need to have a rating report, if applicable.
5. Many cases settle at this time.
6. If Employee fails to attend two Conferences, Division will administratively close the claim.

C. Pre-Hearing

1. After Claim for Compensation has been filed, the Division of Workers' Compensation will set Pre-Hearings.
2. Generally requested by a party.
3. Informal settings used to facilitate settlement or outlining of issues.
4. Alternatives at conclusion are:
 - a. Mediation
 - b. Continue and reset
 - c. Settlement

Note: Unrepresented Employees are entitled to Mediations, Hardship Mediations and Hearings; however, Judges generally recommend they obtain counsel before any of these procedures.

D. Mediation/Hardship Mediation

1. Set before ALJ.
2. Both parties are typically required to have ratings/or medical reports regarding treatment needs.
3. Defense counsel required to have costs of medical, temporary total disability, permanent partial disability and physical therapy.
4. Formal discussion on all issues in case, potential for settlement and defenses.
5. Defense counsel must have access to client for settlement authority.

6. Alternatives at conclusion:

- a. Settlement
- b. Reset for Mediation
- c. Reset for Pre-Hearing
- d. Moved to Trial docket

E. Hearing/Trial – (RSMo § 287.450)

- 1. Before Administrative Law Judge only.
- 2. St. Louis: Mediation conference before Chief Judge with assignment of trial judge if case not settled.
- 3. Each party can receive one change of judge.
- 4. Award generally issued within 30-60 days of trial.
- 5. All depositions and medical evidence must be ready to submit the day of trial.

F. Hardship Hearings – (RSMo § 287.203)

- 1. Only issues are medical treatment and temporary total disability benefits currently due and owing.
- 2. Claim must be mediated first.
- 3. After the mediation, hearing can occur 30 days thereafter.
- 4. Court can order costs of the proceeding to be paid by party if they find the party defended or prosecuted without reasonable grounds.
- 5. All depositions and medical evidence must be ready to submit the day of trial.

G. Notice to Show Cause Setting

- 1. Will be set by the Division if Claim for Compensation has been filed and claim has been inactive for one year.
- 2. Can be requested by Employer if thirty-day status letter was sent to opposing counsel and no response was received.
- 3. If claim is dismissed, Employee has twenty days to appeal the dismissal.

H. Appellate Process

- 1. The Labor and Industrial Relations Commission
 - a. **20 days to appeal ALJ's award.**
 - b. Review of the whole record.
 - c. Labor member, commerce member and neutral member.

2. Court of Appeals
 - a. **30 days to appeal LIRC decision.**
 - b. Review questions of law only.
3. Supreme Court
 - a. **30 days to appeal Court of Appeals decision.**
 - b. Review questions of law only.

I. Liens

1. Spousal and Child Support Liens
 - a. Lien must be filed with the Division of Workers' Compensation.
 - b. Temporary Total Disability: the maximum withheld is 25 percent of the weekly benefit.
 - c. Permanent Partial Disability: the maximum withheld is 50 percent of the total settlement.
 - d. Benefits generally paid to the Clerk of the Circuit Court.
2. Attorney Liens
 - a. Lien must be filed with the Division of Workers' Compensation.
 - b. Must be satisfied prior to payout of proceeds.

XI. DEFENSES

A. Arising out of and in the course of:

1. There must be a causal connection between the conditions under which the work was required to be performed and the resulting injury. The injury results from a "natural and reasonable incident" of the employment, or a risk reasonably "inherent in the particular conditions of the employment," or the injury is the result of a risk particular to the employment.
 - a. *Acts of God* - not compensable
 - b. *Personal Assault* - generally compensable
 - c. *Horseplay* - generally not compensable, unless commonplace or condoned by Employer
 - d. *Personal Errands/Deviation* - generally not compensable
 - e. *Personal Comfort Doctrine* - Accidents occurring while an employee is engaged in acts such as going to and coming from the restroom, lunch or break room are generally compensable.

- f. *Mutual Benefit Doctrine* - An injury suffered by an employee while performing an act for the mutual benefit of the employer and employee is usually compensable.
- g. *Mental Injury* - (RSMo § 287.120.8) Claimant must show that mental injury resulting from work-related stress was extraordinary and unusual to receive compensation. The amount of work stress shall be measured by objective standards and actual events. Mental injury is not compensable if it resulted from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action taken in good faith by the employer.

** Amendments made to the The Workers' Compensation Act in 2005 require that the statute to be *strictly construed*. This could potentially impact all common law doctrines such as the Personal Comfort Doctrine and Mutual Benefit Doctrine.

B. "In the course of"

- 1. Must be proven that the injury occurred within the period of employment at a place where the employee may reasonably be, while engaged in the furtherance of the employer's business, or in some activity incidental to it.
 - a. *Coming and going* - Broad exceptions to this rule.
 - b. *Parking Lot* - If Employer exercises ownership or control over the parking lot, an accident occurring on the lot will generally be found compensable.
 - c. *Dual Purpose Doctrine* - If the work of Employee creates the necessity for travel, he/she is in the course of his/her employment, though he/she is serving at the same time some purpose of his own.
 - d. *Frolic*: "Temporary Deviation"

C. Other Defenses

- 1. *Recreational Injuries* (RSMo § 287.120.7) - Not compensable unless Employee's attendance was mandatory, or Employee was paid wages or travel expenses while participating, or the injury was due to an unsafe condition of which Employer was aware
- 2. *Violation of Employer's Rules or Policies* - An employee is not necessarily deprived of the right to compensation where his injury was received while performing an act specifically prohibited by the employer. Compensation is denied where the employee's violation is such that it removes him from the sphere of his employment.
- 3. *Found Dead Presumption*: Where a worker sustains an unwitnessed injury at a place where the worker is required to be by reason of employment, there is a rebuttable presumption that the injury and death arose out of and in the course of employment. However, in almost all cases the courts have failed to permit recovery based on this presumption.

4. *Alcohol/Controlled Substances*

a. For accidents before August 28, 2017:

- i. *Total Defense* [RSMo. §287.120.6(2)] - Must show that the use of the alcohol or controlled substance was the proximate cause of the accident.
- ii. *Partial Defense* [RSMo. §287.120.6(1)] - Employer is entitled to a 50 percent reduction in benefits (medical, TTD, and PPD) if Employer has policy against drug use and injury was sustained “in conjunction with” the use of alcohol or nonprescribed controlled drugs

b. For accidents on or after August 28, 2017:

- i. If an employee tests positive for a non-prescribed controlled drug or the metabolites of such drug, then it is presumed that the drug was in Employee’s system at the time of the accident/injury and that the injury was sustained in conjunction with the use of such drug.
- ii. For the presumption to apply, the following requirements must be met:
 - (a.) Initial testing within 24 hours of accident or injury
 - (b.) Notice of the test results must be given to the employee within 14 calendar days of the insurer/self-insurer receiving actual notice of the confirmatory results
 - (c.) Employee must have opportunity to perform a second test upon the original sample
 - (d.) Testing must be confirmed by mass spectrometry, using a generally accepted medical forensic testing procedure
- iii. The presumption is rebuttable by Employee

5. *Medical Causation*

6. *Employer/Employee Relationship*

- a. *Owner and Operator of Truck* - Complete defense if the alleged employer meets the standards set out in RSMo § 287.020.1.
- b. *General Contractor-Subcontractor Liability* (RSMo § 287.040) - Subcontractor is primarily liable to its employees and general contractor is secondarily liable. Under the Workers’ Compensation Act, the general contractor has a right to reimbursement from the subcontractor if the subcontractor’s employee receives benefits from the general contractor.
- c. *Independent Contractor* - The alleged employer must prove that the claimant is not only an independent contractor, but must also show that the claimant is not a “statutory employee.”

7. *Intentional Injury* (RSMo § 287.120.3) – not compensable
8. *Last Exposure Rule* (RSMo § 287.063 and § 287.067.7)
9. *Idiopathic Injury* – “idiopathic” means innate to the individual
10. *Failure to Use Provided Safety Devices*: (RSMo § 287.120.5) If the injury is caused by the failure of the employee to use safety devices where provided by the employer **OR** from the employee’s failure to obey any reasonable rules adopted by the employer for the safety of employees, the compensation shall be reduced at least 25 percent, but not more than 50 percent. Employee must have actual knowledge of the rule and Employer must have made reasonable efforts to enforce safety rules and/or use of safety devices prior to the injury.

XII. TORT ACTIONS AGAINST EMPLOYERS – The *Missouri Alliance* Decision

- A. Labor groups challenged the constitutionality of the 2005 amendments.
- B. If a work-related incident meets the definition of “accident” and if it causes “injury” as defined by the Act, then workers’ compensation is the “exclusive remedy.”
- C. If not, the employee is free to proceed in tort.
- D. Types of injuries and accidents at issue:
 1. Injuries that do not meet the definition of “accident,” including repetitive trauma injuries;
 2. Accidents that do not meet the definition of “injury”;
 3. Injuries for which the accident was not the “prevailing factor,” but was the “proximate cause”;
 4. Injuries from idiopathic conditions.
- E. Likely types of claims:
 1. Common law negligence;
 2. Premises liability;
 3. Respondeat superior.

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RECENTLY ASKED QUESTIONS IN MISSOURI

FROM ISSUES ADDRESSED IN RECENT MISSOURI CASES

Q. Can PPD benefits be awarded from the Second Injury Fund for injuries that occurred after January 1, 2014?

A. No. In *Cosby v. Treasurer of the State as Custodian of the Second Injury Fund*, Employee sustained a left knee injury at work in 2014 and filed a workers compensation claim against his employer and the Second Injury Fund. Employee alleged that he was permanently and totally disabled or alternatively, permanently and partially disabled as a result of his knee injury combined with preexisting disabilities. The Missouri Supreme Court held that despite Employee's previous injuries, PPD benefits would not be awarded from the Fund for work injuries occurring after January 1, 2014. Additionally, the Court held that PTD benefits would be analyzed in the same manner as PPD benefits, meaning that the date of the last injury is the only date considered in determining if Fund liability exists.

Employee argued that § 287.220 violated due process, equal protection, and the open court's provision of the Missouri constitution. The Court held that § 287.220 does not violate the open courts provision of the constitution because the statute's failure to authorize PPD claims against the Fund does not arbitrarily deny access to Missouri courts; rather it eliminates a statutory cause of action. Employee argued that the statute violated his due process rights because the statute does not inform the public which rules govern their particular circumstances. Court ruled that Employee's due process violation argument conflated statutory ambiguity with vagueness, and therefore, failed to establish § 287.220 violates his due process rights. Finally, the Court held that the § 287.220 does not violate the equal protection clause because there was a rational basis behind the creation of the statute because the Fund was insolvent at the time the legislature amended the statute to eliminate PPD benefit claims against the fund. The Court confirmed the Commission's decision to deny PPD and PTD benefits. This decision overruled *Gattenby v. Treasure of the State of Missouri*.

Cosby v. Treasurer of State as Custodian of Second Injury Fund, SC 97317, 2019 WL 2588575 (Mo. 2019).

Q. Must an accident be alleged in an injury report in order to be compensable?

A. No. In *Harley Davidson Motor Company, Inc. v. Jones*, Employee was injured at work and filed a report of injury the same day. The report of injury did not include his address and stated that he hurt his "right elbow and right hand." Employee began experiencing back pain and a doctor opined the accident was the prevailing factor of Employee's back pain. Employer argued that notice of the claim was improper due to Employee's failure to provide his address and failure to indicate the nature of his injury correctly. The Court of Appeals affirmed The Commission's decision and stated that the purpose of the notice statute was to give the employer timely opportunity to investigate

facts surrounding the accident. The Court stated that since Employee reported the accident the same day it occurred, there was substantial evidence the employer had knowledge of Employee's injury and therefore had the opportunity to investigate and was not prejudiced.

Harley-Davidson Motor Company, Inc. v. Jones, 557 S.W.3d 328 (Mo. App. W.D. 2018).

Q. Does the Court of Appeals have authority to review cases where the Employer is appealing a ruling of temporary awards by The Commission?

A. Not Necessarily. In *AB Electrical, Inc. v. Franklin*, Employee was working on scaffold performing plaster work when he fell from the scaffolding and suffered injuries to his head, back, and neck. Employee was taken to the hospital and tested positive for THC. The Commission awarded Employee TTD and past and future medical benefits but left the matter open until a final award was issued. Employer appealed and their claim was dismissed by The Court of Appeals. In dismissing this claim, The Court strictly applied the "finality" rule which states that an award must be final before the Court of Appeals can review the Commission's decision. The Court decline to use a judicially created exemption that allowed appellate courts to review the issue of employer liability before a final judgment. The Court implied that the Court of Appeals may still have statutory authority to review cases of temporary awards of PTD that are effectively "final decisions."

AB Electrical, Inc. v. Franklin, 559 S.W.3d 38 (Mo. App. W.D. 2018).

Q. Does an Employee firefighter need to show specific exposure to a carcinogenic substance in order to receive benefits under worker's compensation for an occupational disease?

A. No. In *Cheney v. City of Gladstone*, Employee was a firefighter who contracted non-Hodgkin's lymphoma that ultimately resulted in his death. The ALJ denied benefits to the surviving spouse because there was no evidence the Employee, as a firefighter, was ever specifically exposed to any substance known to cause non-Hodgkin's lymphoma. The Commission reversed the ALJ's decision and awarded benefits, stating that independent of the Firefighter Presumption (§ 287.067), Employee need not show any specific exposure in order to receive benefits.

Employer appealed and argued that there is no recognizable link between non-Hodgkin's lymphoma and Employee's work as a firefighter. Employer based this argument on an opinion by Employee's doctor, what stated that there is no known cause non-Hodgkin's lymphoma and no peer reviewed literature connecting exposures experienced during firefighting to the development of the disease. The Court rejected Employer's argument and upheld the Commission's decision, stating that there was evidence presented to support a finding that Employee's carcinogenic exposures as a firefighter was the prevailing factor in his development of lymphoma.

Cheney v. City of Gladstone, WD 81939, 2019 WL 2345247 (Mo. App. W.D. 2019).

Q. If an employee is injured while pushing a personal cart to carry items into work, is the injury compensable?

A. Yes. In *McDowell v. St. Luke's Hospital of Kansas City*, Employee had two prior hip replacement surgeries completed. She had a difficult time carrying all of her materials from the parking garage to her work station so her supervisor recommended and supplied her with a 2-wheeled cart to carry her items. On the date of the accident, Employee fell while pushing her two wheeled cart through a congested doorway and sustained an injury to her wrist. Employer argued that they were not liable for Employee's injuries because she was at no greater risk for falling when rolling a cart than she would be in her everyday life. Employer also argued that the cart Employee was pushing was not work related because the cart was not necessary for Employee to complete her work. The court found that Employee's injury arose out of employment as required by § 287.020.3(2)(b) because there was substantial evidence to support Commission's finding that Employee was not equally exposed to the cause of her injury outside of her workplace in non-employment life.

McDowell v. St. Luke's Hospital of Kansas City, 572 S.W.3d 127 (Mo App. W.D. 2019).

Q. Must medical experts use specific technical language to interpret § 287.020.3?

A. No. In *Knutter by Knutter v. American National Insurance*, Employee slipped and fell on ice at work and became wheelchair dependent. Shortly after her fall, employee began experiencing shortness of breath and suffered a pulmonary embolism and passed away. The Commission awarded Employee's family with death benefits. Employer appealed and argued that The Commission's decision was not supported by sufficient and competent evidence because Employee's medical expert did not use specific technical language to prove that Employee's injury was work related. The Court held that a medical expert does not have to use technical language to interpret § 287.020.3. The Court held that because the opinions of Claimant's medical experts, read in context of their plain meaning, show their respective opinions that Employee's workplace injury was the prevailing factor that ultimately lead her death, The Commission's awarded was supported by sufficient and competent evidence and should be upheld.

Knutter by Knutter v. American National Insurance, SD 35644, 2019 WL 2092779 (Mo. App. S.D. 2019).

Q. Does a specific analysis need to be used in order to prevail in a not-supported-by-substantial-evidence challenge to awarded benefits?

A. Yes. In *Customer Engineering Services v. Odom*, Employee sustained injuries to his neck, elbow, and back. Employee was never able to return to work after his injuries and a vocational expert testified that Employee was unemployable in the open labor market due to his injuries. The court held that a successful non-supported-by-substantial evidence challenge involves three analytical steps that must be proven: (1) Identify a

factual proposition needed to sustain the result; (2) Identify all favorable evidence in the record supporting the proposition; and (3) Demonstrate, in light of the whole record, that the step two evidence and its reasonable inferences are so non-probative that no reasonable mind could believe the proposition. The court rejected Employer's arguments against future medical expenses and PTD benefits on grounds that Employer's arguments lacked persuasive or analytical value because they ignored the three steps listed above. The Court reversed and remanded the Commission's findings regarding past medical benefits because Employer did not receive proper notice of Employee's need for treatment.

Similarly, in *Robinson v. Loxcreen Company, Inc.*, Employee was injured in a work accident and filed for PTD for injuries to his head, right side of face, right eye, right shoulder, hands, left hip, and left knee. Employer and The Fund Appealed. The Court Appeals affirmed the Commission's findings and stated that Employer's failure to apply the correct three-step analytical process was clear and refused to overturn the Commission's decision.

Customer Engineering Services v. Odom, 573 S.W.3d 88 (Mo. App. S.D. 2019);
Robinson v. Loxcreen Company, Inc., 571 S.W.3d 247 (Mo. App. S.D. 2019).

Q. Does the statute of limitations for filing a workers' compensation claim for an occupation disease against the Second Injury Fund begin when the disease is reasonably discoverable and apparent?

A. Yes. In *Guinn v. Treasurer as Custodian of Second Injury Fund*, Employee filed a claim against Employer and the Fund for hearing loss and tinnitus as a result of his exposure to industrial noise while working at Employer. The Commission denied Employee's claim and ruled that it was barred by the statute of limitations. The Court of Appeals reversed and held that, because Employee's hearing loss is considered an occupational disease under § 287.067.4, the statute of limitations did not begin to run until Employee's hearing loss was reasonably discoverable and apparent. The court ruled that Employee's injury was reasonably discoverable and apparent within two years of filing the workers' compensation claim and reversed the Commission's decision.

Guinn v. Treasurer of Missouri as Custodian of Second Injury Fund, SD 35694, 2019 WL 2537436 (Mo. App. S.D. 2019).

Q. Is testimony of an expert witness who bases their opinions solely on Employee's subjective complaints and not on medical records admissible under 490.065?

A. No. In *Hogenmiller v. Mississippi Lime Company*, Employee filed a claim for compensation for his tinnitus, stating he had worked around loud machinery for over twenty years at Employer. Employee presented testimony from Dr. Mason, an audiologist, who did not review any of employee's medical records and relied solely on subjective complaints of Employee which were obtained via a questionnaire and a

sound matching procedure. Employer presented testimony from a medical doctor with a specialization in otolaryngology.

The Commission found Dr. Mason competent to testify as an expert and awarded benefits to employee. Employer appealed stating that Dr. Manson was unqualified to testify about tinnitus because he focused his practice on the field of audiology and not tinnitus. The Court rejected this argument and cited § 490.605.1, which outlines the criteria for admission of expert testimony. The Court stated that given Dr. Manson's credentials and considering he has developed informed techniques to measure Employee's tinnitus, the Commission did not err in finding Dr. Manson was a qualified expert.

Hogenmiller v. Mississippi Lime Company, 574 S.W.3d 333 (Mo. App. E.D. 2019).

Q. Can a co-employee be held liable for another Employee's injuries when worker's compensation is recoverable?

A. It depends. In *Mems v. LaBruyere*, Employee was injured when his co-employee (LaBruyere) unscrewed a roller door that fell directly onto Employee who was working below. Employee filed a worker's compensation claim against Employer and a civil lawsuit against LaBruyere. LaBruyere argued that Mo. Ann. Stat. § 287.120.1(2012), which provides immunity to co-employees for civil liability for injuries under which workers compensation is recoverable unless the employee is engaged in affirmative negligent acts that purposefully and dangerously caused or increased the risk of injury, prohibits Employee from bring suit.

The Court held LaBruyere was not exempt from immunity under this statute. The Court held that co-employees may be held liable for negligent acts if they failed to maintain a certain level of care to protect fellow employees against unreasonable risks of harm and create or increase the risk of danger to the injured employee. The Court noted that the co-employee must have purposefully performed the act which resulted in Employee's injuries, even if it was not initiated to cause harm.

Further, the court held that in order to determine if the injury was caused by a breach of the Employer's non-delegable duties, it must be determined if the risk was "reasonably foreseeable" from the employer's perspective. The Court stated that if the risk was not "reasonably foreseeable" then the injury was not caused by a breach of employer's non-delegable duties.

The Court stressed that employees still owe a common law duty of care to each other beyond the bounds of workers' compensation.

Mems v. LaBruyere, ED 106319, 2019 WL 2182444 (Mo. App. E.D. 2019).

Q. Is an Employer that was no longer in existence on January 1, 2014 liable for the enhanced remedy benefits under § 287.200.4(3)(a)?

A. Yes. In *Hegger v. Valley Farm Dairy Company*, Employee was last exposed to asbestos through Employer who went out of business in 1998. Employee died in 2015 from mesothelioma caused by exposure to asbestos while working for Employer. The Commission ruled that Employee was not entitled to enhanced benefits under § 287.200.4(3) because they had not elected to provide enhanced benefits due to the fact that they went out of business before the enhanced benefits statute took effect. Employee appealed and argued that the Commission erred because the Employer did elect to accept liability for benefits under strict construction when it insured liability at the time of last exposure and the Employer was not required to provide the Division with notice of an election to accept liability.

The Court reversed the Commission's decision to deny Employee benefits. The Court held that Valley Farm Dairy Company, although not in existence on January 1, 2014, elected to accept coverage for enhanced remedy benefits by insuring their liability, by qualifying as a self-insurer, or by becoming a member of a group of insurance pool when the Employee was last exposed to asbestos. Further, The Court held that under the strict construction of the statute, only employees who chose to become a member of group insurance pool are required to provide notice to the Division of an election to accept liability for enhanced benefits. The Court remanded the case to the Commission to determine which insurer was liable for Employee's injuries.

Hegger v. Valley Farm Dairy Company, ED 106278, 2019 WL 2181663 (Mo. App. E.D. 2019).

Q. Is an amended claim barred by the statute of limitations if it creates a new claim?

A. Yes. In *Naeter v. Treasurer of Missouri as Custodian of Second Injury Fund*, Employee filed a hearing loss claim against Employer. Employee then amended the claim and added claims of Tinnitus and Meniere's disease against Employer. One-hundred and thirty days later, Employee filed a second amended claim with the addition of second injury fund liability for pre-existing Meniere's disease. Employee settled against the Employer.

The Commission found the claim against The Fund was barred by the statute of limitations. Employee appealed. The Court of Appeals affirmed the Commission's decision. The Court stated that the second amended claim was not a new claim against the Employer because "it did not address the same occurrence or term of employment and in some way add to the original claim by adding some cause, effect, or injury relating back to the original claim." The Court ruled that the second amended claim was not "a claim" against Employer and was barred by the statute of limitations. The court also ruled that settlement stipulations are considered a Claim against the Employer only when a formal claim has not been filed.

Naeter v. Treasurer of Missouri as Custodian of Second Injury Fund, ED 106949, 2019 WL 1120097 (Mo. App. E.D. 2019).

Q. Do worker's compensation payments made in another state toll the statute of limitations in Missouri?

A. No. In *Employee: Clifford Austin Employer: AM Mechanical Services Insurer: AMCO Insurance Co.*, 11-112011, 2019 WL 2075835 (Mo. Lab. Ind. Rel. Com. May 1, 2019), Employee sustained an injury to his neck while at work. Employee testified that when he settled his workers' compensation claim in Kansas for his injury, he was under distress and did not understand what jurisdiction meant. Employee further testified that although the Kansas settlement agreement provided that he was closing out claims in all jurisdictions for his injuries, he was never told by the insurance company that he was doing so. The Administrative Law Judge denied benefits to Employee because his claim was barred by the statute of limitations.

The Commission upheld the decision of the ALJ holding that Employee's Missouri claim was time-barred by the statute of limitations pursuant to § 287.430. Employee argued that his worker's compensation benefits made pursuant to Kansas law tolled the statute of limitations and relied on *Small v. Red Simpson, Inc.*, 484 S.W.3d 341 (Mo. App. 2015). The Commission rejected this argument, stating that the Missouri court in *Small* did not use the current version of § 287.800.1, which requires strict construction.

The Commission found that strict construction, as required by § 287.800.1, requires that in order to toll the statute of limitations, payments must be made "under this chapter." Therefore, the Commission found that payments made to Employee under Kansas law did not toll the statute of limitations in Missouri. The Commission stated that since Employee failed to file a claim in Missouri prior to the end of the statute of limitations period and the statute of limitations was not tolled by Kansas workers' compensation payments, Employee's claim must be denied.

Employee: Clifford Austin Employer: AM Mechanical Services Insurer: AMCO Insurance Co., 11-112011, 2019 WL 2075835 (Mo. Lab. Ind. Rel. Com. May 1, 2019).

Q. Is an Employee entitled to TTD benefits if they are terminated by Employer due to misconduct?

A. No. In *Employee: Jeffrey Hicks Employer: Missouri Department of Corrections Insurer: Missouri Office of Administration Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund*, 14-004926, 2019 WL 2412820 (Mo. Lab. Ind. Rel. Com. May 31, 2019), Employee was injured and placed on modified work duty. Employee was then released to return to work without restrictions from Employer's worker's compensation doctor, however, did not return to work and told Employer that he would not return until his shoulder was fixed. Employee did not call daily or return to work again and was eventually sent a letter indicating that he needed to return to work by a specific date. Employee refused to return to work and received a letter stating that

employment was terminated because he violated Employer's rules on reporting absences.

Employer argued that TTD benefits should not be payable to Employee under § 287.170.4. Commission ruled in favor of Employer and stated that Employee committed misconduct by failing to call in his absences and failed to take necessary steps to maintain his employment, and therefore he is not entitled to TTD benefits under § 287.170.4.

Employee: Jeffrey Hicks Employer: Missouri Department of Corrections Insurer: Missouri Office of Administration Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund, 14-004926, 2019 WL 2412820 (Mo. Lab. Ind. Rel. Com. May 31, 2019).

Q: Can a claimant make a civil claim for contempt based on a statutory right to recover interest on a workers' compensation award?

A. No. In *Smith v. Capital Region Med. Ctr.*, 564 S.W.3d 800 (Mo. Ct. App. 2018), the Commission awarded Employee TTD benefits, death benefits, funeral expenses, and interest as provided by law following a workers' compensation claim. Employer paid the benefits that had accrued throughout the appeals process but no interest. Employee filed a claim in Circuit Court seeking to hold Employer in contempt for failure to pay interest. The trial court granted Employer's Motion to Dismiss because civil contempt was not an appropriate remedy to collect a money judgement and because the issue was within the exclusive jurisdiction of the Labor and Industrial Relations Commission. The Western District Court of Appeals held that, "Our courts have long held that Section 511.340 prohibits the use of civil contempt to enforce the mere payment of money." As the Commission award was nothing more than the payment of money, and the Petition was solely for accrued interest, civil contempt was not the appropriate remedy to force Employer to pay the interest.

Smith v. Capital Region Med. Ctr., 564 S.W.3d 800 (Mo. Ct. App. 2018)

Q: Can an Administrative Law Judge admit evidence of an employee's prior conviction for social security fraud?

A: Yes. At a hearing in *Farmer v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 567 S.W.3d 228, 235 (Mo. Ct. App. 2018), the Second Injury Fund (SIF) offered into evidence various certified copies of Employee's conviction for social security fraud, and judgment of conviction. Employee objected based on prejudice and relevance as the Employee had admitted to having been convicted of social security fraud. However, the ALJ used this evidence to deny Employee benefits against the SIF. The Southern District Court of Appeals affirmed the Award because Employee's credibility was crucial to resolving his claim and the court deferred to the Commission on issues of credibility.

Farmer v. Treasurer of Missouri as Custodian of the Second Injury Fund, 567 S.W.3d 228, 235 (Mo. Ct. App. 2018)

Q: Can permanent total disability benefits be granted where a physician does not specifically demonstrate and certify permanent total disability?

A: Yes. In *Moss v. Treasurer of State - Custodian of Second Injury Fund*, No. WD 81467, 2018 WL 6738875, at *5 (Mo. Ct. App. Dec. 26, 2018), Employee was rated by a physician for his primary injury and pre-existing injury, and the physician stated that Employee would be “very limited” in his work capabilities and listed extreme restrictions. Employee was then seen by a vocational consultant and a rehabilitation counselor who determined that Employee was unable to compete in the open labor market. The ALJ awarded permanent total disability benefits, finding that permanent total disability is “not exclusively a medical question.” The Western District Court of Appeals determined that although permanent total disability must be “demonstrated and certified by a physician,” there was no requirement that the physician say any certain magic words. The Court held that Dr. Hopkins demonstrated and certified PTD and there was sufficient competent evidence in the record to support the finding.

Moss v. Treasurer of State - Custodian of Second Injury Fund, No. WD 81467, 2018 WL 6738875, at *5 (Mo. Ct. App. Dec. 26, 2018)

Q. Do workers’ compensation payments made in another state on a dual-jurisdiction claim toll the Missouri statute of limitations where no payments are made under the Missouri claim?

A. No. In *Austin v. AM Mechanical Services*, No. 11-112011 (LIRC, May 1, 2019), Employee was injured on March 10, 2011 and settled his Kansas claim. On September 23, 2015, he filed a claim for compensation in Missouri because he was hired in the state of Missouri. The ALJ denied the claim for Missouri benefits based on the settlement in Kansas plus the fact that the statute of limitations had run. The LIRC noted that one of the starting dates for the statute of limitations is the last date of compensation paid by the employer under the Missouri Workers’ Compensation Act. Although Employee received benefits in his Kansas claim, those were not payments made under the Missouri Act, and the statute of limitations was thus not delayed by those payments.

Austin v. AM Mechanical Services, No. 11-112011 (LIRC, May 1, 2019)

Q. Where an employee works in multiple states and then contracts an occupational disease by repetitive trauma, how can he show that his employment was principally located in Missouri?

A. Employees can establish Missouri jurisdiction even if the disease was contracted outside Missouri by showing that the employment was principally localized within Missouri during the thirteen weeks preceding the injury or diagnosis of the disease, under §287.110.2. In *Wilson v. Liquid Environmental Solutions Corporation*, No. 11-109554 (LIRC, Feb. 5, 2019), the Commission noted that “principally localized” is not defined by the Act, but

provided factors that can help determine the issue: (1) where the work day starts and ends; (2) whether the employer has an office in Missouri; (3) whether the duties performed in Missouri are merely incidental to the position; (4) where the employer receives orders, pay, and supervision; and (5) if the job requires travel, does most of the travel occur within Missouri. The Commission noted that the National Commission of State Workers' Compensation Law has created a Model Act defining "localized," but that the Missouri legislature has not adopted this act or definition.

Wilson v. Liquid Environmental Solutions Corporation, No. 11-109554 (LIRC, Feb. 5, 2019)

Q. *Where an employee suffers heat exhaustion, then has a heart attack later that day at a non-work event, are psychological issues from the heart attack and hospitalization, compensable?*

A. No. In *Miles v. Fred Weber, Inc.*, No. 11-058211 (LIRC, Jan. 30, 2019), Employee suffered an event of heat exhaustion at work, then drove to his granddaughters' birthday party later that day. After the party, he had a syncopal episode and was hospitalized due to a history of cardiac problems. His discharge diagnosis was dehydration and renal failure. The Commission and ALJ agreed that there was a work-related injury that resulted in a 5% permanent partial disability to the body as a whole, as the excessive heat caused an unusual strain resulting in heat exhaustion and dehydration. However, the subsequent events of that day were intervening events that broke the causation chain from the work injury, meaning that the psychological disorders from the hospitalization were not caused by the work event.

Miles v. Fred Weber, Inc., No. 11-058211 (LIRC, Jan. 30, 2019)

Q. *If the parties stipulate at a Hardship Hearing to an average weekly wage that is later shown inaccurate, can the stipulation be disregarded at a later hearing?*

A. Yes. In *Johnson v. Value St. Louis Properties, Inc.*, No. 07-059414 (LIRC, Nov. 30, 2018), the Employee and Employer stipulated to an average weekly wage and compensation rate at a Hardship Hearing. However, it was later determined that the actual average weekly wage was higher, and Employee argued that the stipulation should not take precedence over the actual wage. The Commission recognized that an ALJ's final award can differ from a temporary award, so the rate here could be changed. It continued that while stipulations are typically controlling, a court is not bound by them where it would work manifest injustice.

Johnson v. Value St. Louis Properties, Inc., No. 07-059414 (LIRC, Nov. 30, 2018)

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MISSOURI WORKERS' COMPENSATION 201

I. Evidence of Disability

A. Permanent Partial Disability (RSMo § 287.190)

1. Disability that is permanent in nature and partial in degree, and ... the percentage of disability shall be conclusively presumed to continue undiminished whenever a subsequent injury to the same member or same part of the body also results in permanent partial disability for which compensation under this chapter may be due.
2. Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty.
3. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

B. Occupational Diseases (RSMo § 287.063 & 287.067)

1. An identifiable disease arising with or without human fault out of and in the course of the employment.
 - a. Includes injuries due to repetitive motion
 - b. Occupational exposure must be the prevailing factor in causing the resulting medical condition and disability.
 - c. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.
 - d. Generally, does not include ordinary diseases of life to which the general public is exposed outside of the employment, except where the diseases follow as an incident of an occupational disease as defined in this section.
2. Typically, the employer liable for compensation of occupational diseases is the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability, regardless of the length of time of such last exposure
 - a. This is referred to as the “Last Exposure Rule”

3. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists
 - a. Unless it is an occupational disease due to repetitive motion and the employee has been employed with the current employer for less than three months and there was exposure to the repetitive motion with the immediate prior employer which was the prevailing factor in causing the injury.
 - b. In this case, the prior employer is liable.

II. Post-Injury Misconduct

A. Defined (RSMo § 287.170.4)

1. If the employee is terminated from post-injury employment based upon the employee's post-injury misconduct, neither temporary total disability nor temporary partial disability benefits are payable.
2. Post-injury misconduct does not include absence from the workplace due to an injury unless the employee is capable of working with restrictions, as certified by a physician.

B. Examples of Post-Injury Misconduct:

1. After the claimant was released to return to work on modified duty, and the employer had work within the restrictions available, the claimant both failed to return to work and failed to call in his absences each day, as was required per the employer's policy. The policy specifically required the employees to call their supervisor at least one hour prior to beginning their shift if they could not report that day, unless other arrangements were made. The employee neither called each day nor made other arrangements and was therefore terminated. The Commission held this was a termination for misconduct.

Hicks v. Missouri Dep't of Corrections, No. 14-004926, 2019 WL 2412820 (Mo. Lab. Ind. Rel. Com. May 31, 2019).

2. An over-the-road truck driver sustained an injury to his back but failed to immediately tell his employer about it. A week later, the driver still had not told his employer and was driving a route from Louisiana to Dallas, Texas and then back to Kansas City. While driving from Dallas to Kansas City, his supervisor called him and requested he stop in Arkansas to pick up an additional load. The driver refused and merely said his back was hurting but

did not allege a work-related injury. His employer informed him if he did not pick up the load in Arkansas, he would be fired. The driver still refused to pick it up and he was terminated. The ALJ determined this was a termination due to post-injury misconduct but on appeal the Commission did not incorporate this portion of the decision because it decided the matter on other grounds.

Jones v. Harris Transportation, No. 06-086943, 2009 WL 3786109 (Mo. Lab. Ind. Rel. Com. Nov. 4, 2009).

C. Example of what is NOT post-injury misconduct:

1. Using leave time to cover four post-injury absences while the claimant was working light duty from April 2017 through January 2018, for the following reasons: workers' compensation doctor's appointment, a family emergency, car troubles, and a medical emergency. The employee was fired for "frequent absenteeism" as all four absences occurred in January 2018. However, the Commission held this was not post-injury misconduct.

Lana v. Oldcastle, Inc., No. 17-022682, 2019 WL 1313591 (Mo. Lab. Ind. Rel. Com. Mar. 15, 2019).

III. Safety Violations

A. Defined (RSMo § 287.120.5)

1. Where the injury is caused by:
 - a. The failure of the employee to use safety devices where provided by the employer, or
 - b. From the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees
2. The compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent IF:
 - a. The employee had actual knowledge of the rule so adopted by the employer; and
 - b. The employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

B. Examples

1. Employer's rule required employees to keep all body parts within the confines of a forklift while it was "traveling." However, while a forklift was stationary, the employee stuck his left leg out of the forklift and his left foot was crushed by another forklift passing by. The Missouri Supreme Court

held the employee did not violate the employer's rule because the rule only applied when the forklift was "traveling" or in motion. In this case, the forklift was stationary when the employee stuck his leg out and therefore there was no safety violation.

Greer v. SYSCO Food Services, 475 S.W.3d 655 (Mo. 2015).

2. Employer's rule required employees to lock-out-tag-out every machine before it was repaired. This entailed cutting off the power to the machine (lock-out) and placing a tag at the lock-out point indicating who had locked out the machine and who was authorized to turn it back on (tag-out). The employer regularly distributed written safety materials and trained the employees on these procedures and warned the employees they could be disciplined if they did not follow the procedures. An employee turned off power to part of a machine but not all of it and therefore some of the machine continued to move while he worked on it. The employee's fingers were caught in the moving parts while he was working on it and were injured. The Court of Appeals held the employee had actual knowledge of the safety rule due to the employer's training, the training and threat of discipline also established the employer made a reasonable effort to cause its employees to follow the rule, and that the employee's injury was caused by his failure to follow the safety rule. Therefore, the Court of Appeals awarded a 37.5% reduction.

Thompson v. ICI American Holding, 347 S.W.3d 624 (Mo. Ct. App. 2011).

IV. Alcohol and Drug Rule Violations (Intoxication or Impairment Defense)

A. Definition (RSMo § 287.120.6)

1. The employee must fail to obey any rule or policy adopted by the employer relating to a drug-free workplace or the use of alcohol or nonprescribed controlled drugs in the workplace
2. Then either of the following two situations may apply:
 - a. If the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs, the compensation and death benefit shall be reduced fifty percent.
 - i. "In conjunction with": co-existing in time and space.
 - b. If the use of alcohol or nonprescribed controlled drugs in violation of the employer's rule or policy is the proximate cause of the injury, then the benefits or compensation for death or disability shall be forfeited.
 - i. "Proximate cause": combined with the tort law definition, whether the injury is the natural and probable consequence

of the claimant's use of the alcohol or drugs in violation of the employer's rule or policy.

B. Refusal

1. An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, at the request of the employer shall result in the forfeiture of benefits IF:
 - a. The employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant; OR
 - b. The employer's policy clearly authorizes post-injury testing

C. Presumptions

1. Alcohol
 - a. The voluntary use of alcohol to the percentage of blood alcohol sufficient under Missouri law to constitute legal intoxication shall give rise to a rebuttable presumption that the voluntary use of alcohol was the proximate cause of the injury.
 - b. A preponderance of the evidence standard shall apply to rebut such presumption.
2. Drugs
 - a. 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:
 - i. That the tested nonprescribed controlled drug was in the employee's system at the time of the accident or injury and
 - ii. That the injury was sustained in conjunction with the use of the tested nonprescribed controlled drug
 - b. The presumption only applies if the following are met:
 - i. The initial testing was administered within twenty-four hours of the accident or injury;
 - ii. Notice was given to the employee of the test results within fourteen calendar days of the insurer or group self-insurer receiving actual notice of the confirmatory test results;
 - iii. The employee was given an opportunity to perform a second test upon the original sample; AND
 - iv. The initial or any subsequent testing that forms the basis of the presumption was confirmed by mass spectrometry using generally accepted medical or forensic testing procedures.
 - a. This presumption may be rebutted by a preponderance of evidence

V. Going and Coming Rule and Traveling Employees

A. Going and Coming Rule

1. An employer is generally not liable for a claimant's injury if the claimant was injured while going to or coming from work.
2. Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee's home to the employer's principal place of business or from the employer's principal place of business to the employee's home are not compensable. (RSMo § 287.020.5).
3. However, an injury will generally arise out of and in the course of employment, "when it occurs within the period of employment at a location where employee would reasonably be while engaged in fulfilling the duties of employment or something incidental thereto."

Campbell v. Trees Unlimited, Inc., 505 S.W.3d 805, 815 (Mo. Ct. App. 2016).

B. Mutual Benefit Doctrine

1. Typically applies to arguably work-related activities that do not involve travel.
2. If the employee is injured while performing an action which is for the mutual benefit of both the employee and the employer, the injury will be compensable.
3. The employee's actions must provide some substantive benefit to the employer, and the benefit must be more than merely speculative or remote.

C. Dual Purpose Doctrine

1. Typically applies to arguably work-related activities conducted while an employee is traveling.
2. If the employee is traveling both for his own personal purposes and for purposes related to his employment, any injury sustained while traveling may be compensable if the employee can prove they "would have made the journey even though the private purpose was absent."

Wilson v. Wilson, 360 S.W.3d 836, 846 (Mo.App.W.D.2011).

3. Claimant must prove he was furthering his employer's purposes when the accident occurred.
4. If claimant was on a distinct departure on a personal errand, his injuries are not compensable.
 - a. Departure may be shown if the employee would not have been at the place he was injured, had the employee cancelled his personal errand.

D. Special Task Exception or Special Errand Rule

1. Coming and going rule does not apply when the employee, having identifiable time and space limits on his employment "performs a special task, or errand in connection with his employment."

Baldwin v. City of Fair Play, No. 11-015959, 2012 WL 992473 (Mo. Lab. Ind. Rel. Com. Mar. 21, 2012); *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602 (Mo. Ct. App. 2005).

2. "The journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself."

Custer v. Hartford Ins. Co., 174 S.W.3d 602, 614 (Mo. Ct. App. 2005).

VI. Mental Injuries

A. Two Types: Work-Related Stress and Traumatic Events (RSMo 287.120.8–10).

1. Mental injury resulting from work-related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events.
2. Mental injury does not arise out of and in the course of the employment if it resulted from any:
 - a. Disciplinary action,
 - b. Work evaluation,
 - c. Job transfer,
 - d. Layoff,
 - e. Demotion,
 - f. Termination or
 - g. Any similar action taken in good faith by the employer.

3. Neither of the above diminish a firefighter's ability to receive benefits for psychological stress under 287.067.6, which concerns occupational diseases
 - a. Firefighters of a paid fire department and peace officers of a paid police department may recover for psychological stress if the department is certified and a direct causal relationship is established. (RSMo § 287.067.6).

B. Work-Related Stress – Claimant must prove:

1. As judged by an objective standard based on actual events, the amount of stress the claimant endured was work related, extraordinary, and unusual;
 - a. The “objective standard” is a reasonable person standard: “whether the same or similar actual work events would cause a reasonable [employee] extraordinary and unusual stress.”
Mantia v. Missouri Dep’t of Transp., 529 S.W.3d 804 (Mo. 2017)
 - b. Must put forth objective evidence, such as by having other employees in his or her profession testify as to what they experience in the course of their employment.
 - c. These other employees do not have to work for the same employer at the claimant.
2. Claimant suffered a mental injury which was caused by this work-related stress.

C. Traumatic Event (RSMo § 281.120.1) – Claimant must prove:

1. The mental injury arose out of and in the course of the claimant's employment
2. Examples:
 - a. A nurse was sexually assaulted by a patient and this caused her to develop an adjustment disorder. The Court of Appeals held this mental injury was compensable even though she suffered no physical injury. The claimant did not have to prove her stress was extraordinary or unusual because the mental injury resulted from a traumatic event.
Jones v. Washington Univ., 199 S.W.3d 793 (Mo. Ct. App. 2006).
 - b. Two students were fighting and a teacher who tried to break up the fight was slammed into the wall by the students, resulting in physical and mental injuries. Both the claimant's physical and mental injuries were compensable without her proving her stress was extraordinary or unusual because they both arose out of and

in the course of her employment and resulted from a traumatic, physical, event.

E.W. v. Kansas City Missouri School Dist., 89 S.W.3d 527 (Mo. Ct. App. 2002).

VII. Extension of Premises Doctrine and Parking Lots

A. Definition (RSMo § 287.020.5).

1. The extension of premises doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.
2. Doctrine still applies to injuries which occur on property which the employer owns or controls.
 - a. Employer “controls” property when it exercises power over it, regulates or governs it, or has a controlling interest in it.

Missouri Dep’t of Social Services v. Beem, 478 S.W.3d 461 (Mo. Ct. App. 2015).

B. Examples:

1. Claimant was on a fifteen-minute break and was walking to her car to go home to let her dog out, when she slipped and fell on ice in her employer’s parking lot and broke her ankle. The employer did not own the parking lot, but per the terms of the employer’s lease, the employer was to pay for snow and ice removal in the parking lot and could transfer its interest in the parking lot without the landlord’s approval. Therefore, the Commission held, and the Court of Appeals affirmed that the employer had sufficient rights in the parking lot to “control” it and therefore was liable for injuries which occurred in the parking lot. The claimant’s injuries were consequently compensable even though she was not performing a work-related activity when she was injured.

Missouri Dep’t of Social Services v. Beem, 478 S.W.3d 461 (Mo. Ct. App. 2015).

2. Claimant clocked out from work and was walking to his car to go home when he slipped on ice in his employer’s parking lot and seriously injured his ankle. The employer did not own the parking lot, rather, it was leased to the employer from its landlord. The lease stated the employer had the right to use the parking lot, but the landlord had to manage and maintain the parking lot and had the ability to move the location of the parking lot as well as rearrange or modify it as the landlord saw fit without the employer’s input.

Therefore, the Commission held and the Court of Appeals affirmed that the employer did not “control” the parking lot. The employer therefore was not liable for injuries which occurred in the parking lot under the extension of premises doctrine and the claimant’s ankle injury was not compensable.

Hager v. Syberg’s Westport, 304 S.W.3d 771 (Mo. Ct. App. 2010).

VIII. Penalties Against the Employer

A. Failure of Employer to Comply with Statute or Order (RSMo § 287.120.4).

1. If a claimant’s injury is caused by the employer’s failure to comply with any Missouri statute or lawful order of the Division or Commission, the claimant’s compensation and death benefits are increased fifteen percent.

B. Fraud or Noncompliance Statute (RSMo § 287.128)

1. It is unlawful for an employer to knowingly make or cause to be made any false or fraudulent:
 - a. Material statement or material representation for the purpose of obtaining or denying any benefit;
 - b. Statements with regard to entitlement to benefits with the intent to discourage an injured worker from making a legitimate claim;
 - i. “Statement’ includes any notice, proof of injury, bill for services, payment for services, hospital or doctor records, x-ray or test results.”
 - c. Any employer violating the above may be found guilty of a class A misdemeanor and punished by a fine up to ten thousand dollars.
 - d. Repeat offenders may be found guilty of a class D felony.
2. It is unlawful for an employer to prepare or provide an invalid certificate of insurance as proof of workers' compensation insurance.
 - a. Any employer preparing or providing the invalid certificate may be found guilty of a class E felony and punished by:
 - i. A fine up to ten thousand dollars, or
 - ii. Double the value of the fraud, whichever is greater
3. An employer cannot knowingly misrepresent any fact to obtain workers' compensation insurance for less than the proper rate
 - a. Any employer doing so may be found guilty of a class A misdemeanor
 - b. Repeat offenders may be found guilty of a class E felony.
4. Employer’s covered by the Act must have workers' compensation insurance
 - a. If an employer does not have insurance, they may be found guilty of a class A misdemeanor and punished by:

- i. A penalty up to three times the annual premium the employer would have paid if they had workers' compensation insurance, or
- ii. Up to fifty thousand dollars, whichever amount is greater
- b. Repeat offenders may be found guilty of a class E felony.

C. Failure to report (287.380.4)

- 1. If an employer knowingly fails to report any accident or knowingly makes a false report or statement in writing to the Division or Commission, they may be found guilty of a misdemeanor and punished by:
 - a. A fine of not less than fifty nor more than five hundred dollars, or
 - b. By imprisonment in the county jail for not less than one week nor more than one year, or
 - c. By both the fine and imprisonment.

D. Failure to Pay a Temporary or Partial Award (RSMo § 287.510).

- 1. If a temporary or partial award is entered, and a final award is later entered which is consistent with the temporary or partial award, and the temporary or partial award has not been paid or complied with by the time the final award is entered, the Judge may order the amount which was previously ordered in the temporary or partial award but not paid by the time the final award is entered to be doubled in the final award.
- 2. Whether to award the penalty is discretionary and may be entered by the Administrative Law Judge or Commission.

E. Failure to Post Reasonable Notices that the Employer is Covered by the Act (RSMo § 287.127.3)

- 1. Employer's covered by the act must post the following notices at their place of employment:
 - a. That they are covered by the Act
 - b. That the employees must report all injuries, and to whom the injuries must be reported, within thirty days of when the employee becomes reasonably aware the injury is work related or the employee risks the ability to receive compensation
 - c. Name, address, and telephone number of the insurer; or if self-insured, the name, address, and telephone number of the designated individual responsible for reporting injuries or the adjusting or service company designated to handle the employer's workers' compensation matters.
 - d. Name, address, and number of the Division of workers' compensation
 - e. That the employer will supply additional information upon request

- f. That a fraudulent action by the employer, employee, or any other person is unlawful.
- 2. Any willful violation of the notice requirement may result in a class A misdemeanor and a punishment by:
 - a. A fine of not less than fifty dollars nor more than one thousand dollars, or
 - b. By imprisonment in the county jail for not more than six months or
 - c. By both such fine and imprisonment, and
- 3. Each such violation or each day such violation continues shall be deemed a separate offense.

F. Catch-All Penalty (287.790)

- 1. If any employer violates any provision of the Act and a penalty is not specifically provided, the employer may be found guilty of a misdemeanor and punished by:
 - a. A fine of not less than fifty dollars nor more than five hundred dollars or
 - b. By imprisonment in the county jail for not less than one week and not more than one year or
 - c. Both such fine and imprisonment.

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Notes Pages

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NEBRASKA WORKERS' COMPENSATION

I. JURISDICTION - Neb. Rev. Stat. §§ 48-106, 48-186

A. Act will apply where:

1. Injuries occurred or occupational diseases contracted in Nebraska while in the scope and course of employment.
2. Employer is a resident employer performing work in Nebraska who employs one or more employees in the regular trade, business, profession, or vocation of the employer.
3. Injuries received and occupational diseases contracted outside Nebraska, unless otherwise stipulated by the parties, if—
 - a. The employer was carrying on a business or industry in Nebraska; and
 - b. The work the employee was doing at the time of the injury was part of or incident to the industry being carried on by employer in Nebraska.
 - i. Domicile of the employer or employee and the place where the contract was entered into may be circumstances to aid in ascertaining whether the industry is located within the state.

B. The Act will not apply where:

1. Employer is a railroad engaged in interstate or foreign commerce.
2. The employee is a household domestic servant in a private residence.
3. The employer is engaged in agricultural operations and employees only agricultural employees, with certain exceptions.
4. The employee is subject to a federal workers' compensation statute.

II. PERSONAL INJURY

A. Accident – Neb. Rev. Stat. § 48-151

1. An unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
 - a. For repetitive trauma—
 - i. "Unexpected or unforeseen" requirement is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen;
 - ii. "Suddenly and violently" element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment.
2. An "injury" means violence to the physical structure of the body and such disease or infection as naturally results therefrom.
 - a. Special cases—
 - i. *Heart attack* – legal and medical causation;

- (a) Legal: Court determines what kind of exertion satisfies “arising out of employment.”
 - (b) Medical: Medical evidence establishes employee’s exertion in fact caused his or her heart attack.
 - ii. *Mental/Psychiatric* – requires a physical component and medical testimony linking mental health disorder with physical injuries sustained or occupational disease contracted.
 - iii. *Mental/Mental* – requires condition causing the injury to be extraordinary or unusual when compared to the normal conditions of employment and causation established by competent medical evidence. Applies only to First Responders, ie Police, Firefighters, and EMTs.
3. An injury, to be compensable, must arise out of and in the course of the employment:
- a. “Arise out of” – there must be a causal connection between the conditions under which the work was required to be performed and the resulting injury.
 - i. Special Cases—
 - (a) *Risks to Public at Large/Acts of God*: generally not compensable unless employment duties put employee in position they might not otherwise be in which exposes them to risk, even though risk is not greater than that of general public (positional risk doctrine).
 - (b) *Idiopathic cause*: non-compensable unless employment placed employee in position of increased risk.
 - (c) *Horseplay*: compensable if deviation from work was insubstantial and did not measurably detracted from work.
 - (d) *Assault*: injury may be compensable depending on reason for assault—
 - (i.) Work conditions: generally compensable.
 - (ii.) Personal animosity: generally not compensable.
 - b. “In the course of” – the injury must arise within the time and space boundaries of employment, and in the course of an activity whose purpose is related to the employment.
 - i. *Coming and going*: No recovery for injury while coming to or going from employer’s workplace or jobsite. Injuries which occur on the employer’s premises are generally compensable if no affirmative defenses apply.
 - ii. *Exceptions*:
 - (a) Dual Purpose: If the employee is injured while on a trip which serves both a business and personal purpose, the injuries are compensable if the trip involves some service to the employer which would have caused the employee to go on the trip, and the employee selected a “reasonable and practical” route.

- (b) Employer Created Condition: when a distinct causal connection exists between an employer-created condition and the occurrence of an injury, the injury will be compensable.
- (c) Minor deviation: acts incidental to employment.
- (d) Personal convenience: acts an employee may normally be expected to indulge in under the conditions of his work, if not in conflict with specific instructions, are generally compensable.
- (e) Parking lot: If owned, maintained, or otherwise sponsored by employer.
- (f) Employer-supplied transportation: If provided for work-related reason and not merely for employee benefit or convenience.
- (g) Commercial traveler: If the employee's occupation requires that he or she travel, and there is no easily identifiable labor hub.

B. Occupational Disease – Neb. Rev. Stat. § 48-151

- 1. Occupational disease is a disease which is due to the causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment.
- 2. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable.
- 3. Employee “disabled”, and thus eligible for compensation, when permanent medical impairment or medically assessed work restriction results in labor market access loss.
- 4. Date establishing employer liability is based on “last injurious exposure” or last exposure which bears a causal relationship to the disease. Employment need only be of the type which could cause the disease, given prolonged exposure.

III. NOTICE – Neb. Rev. Stat. § 48-133

- A. Notice of injury is required “as soon as practicable” following the accident.
- B. In repetitive trauma/occupational diseases, notice is required as soon as practicable from time employee's condition becomes an “injury.”
- C. The notice must be written and include the time, place and cause of the injury, except that if employee can show that employer had actual or constructive notice of the injury, no written notice is required.
- D. Notice given five months after the injury is “unreasonable” per se.

IV. REPORT OF INJURY – Neb. Rev. Stat. § 48-144.01

- A. FROI – First Report of Injury

1. For every Reportable Injury (including medical only injuries) arising out of and in the course of employment, a report of injury must be electronically filed with the Nebraska Workers' Compensation Court within ten days of the reportable injury.
 - a. Reportable Injury means those injuries or diagnosed occupational diseases that result in:
 - i. death, regardless of the time between the death and the injury or onset of disease;
 - ii. time away from work;
 - iii. restricted work or termination of employment;
 - iv. loss of consciousness; or
 - v. medical treatment other than first aid.
 - b. Failure to file injury report within 10 days of accident results in tolling of statute of limitations under § 48-137 such that two year statute of limitations does not begin to run until the report is filed.
 2. A First Report of Injury is required:
 - a. In the event of an injury, even if liability is denied;
 - b. A change is necessary to a previously filed report;
 - c. A denial is made at any time;
 - d. The claim has been acquired by another carrier.
 3. Any employer who fails to file a report is guilty of a Class II Misdemeanor for each such failure.
- B. SROI – Subsequent Report of Injury
1. in every case where a benefit payments have been made, a subsequent report of injury shall be electronically filed with the court by the employer or its insurance carrier.
 2. A Subsequent Report of Injury is required when:
 - a. The first indemnity payment has been made;
 - b. A change is necessary to a previously filed report;
 - c. A claim has been denied;
 - d. Every 180 days the claim has been open
 - e. Benefits have been reinstated;
 - f. The claim has been closed;
 - g. Jurisdiction has been changed.

V. CLAIM FOR COMPENSATION – Neb. Rev. Stat. §§ 48-137, 48-144.04

- A. Employee has two years from the date of accident or the last date payment was received by the intended recipient for benefits to file a timely Petition.
- B. If Employer fails to file an injury report within 10 days of accident, the two year statute of limitations does not begin to run until such report is filed.

VI. ANSWER TO PETITION – Neb. Rev. Stat. § 48-176

- A. Petition served upon employer and carrier with Summons. Summons to be returned to Division within 7 days of service. Answer to Petition must be filed within 7 days of summons return to Workers' Compensation Court.
- B. Failure to file timely answer may result in acceptance of facts in claim and default judgment.

VII. MEDICAL TREATMENT – Neb. Rev. Stat. § 48-120

- A. Employer responsible for all reasonable medical/surgical/hospital services required by the nature of the injury, plus mileage for travel and incidental expenses necessary to obtain such services.
- B. If employer does not participate in Managed Care Plan—
 - 1. Following injury, employer must notify employee of right to select a physician who has maintained the employee's medical records and has a documented history with the employee prior to an injury.
 - a. If employer fails to notify employee, employee may choose any provider.
 - b. If, after notification, employee fails to exercise the right to choose his or her provider, then employer may choose.
 - 2. Change of doctor only by agreement of the parties or by order of the compensation court.
- C. If employer participates in Managed Care Plan—
 - 1. Employer must notify employee of right to select primary treating physician in accordance with above—
 - a. Chosen physician, if outside Plan, must agree to the rules of the Plan; or
 - b. Employee may choose among doctors already signed up with the Plan.
 - 2. Choice of physician rules do not apply if:
 - a. Employer denies compensability;
 - b. Injury involves dismemberment or major surgical operation;
 - c. Employer fails to provide notice of right to select treating physician.
 - d. Must be careful when answering petition for benefits. If employer denies compensability, employee may leave Plan and employer is liable for medical services previously provided.
 - 3. Employee may change primary treating physician within the Managed Care Plan at least once without agreement or court order.
 - 4. Employer, insurance carrier, or representative of the employer or insurance carrier has right to access all medical records of the employee. Failure to provide medical records may result in a Court order striking the medical provider's right to payment.
 - 5. Bills are paid pursuant to the Nebraska Fee Schedule.

VIII. VOCATIONAL REHABILITATION – Neb. Rev. Stat. §48-162.01

- A. Employee entitled to vocational rehabilitation services if unable to perform suitable work for which he or she has previous training or experience.
- B. Used to take a potential permanent total to another vocation or to reduce/eliminate loss of wage earning capacity.
- C. Claimant must submit to evaluation by a vocational rehabilitation counselor who will, if necessary, develop and implement a vocational rehabilitation plan.
- D. Claimant has right to accept or decline rehabilitation services, but refusal to participate in a court-approved plan, without reasonable cause, can result in penalties – vocational rehabilitation services may be terminated and compensation court may suspend, reduce, or limit compensation otherwise payable under Workers' Compensation Act.
- E. Costs of vocational rehabilitation paid from Workers' Compensation Trust Fund; weekly temporary benefits and medical costs paid by employer.

IX. AVERAGE WEEKLY WAGE – Neb. Rev. Stat. §§ 48-121, 48-126

- A. For continuous employments where the rate of wages was fixed by the day or hour or by the output of the employee, wage is average weekly income for the period of time ordinarily constituting his week's work, with reference to the average earnings for a working day of ordinary length, and using as much of preceding six months as was worked prior to accident. Overtime earnings excluded, unless the premium for the policy includes a charge for overtime wages.
- B. Gratuity or tip and similar advantages are excluded in calculation of average weekly wage to the extent that the money value of such advantages was not fixed by the parties at the time of hiring.
- C. Special Cases—
 - 1. *Part-time employees*: for permanent disability only, must base average weekly wage on minimum 5-day workweek if paid by the day, minimum 40-hour workweek if paid by the hour or on whichever is higher if paid by output.
 - 2. *Multiple employments*: base average weekly wage on wages of employer where accident occurred only, unless seasonal employee.
 - 3. *Seasonal employment*: in occupations involving seasonal employment or employment dependent on the weather, average weekly wage is determined to be one-fiftieth of the total wages earned from all occupations during the year immediately preceding the accident.
 - 4. *New employees*: where worker has insufficient work history to calculate average weekly wage, what would ordinarily constitute that employee's

average weekly income should be estimated by considering other employees working similar jobs for similar employers. Where available, such similar employees' work records should be considered for the 6-month period prior to the accident.

X. DISABILITY BENEFITS

- A. Temporary Total Disability (TTD) – Neb. Rev. Stat. § 48-121(1)
 - 1. Compensation rate two-thirds Average Weekly Wage (AWW) up to maximum.
 - 2. Payable until maximum medical improvement reached, provided the employee does not secure alternative employment for the same, or a different, employer.
 - 3. Waiting period (Neb. Rev. Stat. § 48-119) – seven calendar days. Benefits must be paid for those seven days if claimant is disabled six or more weeks.
 - 4. Can be owed for scheduled as well as whole body injuries.
- B. Temporary Partial Disability (TPD) – Neb. Rev. Stat. § 48-121(2)
 - 1. Employee able to return to work part-time while under medical care.
 - 2. Compensation rate two-thirds of difference between wages received at time of injury and earning power of employee afterwards, up to maximum.
- C. Permanent Total Disability (PTD) – Neb. Rev. Stat. § 48-121(1)
 - 1. Definition: inability of the worker to perform any work which he or she has the experience or capacity to perform; workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.
 - 2. Compensation rate two-thirds AWW up to maximum, paid for life.
 - 3. Law does allow lump sum settlements based on present value of permanent total award if filed with and approved by the workers' compensation court – Neb. Rev. Stat. § 48-139. Generally saves 34% of total cost of obligation.
- D. Permanent Partial Disability (PPD) – Neb. Rev. Stat. § 48-121(2), (3)
 - 1. Definition: a disability that is permanent in nature and partial in degree.
 - 2. Scheduled Member Injuries – “Loss of Use”
 - a. Injury to a body member – ex. Arm, leg, foot, hand, etc.
 - b. Compensation rate of two-thirds AWW, up to maximum, in accordance with schedule.
 - i. Nebraska favors the 5th Edition of the AMA Guidelines for Permanent Impairment, but will accept a rating pursuant to the 6th Edition of the Guidelines to assist the trier of fact. The Court is not bound by the guidelines or a rating provided by a physician.
 - c. Two-member injury rule – – total loss or total permanent loss of use of two members in one accident constitutes permanent total disability.
 - d. If loss of use of more than one member does not constitute permanent

total disability, compensation is paid for each member with periods of benefits running consecutively.

- e. No deduction for TTD benefits paid.
- 3. Body as a Whole Injuries – “Loss of Earning Capacity”
 - a. Injury to trunk of body, neck or head, but not including shoulder or injuries below the trochanteric neck of the femur.
 - b. Injuries to two scheduled members from the same accident which combine to create a loss of earnings of more than thirty percent are compensated on the basis of loss of earning capacity.
 - c. Compensation rate is percentage of lost earning capacity multiplied by two-thirds of AWW.
 - d. Payable for 300 weeks.
 - e. Deduction for weeks TTD benefits paid.
- 4. Calculation of Permanent Partial Disability
 - a. Scheduled Member Injury:
 - i. Claimant has a rating of 10 percent permanent partial disability to the foot, which qualifies for 150 weeks of benefits.
 - ii. Claimant qualifies for maximum compensation rate for his date of accident of \$644.00.
 - iii. Award would be \$9660.00 (150 wks X 10% X \$644).
 - iv. No credit for TTD paid.
 - b. Body as a Whole:
 - i. Claimant qualifies for maximum compensation rate for his date of accident of \$644.00.
 - ii. Claimant has a 50% loss of earning capacity.
 - iii. Claimant received TTD benefits for 20 weeks (300 – 20 = 280 wks payable).
 - iv. Award would be \$90,160.00 (280 wks X \$644.00 X 50%).

E. Death - Neb. Rev. Stat. § 48-122

- 1. Death resulting from accident/injury.
 - a. Widow(er) entitled to weekly compensation benefits for life or until remarriage.
 - i. No children - rate of compensation two-thirds AWW at time of death, up to maximum.
 - ii. Children - rate of compensation three-quarters AWW at time of death, up to maximum.
 - b. If spouse remarries, he/she receives two years of benefits in lump sum and payments cease.
 - c. Dependent children receive weekly benefits payable to children during dependency or until age 19, or age 25 if incapable of support or a full-time student at an accredited institution.
 - d. Lump sum settlements are allowed if filed with and approved by the

- workers' compensation court – Neb. Rev. Stat. § 48-139
- e. Reasonable expenses of burial, not exceeding \$10,000.00.

XI. DEFENSES

A. Statutory:

1. *Willful Negligence* (Neb. Rev. Stat. §§ 48-127, 48-151): employer must prove
(a) a deliberate act knowingly done; (b) such conduct as evidences a reckless indifference for safety; or (c) intoxication.
 - a. “Reckless indifference for safety” means more than want of ordinary care. The conduct of the employee must manifest a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result.
 - b. Intoxication:
 - i. Burden on employer; must show that employee was intoxicated, either by alcohol or non-prescribed controlled substance, and that the intoxication was the cause of the accident.
 - ii. Defense unavailable if employee was intoxicated with consent, knowledge, or acquiescence of employer.
2. *Statute of Limitations* (Neb. Rev. Stat. § 48-137): two years from date of accident or of last benefits paid, unless the injury report is not timely filed by the employer. In that case, the statute tolls the two-year limitation until the injury report is filed. Employer has 10 days from the date they are notified of the accident to file the injury report with the Workers' Compensation Court.
3. *Timely Notice of Accident to Employer* (Neb. Rev. Stat. § 48-133): Claimant must give written notice of the time, place, and nature of the injury as soon as practicable after the happening thereof. The Supreme Court has ruled that five months is per se unreasonable.

B. Other Defenses:

1. *Failure to Use Provided Safety Devices*: compensable only if failure to use safety devices amounted to willful negligence.
2. *Intoxication*: Intoxication will bar recovery if, at the time of the injury, the Plaintiff was in a state of intoxication and the intoxication caused or contributed to the cause of the injury. The employer must not have known about the intoxication.
3. *Violation of a Safety Rule*: An employer may prevail where the employer has:
 - a. a reasonable rule designed to protect the health and safety of the employee,
 - b. the employee has actual notice of the rule
 - c. the employee has an understanding of the danger involved in the violation of the rule
 - d. the rule is kept alive by bona fide enforcement by the employer, and
 - e. the employee has no bona fide excuse for the rule violation.

4. *Recreational Injuries*: Generally compensable when:
 - a. they occur on the premises as a regular incident of employment;
 - b. the employer, by expressly or impliedly requiring participation brings the activity within the orbit of employment; or
 - c. the employer derives substantial direct benefit from the activity beyond value of improvement in employee health and morale.
5. *Independent Contractor*:
 - a. "Independent Contractor" – one who, in course of independent occupation or employment, undertakes work subject to will or control of person for whom the work is done only as to result of the work and not as to methods or means used; such person is not employee within meaning of workers' compensation statutes.
 - i. Exception – if the employer has created a scheme, artifice or device to enable them to execute work without providing workers' compensation coverage, then liability will be imputed to the employer.
 - b. To be eligible for compensation under Workers' Compensation Act, alleged employee must prove that he or she is an "employee" in order to invoke jurisdiction of Workers' Compensation Court.

XII. PENALTIES

- A. Absent a reasonable controversy, the employer or insurance carrier must pay, within thirty days, all medical and indemnity benefits due and owing to the employee and medical providers. Failure to do so will result in;
 1. A 50% penalty on all indemnity benefits due and owing, plus interest and/or;
 2. Attorney's fees and interest for securing payment of all medical expenses not timely made.
- B. A reasonable controversy is;
 1. The existence of any reasonable factual dispute that, if proven true, would absolve the employer or insurance carrier of liability, or;
 2. Any unanswered question of law which bears on the outcome of compensability.

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RECENTLY ASKED QUESTIONS IN NEBRASKA FROM ISSUES ADDRESSED IN RECENT NEBRASKA CASES

Q. What are the requirements for termination of coverage?

- A. In *Greenwood v. JJ Hooligans/FirstComp*, the insurer moved to dismiss the petition arguing that they had given the employer proper notice of termination of coverage due to nonpayment of premiums in compliance with § 48-144.03. In support of the Motion to Dismiss, FirstComp provided evidence that notice of the cancellation was sent via electronic certified mail in November 2011, that notice of cancellation was filed with the Workers' compensation Court and evidence of a certified mail tracking number.

The Workers' Compensation Court dismissed the petition, however the Supreme Court reversed and remanded the case, finding that a material issue of fact existed as to whether notice was actually sent to the employer based on the electronic mailing system used by FirstComp. The court held that a tracking number alone does not establish certified mail service.

Accordingly, it is advisable that all insurers additionally send a physical copy of a notice of termination of coverage and document its delivery.

Greenwood v. JJ Hooligans/FirstComp, 297 Neb. 435 (2017).

Q. How do room and board factor into average weekly wage?

- A. In *Foster-Rettig v. Indoor Football Operating, LLC*, the employee was injured playing professional football for the Omaha Beef. While playing for the Beef, he was paid between \$225 and \$250 per game. The league also provided a room at a particular hotel in Omaha seven days a week during the football season. If he chose not to stay at the hotel on a particular night, however, he did not receive any additional compensation from Indoor Football. The injured worker also received "a stack of meal vouchers" every week so that he could eat three meals a day at local restaurants. The injured worker testified that he would receive at least 21 meal vouchers per week.

The Workers' Compensation Court found an average weekly wage of \$231.25 without adding in the per diem of meals and lodging.

When adding extra weekly benefits (\$350.00 cost of lodging and \$322.00 vouchers for meals), his average weekly wage was \$903.25 per week. The Court reasoned that the lodging and meals represented economic gain for the injured worker and thus should be included in his average weekly wage.

The employer appealed, citing prior case law that required evidence to demonstrate that (1) the money value of the advantages was fixed by the parties at the time of hiring and (2) the advantages constitute a real and reasonably definite economic gain to the

employee. They argued that the injured worker provided no evidence that the lodging and meal costs were fixed.

The Court of Appeals held that, despite the injured worker having no knowledge of the actual costs at the time of his employment, the costs to the employer for the benefits received were fixed and thus the higher wage was appropriate.

Foster-Rettig v. Indoor Football Operating, LLC, 25 Neb. App. 551 (2018).

Q. How does a Plaintiff moving effect from an urban to rural environment affect their Loss of Earning Capacity (LOEC)?

A. In *Wiedel v. Lucile Duerr Hair Styling, Inc.*, the employee was injured while working as a cosmetologist in Lincoln, Nebraska. Following the accident, the employee gradually returned to working full duty. She later retired to and moved to Hebron, Nebraska to be closer to her family.

As a result of the accident, the injured worker was employable at the sedentary-light physical demand classification on a full-time basis. She was not qualified for up to constant standing or walking, but was qualified for up to constant sitting.

The vocational counselor assigned to this case initially determined the injured worker's LOEC when she had returned to work full time in Lincoln finding that she sustained a 25% LOEC. Following her move to the more rural Hebron, the injured worker sought an update analysis. The counselor affirmed the 25% LOEC. The injured worker then sought a rebuttal LOEC analysis and found a counselor to opine she sustained a 100% LOEC.

At trial, when addressing whether to use Lincoln or Hebron as the plaintiff's "Hub-Community," the court recognized that plaintiff's move from Lincoln to Hebron was prompted by her desire to be near relatives. Thus, the court rejected plaintiff's suggestion that her loss of earning capacity should be assessed from the hub-community of Hebron.

The plaintiff appealed, citing prior Nebraska case law that holds when an employee injured in one community relocates to a new community, the new community will serve as the hub-community from which to assess the claimant's earning capacity, provided that the change of community was done in good faith and not for improper motives.

Despite this precedent, the decision was affirmed as the plaintiff had returned to working full-duty in Lincoln prior to moving to a rural location

Wiedel v. Lucile Duerr Hair Styling, Inc., No. A-17-304, 2017 WL 5450758, (Neb. Ct. App. Nov. 14, 2017).

Q. How does the Court react when a plaintiff's attorney attempts to use trickery through discovery?

A. Unlike many states, Nebraska workers' compensation uses formal discovery similar to a civil matter. *Wynne v. Menard, Inc.* illustrates how plaintiffs' attorneys attempt to use trickery through discovery and how the Court reacts.

In *Wynne*, one of the plaintiff's doctors issued extreme permanent work restrictions of sitting for only up to ten minutes at a time. While there was plenty of additional medical evidence that suggested other permanent work restrictions, the vocational counselor did note that if those particular restrictions were adopted, the plaintiff would be permanently and totally disabled.

Plaintiff counsel subsequently asked in a Request for Admission (RFA), "Admit that in [his] report . . . the vocational rehabilitation counselor opined that plaintiff had a loss of earning capacity of 100% as set out in attached Exhibit D."

Defense counsel admitted that in a portion of the report the vocational counselor did in fact find a 100% LOEC. Plaintiff's counsel filed a Motion for Summary Judgment, arguing that as defendant's responded affirmatively to plaintiff's RFA, defendant admitted that plaintiff was permanently and totally disabled.

The Court differentiated the Admission correctly, ruling that "pursuant to X restrictions, the plaintiff is permanently and totally disabled," is not at all the same as "the plaintiff is permanently and totally disabled."

The Court cited Section 48-168(1), which provides that the Nebraska Workers' Compensation Court shall not be bound by the unusual common-law or statutory rules of evidence or by any technical or formal rules of procedure." While not a surprising ruling, this case serves as insight into some of the antics that can be brought via formal discovery.

Wynne v. Menard, Inc., 299 Neb. 710, 910 N.W.2d 96 (2018).

Q. Can an outdated mailing address provide sufficient basis for an award of waiting time penalties?

A. In *Rice v. Sykes Enterprises, Inc.*, two parties entered into a settlement agreement regarding a workers' compensation claim. As part of the settlement agreement, the insurer would make an upfront payment of \$15,000 and a second payment of \$93,375.92. After reaching the agreement, the parties applied to the workers' compensation court for approval of the settlement agreement. An order approving the application for settlement was entered on January 26, 2016. Over a year later, on March 8, 2017, the plaintiff filed a motion for waiting time penalties, attorney fees, and interest.

The evidence showed that a check was initially issued on February 3 and mailed to the attorney's address on February 4, approximately one week after the settlement was

approved. This check, however, was returned to the defendant, stating “UNKNOWN AT THIS PO BOX NAME.”

Defendants re-issued the check and it was re-mailed on February 27, more than 30 days after the settlement was approved by the Court. Additional evidence showed that the address defendant initially mailed the check to was outdated. However, the first installment of the settlement agreement (\$15,000) had been successfully mailed to that same address a month earlier.

The Court of Appeals concluded that the inclusion of an incorrect or outdated address on the check was, at most, a clerical error. Further, they noted it appeared reasonable for the defendant to have relied on the outdated address as being valid, because the address had been successfully utilized in the recent past. Accordingly no penalties were awarded.

Rice v. Sykes Enterprises, Inc., No. A-17-496, 2018 WL 1505425, (Neb. Ct. App. Mar. 27, 2018).

Q: What constitutes a “fixed place of employment” and an “employer-created condition” when determining compensability of a workers’ compensation claim?

A: In *Coughlin*, the case first clarifies the “fixed place of employment” when determining going to and coming from work. In this case, the deputy’s patrol car was always returned to the Department’s garage after the shift was finished so there was a fixed place of employment.

Additionally, the major issue dealt with in this case is what constitutes an employer-created condition. The facts of the case ask the question of whether the deputy’s use of his cell phone to communicate shift-change information while he was driving home was an employer-created condition. Because the Department did not specifically direct a method of communicating information, use of the cell phone was not employer-created. Because the use of the cell phone placed this outside of an employer-created condition, the accident was not causally connected and the going to and from work rule rendered the injury and death noncompensable.

Coughlin by and through Coughlin v. County of Colfax, 2019 WL 1442418 (Neb.Ct.App. April 2, 2019).

Q: Is a contractor a statutory employer under the Nebraska Workers’ Compensation Act even if they took steps to avoid responsibility?

A: This case held that a contractor was a statutory employer under the Nebraska Workers’ Compensation Act despite the fact that the contractor was out of state and had taken steps to circumvent its responsibility under the Nebraska Workers’ Compensation Act.

The Court also held that the findings of the compensation court were not clearly erroneous as to the award of earning capacity because the decision as supported by evidence in the record.

Martinez v. CMR Construction & Roofing of Texas, LLC, 924 N.W.2d 326 (Neb. 2019).

Q: What constitutes a sufficient basis for a court to exercise personal jurisdiction over a workers' compensation claim?

A: This case discusses Nebraska's Long-Arm Statute for purposes of exercising personal jurisdiction. The court held that although EM Pizza was not a Nebraska corporation, they did submit an application for insurance to Applied Underwriters at the Omaha office, faxed requests for service, allowed debiting bank accounts, and submitted payroll reports and customer service to the Omaha office. This was sufficient for minimum contacts to be established.

The Court then determined it was not reasonable to exercise personal jurisdiction because California law would likely be used so a California court would be better positioned to apply California workers' compensation laws. California also has a substantially greater interest in handling the dispute.

Applied Underwriters Captive Risk Assurance Company, Inc. v. E.M. Pizza, Inc., 923 N.W.2d 789 (Neb. 2019).

Q: Can a Court take judicial notice of disputed allegations?

A: No. The Court evaluated calculation of average weekly wage and found that the court cannot take judicial notice of disputed allegations.

Bortolotti v. Universal Terrazzo and Tile Company, 2019 WL 446630 (Neb.Ct.App. February 5, 2019).

Q: Is sending recruiters to Nebraska sufficient minimum contacts to establish jurisdiction in Nebraska?

A: The Court held that sending recruiters to Nebraska to hire an employee that ultimately was injured in another state was not sufficient to establish Nebraska jurisdiction. Thus, the petition for benefits in Nebraska was dismissed.

Hassan v. Trident Seafoods and Liberty Mutual Insurance, 921 N.W.2d 146 (Neb. 2019).

Q: Who is responsible for benefits if an injury is a recurrence of a prior injury?

A: The Court found no error in the compensation court finding that Freeman Expositions was an employer. There was evidence in the record both for and against but deferred to the judgment of the compensation court.

The court also held that if an injury is a recurrence of a prior injury, the insurer at risk at the time of the prior injury is liable rather than the insurer at the time of the recurrence.

The court held that when there is conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.

Weyerman v. Freeman Expositions, Inc., 922 N.W.2d 246 (Neb. 2018).

Q: Can an employee who has a compensable permanent total disability consistent with the Nebraska Workers' Compensation Act be deprived of ongoing disability benefits because of a subsequent non-compensable injury that independently causes permanent disability?

A: The Court held again that an appellate court will not substitute its judgment if there is conflicting evidence in the record unless there is a clear error.

In a matter of first impression, this case involved an injury and a subsequent stroke. The employer asked to “cut off” benefits at the time of the stroke. The question posed is whether an employee who has a compensable permanent total disability can, consistent with the Nebraska Workers' Compensation Act, be deprived of ongoing total disability benefits because of a subsequent non-compensable injury that independently causes permanent disability. The Court held that the employee was permanently and totally disabled as a result of a work accident and injury. The fact that she subsequently suffered a stroke that was neither medically nor causally related does not relieve the employer of its obligation to pay permanent total disability benefits under the Nebraska Workers' Compensation Act.

Krause v. Five Star Quality Care, Inc., 919 N.W.2d 514 (Neb. 2018).

Q: How should the Court treat medical opinions and are checkmark forms sufficient as medical opinion?

A: Challenges the admission of certain medical opinions and the court's conclusion that she did not suffer an injury to her lower back. Also challenges court's characterization of a doctor's billing record as a “checklist” which lacked credibility or weight.

No abuse of discretion found in finding opinions of Greater Omaha Packing's expert medical opinions. The opinions were supported by the record. It is the Court's discretion as to what weight and credibility should be given to medical opinions. When the record only presents conflicting medical testimony, the appellate court will not substitute its judgment.

The Court also cautioned the reliability of "checkmarks" on forms. The Court found that more detailed medical records were more reliable than checkmarks on a standard form. Additionally, resolving conflicts within a health care provider's opinion rests within the court's discretion as the trier of fact.

Diaz De Mora v. Greater Omaha Packing Company, Inc., 2018 WL 5279056 (Neb.Ct.App. October 23, 2018)

Q: How must medical opinion reports be signed?

A: The Court found that due to Rule 10, an evidentiary rule, the medical report must be signed by the physician, surgeon, vocational rehabilitation expert, physical therapist, or psychologist. A physician assistant does not satisfy Rule 10. Only the supervising physician in a physician-physician assistant relationship falls under the definition of physician as stated in Workers' Compensation Court rule 49(O).

The Court also reinforced that its jurisdiction does not extend to employment contractual disputes. It is limited to only that which is contained within the Nebraska Workers' Compensation Act. It does extend to contractual disputes concerning coverage by providers of workers' compensation insurance. The Court does not have jurisdiction over wrongful discharge claims.

The Court reinforced the "reasonable controversy" necessary in avoiding 50% penalties.

Bower v. Eaton Corporation, 918 N.W.2d 249 (Neb. 2018)

Q: How does the court construe indemnification agreements?

A: The Court reinforced that an indemnification agreement is construed according to general contract principles and an employer who enters an indemnity agreement need not affirmatively waive its workers' compensation immunity in order to be subject to indemnity claims brought by third parties based on employees' losses.

Jacobs Engineering Group, Inc. v. ConAgra Foods, Inc., 917 N.W.2d 435 (Neb. 2018)

Q: Does a Workers' Compensation Court have jurisdiction over third-party claims and is a scrivener's error sufficient to give rise to a reasonable controversy when assessing penalties?

A: Court held that the compensation court does not have authority to determine the credit the employer is entitled to in a third-party claim.

The Court affirmed, again, that the findings of the trial court will be viewed in the light most favorable to the successful party and every inference reasonably deduced will be given to the successful party. There must be clear error to reverse a decision on the evidence presented.

The Court also found that a scrivener's error will not give rise to a reasonable controversy when determining whether penalties should be awarded.

Gimple v. Student Transportation of America, 915 N.W.2d 606 (Neb. 2018)

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OKLAHOMA WORKERS' COMPENSATION

FOR ACCIDENTS OCCURRING ON OR AFTER 5/28/2019

I. JURISDICTION – (85A O.S. § 3)

A. Act will apply where:

1. Injuries received and occupational diseases contracted in Oklahoma.
2. Contract of employment made in Oklahoma and employee was acting in the course of such employment under the discretion of the employer.
3. Claimant may not receive workers' compensation benefits in Oklahoma if claimant filed a claim in another jurisdiction unless the WCC determines there is a change of circumstances that create a good cause. Claimant cannot receive duplicate benefits. Oklahoma time limitations still apply per Section 69.

II. ACCIDENTS - (85A O.S. § 2):

A. Compensable Injury:

1. Compensable injury is defined as damage or harm to the physical structure of the body or prosthetic appliance including eyeglasses, contact lenses or hearing aids of which the major cause is either accidental, cumulative trauma or occupational disease arising out of the course and scope of the employment.
2. The accident should be unintended, unanticipated, unforeseen, unplanned and unexpected; occur at a specifically identifiable time and place; occur by chance from unknown cause; is independent of sickness, mental incapacity, body infirmity or other cause.
3. Compensable injury shall be established by objective medical evidence.
4. An employee has to prove by a preponderance of the evidence that he or she suffered a compensable injury.
5. Benefits shall not be payable for condition which results from a non-work-related independent intervening cause following a compensable injury which prolongs disability, aggravation or requires treatment.

B. Consequential injury:

1. Injury or harm to a part of the body that is a direct result of the injury or medical treatment to the body part originally injured in the claim.

C. Cumulative trauma:

1. The combined effect of repetitive physical activities expending over a period of time in the course and scope of claimant's employment. Cumulative trauma shall have resulted directly and independently of all other causes. There is no minimum time of employment or injurious exposure requirement for a compensable injury.

III. NOTICE - (85A O.S. §§ 67-68):

A. Cumulative Trauma and Occupational Disease Notice:

1. Written notice must be given to the employer of occupational disease or cumulative trauma by the employee within six months after first distinct manifestation of disease or cumulative trauma or within six month after death.

B. Single Event Notice:

1. Unless an employee gives oral or written notice to the employer within 30 days of the date the injury occurs, there will be a rebuttable presumption that the injury is not work related.

C. Rebuttable Presumption:

1. Unless an employee gives oral or written notice to the employer within 30 days of the employee's separation from employment, there is a rebuttable presumption that the occupational disease or cumulative trauma did not arise out of or in the course of the employment.

IV. EMPLOYER'S NOTICE TO THE COMMISSION (85A O.S. § 63):

- A. Within ten days of the date of receipt of notice or knowledge of injury or death, the employer must send the Commission a report providing factual information regarding the parties and injury.

1. CC – FORM 2

V. CLAIM FOR COMPENSATION – (85A O.S. § 111(A)):

- A. Any claim for any benefit under this act is commenced with the filing of an Employee's First Notice of Claim for Compensation by the employee with the Workers' Compensation Commission.

1. CC – FORM 3

VI. EMPLOYER'S ACCEPTANCE OR CONTROVERSION OF CLAIM – (85A O.S. § 111(B)):

- A. If an employer controverts any issue related to the Employee's First Notice of Claim for Compensation, the employer must file a Notice of Contested Issues on a form prescribed by the Commission.

1. CC – FORM 2A – Filing of the Form 2A is no longer mandatory

VII. MEDICAL TREATMENT - (85A O.S. § 50):

- A. The employer has the right to choose the treating physician.
- B. If the employer fails or neglects to provide medical treatment within five days after actual knowledge is received of the injury, the employee may select the treating physician at the expense of the employer.

- C. Diagnostic testing shall not be performed shorter than six months from the date of the last test without good cause shown.
- D. Unless recommended by a treating physician or an independent medical examiner, continued medical maintenance should not be awarded by the Commission.
- E. An employee claiming benefits under this Act shall submit him/herself to medical examination, otherwise rights and benefits shall be suspended.
- F. Mileage is reimbursed to the claimant for mileage in excess of 20 miles not to exceed 600 miles.
- G. Payment for medical care as required by this Act is due within 45 days of receipt by the employer or insurance carrier of a completed and accurate invoice unless there is a good faith reason to request additional information. Thereafter, the Commission may assess a penalty of up to 25% of any amount due under the fee schedule that remains unpaid on the finding by Commission that no good faith existed for the delay. A pattern of willfully and knowingly delaying payments can result in a civil penalty of not more than \$5,000.00.
- H. If an employee misses a scheduled appointment with a physician, the employer's insurance company shall pay the physician a reasonable charge determined by the Commission for the missed appointment. In absence of a good faith reason for missing the appointment, the Commission shall have the employee reimburse the employer and insurance carrier.

VIII. VOCATIONAL REHABILITATION – (85A O.S. § 45):

- A. An injured employee who is eligible for permanent partial disability under this section is entitled to receive vocational rehabilitation services. Vocational rehabilitation services and training shall not exceed a period of 52 weeks.
- B. On application of either party or by order of an ALJ the Vocational Rehabilitation Director shall assist the Commission to determine if a claimant is appropriate to receive vocational rehabilitation services. If appropriate, the ALJ can refer the employee for an evaluation. The cost of evaluation shall be paid by the employer. If following the evaluation, the employee refuses services, or training ordered by the ALJ or fails to make a good faith attempt in vocational rehabilitation, the cost of the evaluation and services or training may, in the discretion of the ALJ, be deducted from any remaining PPD award.
- C. Request for vocational services must be filed within 60 days of permanent restrictions.
- D. If retraining requires residence away from employee's residence, reasonable room, board, tuition and books shall be paid.
- E. If the employee is actively and in good faith participating in a retraining program to determine permanent total disability, he may be entitled to 52 weeks of temporary total disability benefits, plus all tuition and vocational services. The employer or employer's insurance carrier may deduct the amount paid in tuition from compensation awarded to the employee.

IX. AVERAGE WEEKLY WAGE – (85A O.S. 59):

- A. Average weekly wage is determined by dividing the gross wages by the number of weeks of employment for maximum of 52 weeks.
- B. If an injured employee works for wages by the job, the average weekly wage is determined by dividing the earnings of the employee by the number of hours required to earn the wage, then multiplying the hourly rate by the number of hours in a full time work week for employment.

X. DISABILITY BENEFITS

- A. Temporary Total Disability (85A O.S. § 45/ §62) If the injured worker is temporarily unable to perform his job or any alternative work, he is entitled to receive compensation equal to 70% of his average weekly wage.
 - 1. Maximum TTD is 156 weeks.
 - 2. TTD is not paid for the first three days of the initial period of TTD.
 - 3. TTD shall not exceed 8 weeks for nonsurgical soft tissue injuries regardless of the number of body parts.
 - a. If a claimant receives an injection or injections, they should be entitled to additional 8 weeks of TTD.
 - b. Injection shall not include facet injections or IV injections.
 - 4. If there is a surgical recommendation the injured employee can be entitled to an additional 16 weeks of TTD. If the surgery is not performed within 30 days of approval by the employer's insurance carrier and the delay is caused by the employee acting in bad faith, the benefits for the extended period shall be terminated and reimbursed all TTD beyond 8 weeks.
 - 5. Soft tissue includes but is not limited to sprains, strains, contusion, tendinitis and muscle tears, cumulative trauma is considered soft tissue unless corrective surgery is necessary.
 - a. Soft tissue does not include injury or disease to the spine, disks, nerves or spinal cord where corrective surgery is performed, many brain or closed head injuries as evidenced by sensory or motor disturbance, communication disturbance, disturbances of cerebral function, neurological disorders or other brain and closed head injuries at least as severe in nature as above, and any joint replacement.
 - 6. If the Administrative Law Judge finds a consequential injury, the claimant may receive an additional period of 52 weeks of TTD; such finding shall be by clear and convincing evidence.
 - 7. If the employee is released by the treating physician for all body parts, misses three consecutive medical treatment appointments without valid excuse, fails to comply with medical orders of the treating physician or abandons care, the employer may terminate TTD by giving notice to the employee or their counsel.

8. If employee objects to determination of TTD, the Commission shall set a hearing within 20 days to determine if TTD should be reinstated.
 9. If otherwise qualified according to the provisions of this act, PTD benefits may be awarded to an employee who has exhausted the maximum TTD even though the employee has not reached MMI.
 10. Benefits under this subsection shall be permanently terminated by order of the Commission if the employee is noncompliant or abandons treatment for sixty (60) days, or if benefits under this subsection have been suspended under this paragraph at least two times.
 11. An employee who is incarcerated shall not be eligible to receive temporary total disability benefits under this title. Any medical benefits available to an incarcerated employee shall be limited by other provisions of this title in the same manner as for all injured employees.
- B. Temporary partial disability (85A O.S. § 45):
1. If claimant is only able to work part-time, he can receive the greater of 70% of the difference between the pre-injury average weekly wage and the weekly wage for performing alternative work but only if his or her weekly wage in performing the alternative work is less than the TTD rate.
 2. If the employee refuses alternative work, they are not entitled to temporary total or temporary partial disability benefits.
 3. TPD benefits are limited to 52 weeks.
- C. Permanent Partial Disability (85A O.S. § 45-46):
1. Permanent Partial Disability may not exceed 100% to the body part or body as a whole. (The language indicating that surgical body parts are not included is no longer in the Workers' Compensation Act)
 2. A physician's opinion of the nature and extent of permanent partial disability benefits to parts of the body other than scheduled members, must be based solely on criteria established under the 6th edition of the AMA Guides. All parties may submit a report from an evaluating physician.
 3. Permanent disability should not be allowed to a body part for which no medical treatment has been received.
 4. Permanent partial disability shall be 70% of the average weekly wage, not to exceed \$350.00 per week. PPD shall increase to Three Hundred Sixty Dollars (\$360.00) per week on July 1, 2021.
 5. Maximum permanent disability is 360 weeks to the body as a whole.
 6. In the event there exists a previous PPD, including non-work related injury or condition which produces PPD and the same is aggravated or accelerated by an accidental personal injury or occupational disease, compensation for PPD shall be only for such amount as was caused by such accidental personal injury or occupational disease and no additional compensation shall be allowed for the pre-existing PPD or impairment.
 7. An employee cannot receive payment on two permanent partial disability orders at the same time.

8. Permanent partial disability for amputation or permanent total loss of a scheduled member shall be paid regardless of whether or not claimant returns to work in his/her pre-injury or equivalent job.

D. Permanent Total Disability (85A O.S. § 45):

1. 70% of the average weekly wage not to exceed the maximum TTD rate for the DOA.
2. Benefits are payable until claimant reaches the age maximum of social security retirement benefits or for period of 15 years whichever is longer.
3. If claimant dies of causes unrelated to the injury or illness, benefits cease on the date of death.
4. Any person entitled to revive the claim shall receive a one time lump sum payment equal to 26 weeks of permanent total disability benefits.
5. In the event the Commission awards both permanent partial disability and permanent total disability, permanent total disability does not start until permanent partial disability benefits have been paid in full.
6. Permanent total disability benefits may be awarded to an employee who has exhausted the maximum period of temporary total disability even though the employee has not reached MMI.
7. The Commission shall annually review the status of an employee receiving permanent total disability benefits against the last employer and shall require the employee to file an affidavit noting that he/she has not returned to gainful employment and is not able to return to gainful employment. Failure to file the affidavit shall result in suspension of benefits which can be reinstated.
8. Benefits for a single event injury are determined by the law in effect at the time of the injury. Benefits for cumulative trauma or occupational disease or illness are determined by the law in effect at the time the employee knew or reasonably should have known of the injury. Benefits for death are determined at the time of death.

E. Disfigurement (85A O.S. § 45):

1. Maximum disfigurement is \$50,000.00.
2. No award for disfigurement shall be entered until 12 months from the injury unless the treating physician deems the wound or incision to be fully healed.

F. Revivor of PPD(85A O.S. § 71 (E)): No compensation for disability of an injured employee shall be payable for any period beyond his or her death; provided, however if an injured employee is awarded compensation for permanent partial disability by final order and then dies, a revivor action may be brought by the injured employee's spouse, child or children under disability as defined in Section 67 but limited to the number of weeks of disability awarded to the injured employee minus the number of weeks of benefits paid for the PPD to the injured worker at the time of the death of the injured employee. An award of compensation for PPD may be made after the death of the injured employee. Such revivor action may be brought only by the injured employee's spouse, minor child or children under Section 67.

XI. DEATH BENEFITS - (85A O.S. § 47):

- A. If death does not arise within one year from the date of accident or within the first three years of the period for compensation payments fixed by the compensation judgment, a rebuttable presumption shall arise that the death did not result from the injury.
- B. A Common law spouse shall not be entitled to benefits unless he/she obtains an order from the Commission ruling that a common-law marriage existed. The Commission's ruling shall be exclusive regardless of any district court decision.
- C. A surviving spouse is entitled to a lump sum payment of \$100,000.00, weekly checks at 70% of the average weekly wage, and a 2-year indemnity benefit upon remarriage.
- D. Children get \$25,000.00 lump sum and 15% of the average weekly wage up to two children. If more than two children they divide \$50,000.00 equally, and split 30% of the average weekly wage equally. If there are children but no surviving spouse, each child \$25,000.00 and 50% of the average weekly wage to each child. If more than two children, this is split equally, not to exceed \$150,000.00 maximum lump sum benefit.
- E. Funeral expenses shall not exceed \$10,000.00.

XII. SUBROGATION

- A. Primary Contractor Liability (85A O.S. § 36):
 - 1. If a subcontractor fails to secure compensation required by this act, the primary contractor shall be liable for compensation to the employees of the subcontractor unless there is an intermediate subcontractor who has workers' compensation coverage. In this event the primary contractor would have a cause of action against the subcontractor to recover compensation paid.
- B. Third Party Liability (85A O.S. § 43):
 - 1. The making of a claim for compensation against an employer or carrier for injury or death by an employee, shall not affect the right of the employee to have a cause of action against a third party.
 - 2. The employer or employer's carrier shall be entitled to reasonable notice and opportunity to join the third party action.
 - 3. If the employer or carrier join the third party action for injury or death, they shall be entitled to a first lien of 2/3 of the net proceeds recovered in the action that remain after payment of reasonable cost of collection.
 - 4. An employer or carrier, liable for compensation under this act shall have the right to maintain an Action in Tort against any third party responsible for injury or death; however, the employer or carrier shall notify the claimant in writing that the claimant has right to hire a private attorney and pursue benefits.

XIII. PROCEDURE

A. Workers' Compensation Commission Proceedings (85A O.S. § 72):

1. In making investigation or inquiry or conducting a hearing, the Administrative Law Judge and Commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure except provided by this act.
2. Hearings to be Public – Records.
 - a. Hearings before the Commission shall be open to the public and shall be stenographically reported. The Commission is authorized to contract for the reporting of the hearings.
 - b. The Commission shall, by rule, provide for the preparation of a record of all hearings and other proceedings before it.
 - c. The Commission shall not be required to stenographically report or prepare a record of joint petition hearings. (Editor's note: The joint petition record has always been used to protect the employer as to the terms of the joint petition. It would be my recommendation to continue making a record for joint petitions so all parties are clear about the terms of the settlement and the rights the claimant is waiving.)
 - d. All oral and documentary evidence shall be presented to the ALJ during the initial hearing on a controverted claim. Medical reports shall be furnished to opposing party at least 7 days prior to the hearing. Witness shall be exchanged 7 days prior to hearing.
 - e. Expert testimony should not be allowed unless it satisfies the requirements of Federal Rules of Evidence 702.

B. Workers' Compensation Commission Powers (85A O.S. § 73):

1. The Commission shall have the power to preserve and enforce order during, or proceeding before it, issue subpoenas, administer oaths and compel attendance and testimony as well as production of documents. Any person or party failing to take the oath, attend, produce documents or comply with final judgment of Administrative Law Judge or Commission or willfully refuses to pay uncontroverted medical or related expenses within 45 days can be held in contempt and fined up to \$10,000.00.

C. Appeals (85A O.S. § 78):

1. Any party feeling aggrieved by a judgment decision or award made by Administrative Law Judge may within 10 days of issuance appeal to the Workers' Compensation Commission. The Commission may reverse, modify or affirm the decision that was against the clear weight of evidence or contrary to law.
2. The judgment decision or award of the Commission shall be final and conclusive on all questions within its jurisdiction between the parties unless an action is commenced with the Supreme Court within 20 days of the award or decision.

- D. Certification to District Court (85A O.S. § 79):
1. If an employee fails to comply with final compensation judgment or award, any beneficiary may file a certified copy of the judgment or award in the office of the district court of any county in this state where any property of the employer may be found.
- E. Workers' Compensation Commission – Limited Review of Compensation Judgment (85A O.S. § 80):
1. Except in the case of joint petition settlement, the Commission may review a compensation judgment, award or decision any time within six months of termination of the compensation fixed in the original compensation judgment or award on the Commission's own motion or application of either party, on the ground of a change of physical condition or on proof of erroneous wage rate. On review, the Commission may make judgment or award terminating, continuing, decreasing or increasing the compensation previously awarded subject to the maximum limits provided for this in Act.

XIV. DEFENSES

- A. "Course and scope of employment" (85A O.S. §2(13)): Injury must derive from an activity of any kind or character for which the employee was hired and that relates to and derives from the work, business, trade or profession of an employer, and is performed by an employee in the furtherance of the affairs or business of an employer. The term includes activities conducted on the premises of an employer or at other locations designated by an employer and travel by an employee in furtherance of the affairs of an employer that is specifically directed by the employer. This term does not include:
1. An employee's transportation to and from his or her place of employment,
 2. Travel by an employee in furtherance of the affairs of an employer if the travel is also in furtherance of personal or private affairs of the employee,
 3. Any injury occurring in a parking lot or other common area adjacent to an employer's place of business before the employee clocks in or otherwise begins work for the employer or after the employee clocks out or otherwise stops work for the employer unless the employer owns or maintains exclusive control over the area or
 4. Any injury occurring while an employee is on a work break, unless the injury occurs while the employee is on a work break inside the employer's facility or in an area owned by or exclusively controlled by the employer and the work break is authorized by the employer's supervisor.
- B. Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of non-employment-related hostility or animus of one, both, or all of the combatants and which assault or combat amounts to a deviation from customary duties; provided, however, injuries caused by horseplay shall not be considered to be compensable injuries, except for innocent victims (85A O.S. §2(9)(b)(1)),

- C. Injury incurred while engaging in or performing or as the result of engaging in or performing any recreational or social activities for the employee's personal pleasure (85A O.S. §2(9)(b)(2)),
- D. Injury which was inflicted on the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated(85A O.S. §2(9)(b)(3)),
- E. Intoxication - Injury where the accident was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders (85A O.S. §2(9)(b)(4)). If a biological specimen is collected within twenty-four (24) hours of the employee being injured or reporting an injury, or if at any time after the injury a biological specimen is collected by the Oklahoma Office of the Chief Medical Examiner if the injured employee does not survive for at least twenty-four (24) hours after the injury and the employee tests positive for intoxication, an illegal controlled substance, or a legal controlled substance used in contravention to a treating physician's orders, or refuses to undergo the drug and alcohol testing, there shall be a rebuttable presumption that the injury was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. This presumption may only be overcome if the employee proves by clear and convincing evidence that his or her state of intoxication had no causal relationship to the injury
- F. Major Cause - Any strain, degeneration, damage or harm to, or disease or condition of, the eye or musculoskeletal structure or other body part resulting from the natural results of aging, osteoarthritis, arthritis, or degenerative process including, but not limited to, degenerative joint disease, degenerative disc disease, degenerative spondylosis/spondylolisthesis and spinal stenosis (85A O.S. §2(9)(b)(5)),
 - "Major cause" means more than fifty percent (50%) of the resulting injury, disease or illness. A finding of major cause shall be established by a preponderance of the evidence. A finding that the workplace was not a major cause of the injury, disease or illness shall not adversely affect the exclusive remedy provisions of this act and shall not create a separate cause of action outside this act
- G. Preexisting condition - except when the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment (85A O.S. §2(9)(b)(6)).
- H. Mental Injury or Illness (85A O.S. § 13):
 - 1. A mental injury or illness is not a compensable injury unless caused by a physical injury to the employee, and shall not be considered an injury arising out of and in the course and scope of employment or compensable unless demonstrated by a preponderance of the evidence
 - a. Physical injury limitation shall not apply to any victim of a crime of violence.
 - 2. No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the

diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

3. Where a claim is for mental injury or illness, the employee shall be limited to twenty-six (26) weeks of disability benefits unless it is shown by clear and convincing evidence that benefits should continue for a set period of time, not to exceed a total of fifty-two (52) weeks.
 4. In cases where death results directly from the mental injury or illness within a period of one (1) year, compensation shall be paid the dependents as provided in other death cases under this act.
 - a. Death directly or indirectly related to the mental injury or illness occurring one (1) year or more from the incident resulting in the mental injury or illness shall not be a compensable injury.
- I. Heart claims (85A O.S. § 14):
1. A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, the course and scope of employment was the major cause.
 2. An injury or disease included in subsection A of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment, or that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.
- J. Notice - (85A O.S. § 67-68)
1. Single event Notice – Unless an employee gives oral or written notice to the employer within 30 days of the date of injury occurs, there will be a rebuttable presumption that the injury is not work related.
 2. Cumulative/Occupational Notice – written notice must be given to the employer of occupational disease or cumulative trauma by the employee within 6 months after the first distinct manifestation of the disease or cumulative trauma. Unless an employee gives oral or written notice to the employer within thirty (30) days of the employee's separation from employment, there shall be a rebuttable presumption that an occupational disease or cumulative trauma injury did not arise out of and in the course of employment. Such presumption must be overcome by a preponderance of the evidence.
- K. Statute of Limitations – (85A O.S. § 69):
1. Other than occupational disease, a claim for benefits under this Act shall be barred unless it is filed with the Commission within one year from the date of

injury or within 6 months from the date of the last issuance of benefits. A claim for occupational disease or occupational infection shall be barred unless it is filed within two years from the date of last injurious exposure.

2. A claim for compensation for disability on account of silicosis or asbestosis shall be filed with the Commission one year after the time of disablement and the disablement shall occur within three years from the last date of injurious exposure.
3. A claim for compensation for death benefits shall be barred unless it is filed within two years from the date of death.
4. If a claim for benefits has been timely filed under section and the employee does not: A) make a good-faith request for a hearing to resolve a dispute regarding the right to receive benefits, including medical treatment, under this title within six (6) months of the date the claim is filed, or B) receive or seek benefits, including medical treatment, under this title for a period of six (6) months, then on motion by the employer, the claim shall be dismissed with prejudice.
5. Replacement of medical supplies or prosthetics shall not toll the statute of limitations.
6. Failure to file a claim within the period prescribed in subsection A of this section shall not be a bar to the right to benefits hereunder unless objection to the failure is made at the first hearing on the claim in which all parties in interest have been given a reasonable notice and opportunity to be heard by the Commission.
7. Any claimant may, upon the payment of the Workers' Compensation Commission's filing fee, dismiss any claim brought by the claimant at any time before final submission of the case to the Commission for decision. Such dismissal shall be without prejudice unless the words "with prejudice" are included in the order. If any claim that is filed within the statutory time permitted by Section 18 of this act is dismissed without prejudice, a new claim may be filed within one (1) year after the entry of the order dismissing the first claim even if the statutory time for filing has expired.

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RECENTLY ASKED QUESTIONS IN OKLAHOMA

FROM ISSUES ADDRESSED IN RECENT OKLAHOMA CASES

Q. *If an injured employee receives full wages in lieu of temporary total disability benefits is the employer entitled to a credit for wages paid over the employee's TTD rate?*

A. Yes. In *Braitsch v. City of Tulsa*, 2018 OK 100, the Oklahoma Supreme court ruled that 85A O.S. § 89 is not unconstitutional and did not violate Claimant's right to due process nor is a statute that is a special law.

In *Braitsch*, Claimant injured her right arm while employed by the City of Tulsa. Through her collective bargaining agreement, Braitsch was paid her full salary in lieu of temporary total disability (TTD) payments. She was later awarded permanent partial disability (PPD) benefits which were reduced by the amount her full salary payments were in excess of TTD benefits pursuant to 85A O.S. § 89. Claimant argued 85A O.S. § 89 denied her due process of the law and is an unconstitutional special law. The Administrative Law Judge denied the constitutional challenges and the Workers' Compensation Commission en banc affirmed the ALJ's decision.

On appeal to the Supreme Court the ALJ's decision was affirmed. The Court reasoned that the deduction from PPD of excess TTD benefits ensures fairness and predictability in the award of PPD benefits. By receiving her full wages during her temporary total disability period, Claimant, received more than what other employees would receive who are only awarded TTD benefits. The deduction brings parity to workers' compensation awards by providing, in the end, relatively the same amount of benefits to all injured workers. Further, it reasoned that no subclass has been carved out for special treatment. Section 89 allows all similarly situated employers to deduct the amounts paid in excess of the temporary disability maximum from any permanent partial disability award. Employees who received amounts in excess of the TTD maximum will also be treated alike and receive a reduction in their permanent partial disability awards. The manifest intent of Oklahoma's Constitution's framers was for all persons under the same conditions and in the same circumstances to be treated alike.

Q. *If an employee is injured while crossing a public road to get to the employer's designated parking lot after clocking out for the day, is the injury work related?*

A. No. In *Harwood v. Ardagh Group*, Supreme Court No. 116,535, the Oklahoma Court of Civil Appeals ruled that an injury occurring in a common area adjacent to an employer's place of business after the employee clocks out or otherwise stops work for the employer is excepted from the definition of "the course and scope of employment" pursuant to 85A O.S. § 2(13)(c).

In *Harwood*, the employer's place of business was located on the west side of Oklahoma Highway 66 and the parking lots the employees used to park their vehicles were on the east side of Oklahoma Highway 66. The parking lots on the east side were either owned or leased by the employer. There was a crosswalk on the highway with pedestrian activated overhead lights. At the time of Claimant's injuries the lights were not functioning properly. The employer did not own, operate or control the crosswalk across the highway. After clocking out for the day, at the end of his shift, Claimant left the employer's place of business and attempted to cross the highway. In doing so he was hit by a motor vehicle and severely injured.

The employer denied Claimant's injuries occurred within the course and scope of his employment. The ALJ concurred, ruling that Claimant sustained injuries in a common area adjacent to the employer's place of business after he had clocked out and; therefore, his injuries did not arise out of the course and scope of his employment within the meaning of the Administrative Worker's Compensation Act. Any injury sustained by Claimant when struck by the motor vehicle while on a public roadway which the employer did not own, operate or control was excluded from the definition of course and scope of employment found in 85A O.S. § 2(13) and from the definition of compensable injury set forth in 85A O.S. § 2(9).

On appeal both the Commission and the Court of Civil Appeals affirmed the ALJ's decision. The Court of Civil Appeals found that based on the plain meaning of the statute the legislative intent was to exclude injuries occurring in a common area adjacent to an employer's place of business after the employee clocks out or otherwise stops working for the employer. It reasoned that the language was plain and unambiguous; adjacent means lying near or close to but not necessarily touching, not distant, nearby, or having a common endpoint or border and "common" as defined by Black's Law Dictionary means a legal right to use another person's property, such as an easement which is a tract of land set aside for the general public's use. Using the definition and meaning of these two words the Court ruled that the crosswalk on the highway was not the employer's premises but was instead a common area adjacent to the employer's place of business. Thus the injuries sustained by Claimant were not compensable.

Q. *If an employee's knee simply "gives out" while walking during their shift, with no known reason for the knee "giving out" and the employee does not have a pre-existing condition, is the injury compensable?*

A. Yes. In *Mullendore v. Mercy Hospital Ardmore*, 2019 OK 11, the Oklahoma Supreme court ruled that even though the claimant was not certain how she hurt her knee, the fact that she was symptom free at the time of the event with no known pre-existing condition makes her injury while at work compensable under Title 85A.

In *Mullendore*, a 21-year-old nursing assistant fell while carrying bags of ice. She did not know how she fell; however, her right knee swelled and she sought medical attention. The employer denied the claim contending the injury was not work related but was an idiopathic injury. At trial the ALJ denied the claim as an idiopathic injury. The claimant appealed, citing the fact that the word "idiopathic" does not appear in the Administrative Workers' Compensation Act. The Workers' Compensation Commission affirmed the denial. So did the Court of Civil Appeals. The Oklahoma Supreme Court accepted certiorari and reversed all three decisions.

The Court indicated that a workers' compensation claim is compensable if (1) there is damage or harm to a part of the body, (2) the damage is the result of an accident, cumulative trauma, or occupational disease, and (3) the damage arises out of and is in the course of employment. Under Title 85A "accidental injury", as defined in Section 2, needs to be liberally construed and not construed narrowly in a restricting manner. If an accidental injury is an unplanned and unforeseen event that occurs at a specific time, and is from unknown causes it is compensable absent any evidence of an independent of sickness, mental incapacity, bodily infirmity or any other cause.

Q. Is the use of the most current edition of the AMA Guides to rate for impairment to non-scheduled members constitutional?

A. Yes. In *Hill v. American Medical Response*, 2018 OK 57, the Oklahoma Supreme Court ruled that the mandatory use of the AMA Guides, Sixth Edition, for assessing impairment for non-scheduled members does not violate the Oklahoma Constitution.

In *Hill*, claimant tore his rotator cuff while trying to lift a very heavy person. His injury required surgery. After post-operative physical therapy claimant was released at MMI and given permanent work restrictions. Claimant's employer was unable to accommodate his permanent restriction so he was forced to find subsequent employment earning 25% less per annum. The case eventually went to trial on permanency issues. At trial claimant submitted the report of Dr. Stephen Wilson, who opined that claimant sustained an 8% whole person impairment pursuant to the AMA Guides, Sixth Edition, and a 31.8% impairment pursuant to the AMA Guides, Fifth Edition. Dr. Wilson did not express an opinion as to which rating more accurately described Hill's PPD. Respondent's evaluating physician, Dr. William Gillock, asserted in his own report that claimant sustained a 4.2% whole person impairment pursuant to the AMA guides, Sixth Edition. ALJ Inhofe awarded claimant a 7% impairment to the whole person.

Claimant appealed to the Commission and the Commission upheld ALJ Inhofe's decision. Claimant then appealed to the Oklahoma Supreme Court arguing as his main argument that the use of the AMA Guides, 6th Edition to rate for impairment to non-scheduled members was unconstitutional and in violation of the grand bargain.

The Supreme Court found that the mandatory use of the most current edition of the AMA Guides to rate of impairment for non-scheduled members is 1) not an unconstitutional restraint upon the trier of fact nor an impermissible legislative predetermination of an adjudicatory scientific fact; 2) does not constitute an unlawful delegation of the state's legislative power; 3) the provisions of the AWCA requiring use of the AMA Guides do not constitute a denial of due process; and 4) mandatory use of the AMA Guides as part of the process for determining PPD does not violate Okla. Const. art. 2, § 6. Additionally, it found that claimant's claims concerning the ongoing destruction of the grand bargain and the increasing insufficiency of workers' compensation awards are arguments about policy best brought before the Oklahoma Legislature and not the Oklahoma Supreme Court.

Hill v. American Medical Response, 2018 OK 57

Q. Does the statute of limitation for an alleged cumulative trauma injury start to run on the date that the claimant became aware that the injury was caused by their employment?

- A. No. In *Rolled Alloys, Inc., v. Wilson*, 2018 OK CIV APP 43, the Oklahoma Court of Civil Appeals ruled that the statute of limitation begins to run at claimant's date of last exposure and not date of awareness as it relates to an alleged cumulative trauma injury.

In *Wilson*, claimant filed an Employee's First Notice and Claim for Compensation on November 24, 2015, alleging cumulative trauma injury to his bilateral hands from repetitive twisting and gripping of controls on plasma machines. Claimant initially alleged a date of injury of "1+ year ago". Claimant then proceeded to amend his Form 3 on two occasions, first changing the injury date to December 2014 and second changing the injury date to "Awareness April 2014". Respondent alleged a statute of limitations defense pursuant to 85A O.S. §§ 67 and 69(A)(1), in addition to a lack of notice defense under § 68.

At trial claimant testified that his symptoms began shortly before he saw a doctor in May of 2014. He then saw Dr. Chalkin who recommended claimant wear night splints. After claimant's symptoms worsened he was sent by Respondent to Concentra in November of 2015 at which time claimant reported his injury to Respondent's president. Claimant worked until April of 2016 at which time he underwent shoulder surgery (related to another workers' compensation claim). Claimant returned to work following the surgery on a light duty basis and worked his last day for Respondent on August 25, 2016. On that same day claimant underwent right hand surgery resulting from care claimant had sought on his own.

The ALJ found that claimant's claim was not time-barred and claimant had sustained a compensable injury to his right hand, left hand and left arm with a date of awareness of April 2014 and a date of last exposure of April 2016. The Respondent filed for a review by the Commission. After oral arguments the Commission affirmed the ALJ's decision.

The Commission reasoned and the Court of Civil Appeals agreed that since 1985, in cumulative trauma cases, the law in effect on the date of awareness determined the substantive rights, while the date of last exposure/employment triggered the limitations period. The Commission indicated that the term “accident” as it relates to a cumulative trauma injury under the AWCA “means that an accident occurs each time an employee is exposed to injurious repetitive activity”. This construction harmonizes the definition of accident, within the AWCA, which occurs “at a specifically identifiable time and place,” with the ongoing nature of cumulative trauma which occurs “over a period of time”. Thus each day an employee performs repetitive physical activities that cause physical harm it is considered a “date of injury” for the purposes of 85A O.S. § 69(A)(1).

Rolled Alloys, Inc., v. Wilson, 2018 OK CIV APP 43

Q. Does the statute of limitation begin to run from when claimant is last paid a temporary total disability payment?

- A. No. In *Green Country Physical Therapy, LP., v. Sylvester*, Supreme Court Case No. 115,930, the Oklahoma Court of Civil Appeals ruled that under 85A O.S. § 69(B)(1) the statute of limitation begins to run when the last medical services are furnished to a claimant or when the last compensation is paid to a claimant, whichever is the latter.

In *Sylvester*, claimant was injured on March 28, 2014. The injury required surgery, which was paid for by Respondent. Following surgery claimant received temporary total disability benefits until September 27, 2014. Claimant required additional medical care for his injury and medical care was provided and paid for by Respondent in May of 2016. When claimant’s treating physician indicated additional surgery would be required a dispute arose regarding the same. Claimant filed an Employee’s First Notice of Injury and Claim for Compensation on July 15, 2016. Respondent asserted a statute of limitations defense under § 69(B)(1) which read in pertinent part

In cases in which any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one (1) year from the date of the last payment of disability compensation or two (2) years from the date of the injury, whichever is greater.

At trial the ALJ agreed with Respondent and dismissed the case. The ALJ concluded that claimant had to file a claim within two years of the injury date or one year from the last date of payment of disability compensation. Thus, claimant would have two years from March 28, 2014, or one year from September 27, 2014, to file his claim. The former provided the longer time, so using the injury date resulted in a last date to file of March 28, 2016. Claimant filed his Form 3 in July of 2016; therefore, the ALJ ruled his claim was barred by the statute of limitations.

Claimant appealed to the Commission who reversed the ALJ's ruling. Respondent then appealed to the Oklahoma Supreme Court and the Court of Civil Appeals affirmed the Commissions reversal.

The Court reasoned the triggering date in the instance case is the "last payment of disability compensation". Under 85A O.S. § 2(10) the term "compensation" includes "medical services" and this definition is the same whenever used in the AWCA unless there is a plainly contrary legislative intention. Therefore; payment of a claimant's medical services and the last date thereof establishes the date on which the limitations period begins to run under § 69(B)(1).

Green Country Physical Therapy, LP., v. Sylvester, Supreme Court Case No. 115,930

Q. Can the sole owner and shareholder of a corporation be sued on a negligence theory as an individual third party landowner?

- A. Yes. In *Lind v. Barnes Tag Agency*, 2018 OK 35, the Oklahoma Supreme Court has ruled that a third party landowner that is also the sole owner and shareholder of a corporation is not immune from liability under the exclusivity provision of the Oklahoma Workers' Compensation Code.

Claimant was hired by Barnes Tag Agency to perform maintenance work on property individually owned by Mr. Barnes the sole stockholder of Barnes Tag Agency. There was an explosion on the property while claimant was present causing severe injuries which ultimately led to his death. Claimant's children brought a workers' compensation claim against Barnes Tag Agency and were awarded death benefits. In a separate order issued by the Workers' Compensation Court of Existing Claims claimant was found not to be an employee of Mr. Barnes and the workers' compensation claim against Mr. Barnes individually was dismissed with prejudice.

Claimant's children then filed a wrongful death action in district court against Barnes Tag Agency and Mr. Barnes alleging a breach of duty of care to assure that the premises were in a suitably safe condition. The case was dismissed on summary judgement with the district court finding that Barnes Tag Agency and Mr. Barnes had immunity from suit under the workers' compensations exclusivity provision and that claimant's children had already received benefits under the workers' compensation code. The issue was appealed and the Civil Court of Appeals affirmed the trial court's decision. Claimant's children then filed a Writ of Certiorari with the Oklahoma Supreme Court. The Court granted certiorari.

The Court found that Mr. Barnes was not immune for a separate action in tort simply by being a stockholder and owner of Barnes Tag Agency. To reach its decision the Court looked to other jurisdictions as this was a question of first impression in Oklahoma. The Court looked mainly to New Jersey, Maine and Wisconsin in formulating its ruling. Ultimately, the Court ruled that no express grant of immunity under the circumstances existed pursuant the Oklahoma Workers' Compensation Code, and were persuaded by

the rationale of those jurisdictions that permit suits against shareholders of a corporate entity for their independent tortious conduct as a third-party landowner. A corporation and its sole owner and shareholder are separate entities and the immunity of the workers' compensation laws that shields the corporation from tort liability to employees does not extend to the owner of the corporation as a third-party landowner.

Lind v. Barnes Tag Agency, 2018 OK 35

Q. Can an injury be found compensable if a claimant is injured while driving to a jobsite before clocking in for the day?

- A. Yes. In *Pina v. American Piping Inspection*, 2018 OK 40, the Oklahoma Supreme Court ruled that an injury sustained while driving to a worksite after stopping at a preset gas station to fill up for gas using the Respondent's company credit card is a compensable injury within the course and scope of employment and does not fall within one of the exceptions under 85A O.S. § 2(13).

In *Pina*, Respondent had agreed to purchase ice and water each day for the entire crew, but only if they stopped at the designated gas station at the time specified by Respondent. Respondent would not pay for these items unless the employees stopped at the location as directed. There were no stores within walking distance of the drilling site where employees could buy ice and water or gasoline. Thus, claimant's option on the morning of his injury was to personally pay for the gas for the work day or follow the Respondent's instructions and arrive at the gas station at the appointed time. Respondent had been paying for Respondent's gasoline for three months prior to his injury. After getting supplies, the employees would drive another 30 miles from the gas station to the drilling site. Once they arrived at the drilling site, all employees were required to attend a safety meeting each morning and sign a log noting their attendance. This log was used as a means for determining who worked each day and identify who was to get paid for the day's work. Both of the Respondent's representatives testified that "work" did not begin until the employees signed the log.

On the morning of September 22, 2014, Respondent met his supervisor at the designated gas station to get ice, water and gasoline. The supervisor agreed that "Claimant was reporting to work that morning when he made it to the gas station." Claimant explained that he was supposed to stop at the gas station so they can fill up your tank of gas because you're moving all day long. The supervisor paid for the gas and supplies with the company credit card just as he had been doing for three months. Claimant then asked his supervisor for permission to leave the gas station and drive to the drilling site. On his way, Petitioner had a collision and sustained serious injuries. Emergency medical care was given and claimant was transported via helicopter for medical treatment. Claimant never arrived at the drilling site that morning. Although claimant did not sign the attendance sheet at the rig site that morning, Respondent paid him for a full day of work.

Claimant filed a claim for benefits and Respondent denied claimant's claim alleging claimant was not performing employment services at the time of injury as required by 85A

O.S. § 2 (9)(b)(3); and that the injury did not occur in the course and scope of employment pursuant to 85A O.S. (13). The ALJ agreed and wrote an Order Denying Compensability. Claimant appealed the ALJ's ruling and both the Commission and Court of Civil Appeals affirmed the ALJ's order.

Claimant filed a Petition for Certiorari. On certiorari the Oklahoma Supreme Court vacated the Court of Civil Appeals opinion, reversed the Commission's Order and the Order of the ALJ. The Court found that claimant's travel that morning was for the sole benefit of Respondent; therefore, the accident is a covered event under the AWCA as being in the course and scope of his employment.

Pina v. American Piping Inspection, 2018 OK 40

Q. Does an Administrative Law Judge's order need to contain the specific language used in the when a finding of compensability is issued?

- A. NO. In *Flex-N-Gate Oklahoma, LLC. v. Powell*, the Oklahoma Court of Civil Appeals ("Court") ruled an Administrative Law Judge's order finding compensability of a cumulative trauma injury is not flawed if it does not contain the specific language that a claimant's injury was caused "directly and independently of all other causes" pursuant to 85A O.S. § 2(14). The Court ruled that nothing in the Administrative Workers' Compensation Act requires such language to be included in the ruling of either an ALJ or the Commission in a case involving a cumulative trauma injury.

Flex-N-Gate Oklahoma, LLC. v. Powell, Court of Civil Appeals, Division I, Supreme Court No. 115,667

Q. If a claimant misses two or more scheduled appointments for treatment are they barred from receiving further benefits?

- A. In *Gibby v. Hobby Lobby*, 2017 OK 78, the Oklahoma Supreme Court ruled Title 85A Section 57 is unconstitutional. Section 57 made a claimant ineligible to receive further benefits if the claimant missed two or more scheduled appointments for treatment unless the absence was caused by an extraordinary circumstance beyond the claimant's control or the claimant gave the employer at least two hours' notice of the absence and had a valid excuse. Inability to get transportation to or from the appointment was not considered an extraordinary circumstance nor a valid excuse for the absence.

The Court reasoned that Section 57 lies far outside the Grand Bargain and operates to forfeit existing vested rights a claimant has to workers' compensation benefits. Workers' compensation benefits become vested at the time of the injury. By the Legislator enacting a statute designed to create a forfeiture of a vested right the delicate balance achieved by the Grand Bargain tips too far in favor of the employers and fails to provide an

adequate substitute remedy to the claimant, thus reinstating the concept of fault into a no-fault system. The Court struck Section 57 in its entirety from Title 85A.

Gibby v. Hobby Lobby, 2017 OK 78

Q. If a claimant was injured prior to February 1, 2014, but was terminated after February 1, 2014, does the Oklahoma Workers' Compensation Commission have jurisdiction over a retaliatory and discrimination suit arising out of the workers' compensation claim?

A. No. In *Young v. Station 27, Inc.*, 2017 OK 68, the Oklahoma Supreme Court ruled that the Oklahoma Workers' Compensation Commission does not have jurisdiction over a retaliatory discharge claim based on an injury date prior to February 1, 2014. In *Young* claimant was injured prior to February 1, 2014, but was terminated after February 1, 2014. Young filed a retaliatory discharge claim in district court. The district court judge dismissed the case finding that the Administrative Workers' Compensation Act (AWCA), specifically Section 7, gave the Commission jurisdiction over retaliatory and discrimination claims arising out of a workers' compensation claim. The Supreme Court found that the date of injury controls which court has jurisdiction over a claim and not the date of termination. The Court did not rule on the constitutionality of Section 7 of the AWCA as it found that it did not have to determine Section 7's constitutionality in order to decide the issue at hand. It reserved the substantive constitutionality of Section 7 for another day.

Young v. Station 27, Inc., 2017 OK 68

Q. If a claimant sustains a recurrent hernia are they entitled to additional medical treatment and an additional six (6) weeks of TTD?

A. Yes. In *Graham v. D & K Oilfield Services*, 2017 OK 72, the Oklahoma Supreme Court ruled that if a claimant sustains a recurrent hernia they are entitled to medical treatment and an additional six weeks of TTD pursuant to Title 85A Section 61. The Court reasoned that the Legislature through the language of Section 61 intended to allow up to six weeks of TTD benefits for each hernia, regardless of whether they were caused by the same accident. In *Graham* claimant underwent two surgeries and two recovery periods due to a recurrence of the hernia over the span of seven months. The Court indicated that the number of surgeries a claimant undergoes is the key factor, noting a recurrent hernia is distinguishable from bilateral hernias in that bilateral hernias are often repaired simultaneously with one surgery and only require one period of TTD benefits.

Graham v. D & K Oilfield Services, 2017 OK 72

Q. Can the company that owns an oil and gas well be sued under a negligence theory if an employee of another company is injured while working at the well?

- A. Yes. In *Strickland v. Stephens Production Company*, 2018 OK 6, the Oklahoma Supreme Court (“Court”) ruled that the last sentence of § 5(A) of Title 85A is an impermissible and unconstitutional special law under the Oklahoma Constitution. The sentence was ordered to be severed from the remainder of the provision.

In *Strickland* an employee of a trucking company was killed while on the job of an oil-well site. The employee’s surviving daughter brought a wrongful death action against the owner and operator of the well site in district court. The owner of the well sought to dismiss the case pursuant to 85A O.S. § 5(A), which read in pertinent part that any operator or owner of an oil and gas well was deemed to be an intermediate or principal employer for the purposes of extending immunity from civil liability. The district court denied the motion to dismiss finding that 85A O.S. § 5(A) was an unconstitutional special law. The district court then certified the order for immediate interlocutory review and the Court granted certiorari review.

The Court explained that a special law, which provides different treatment for a specific subsection of an entire class, is permissible if it is reasonably and substantially related to a valid legislative objective. The owner of the well argued that “oil and gas production involves complex processes including exploration, drilling, and production, and that such processes are routinely performed by different specialists subcontracted by the owner of the well, making the oil and gas industry unique.” Additionally, it argued that oil and gas well owners needed certainty regarding their exposure to civil liability. The Court rejected the owner’s argument stating “employers in other industries would, in all likelihood, also prefer to have certainty regarding their exposure to liability.” Thus certainty regarding immunity from liability was not a distinctive characteristic of the oil and gas industry that warranted special treatment nor was it a practical and reasonable basis for discrimination.

Strickland v. Stephens Production Company, 2018 OK 6

Q. Can osteoarthritis resulting from the natural results of aging be a compensable injury?

- A. YES. In *Sequel Youth & Family Services, LLC v. Ayisi*, 2018 OK CIV APP 7, the Oklahoma Court of Civil Appeals (“Court”) ruled that a degenerative condition, which is the result of the natural aging process, is not a compensable injury unless it is found that the employment is the major cause of the deterioration or degeneration and such a finding is supported by objective medical evidence.

In *Ayisi*, a claimant sustained a single incident injury to both of her knees when she was tripped by a student causing her to falling landing on both her knees on a concrete tile floor. Claimant had one prior surgery in 2000 to her right knee that completely resolved and she had not sought any additional treatment since that time. Claimant had never

presented to a doctor regarding her left knee. She was diagnosed with contusions of her knees as well as osteoarthritis. Dr. Hargove, the treating physician, found that claimant sustained an exacerbation of a pre-existing condition. Dr. Maitino was appointed by the Commission as the Independent Medical Examiner. He found claimant had sustained an identifiable or significant aggravation of her pre-existing condition but at his deposition agreed that nothing in the diagnosis was caused by a traumatic event nor was there any objective medical evidence of an aggravation of a pre-existing condition. His opinion that claimant had sustained a significant aggravation of a pre-existing condition was based on claimant's complaints of pain.

At trial the Administrative Law Judge ("ALJ") found claimant's injuries to be compensable. The right knee was found to have sustained a significant and identifiable aggravation of a pre-existing condition. The ALJ did not apply the significant and identifiable aggravation to the left knee because her left knee did not fit the definition for a pre-existing condition pursuant to 85A O.S. § 2(9)(b)(6)¹ because she had not had previous medical treatment or a diagnosis. Nevertheless, the ALJ found the left knee compensable and ordered treatment.

Respondent appealed. The Commission En Banc affirmed the ALJ's decision. On appeal to the Court the case was remanded for further proceedings. The Court found that "solely caused" and "major cause" were effectively the same term. It reasoned that when you harmonized sole cause with major cause used elsewhere in the statute it avoids rendering 85A O.S. § 2(9)(b)(5)² vain and useless and avoids serious constitutional pitfalls. A strict reading of § 2(9)(b)(5) might seem plain when viewed in isolation; however, such a plain reading turns out to be untenable in light of the statute as a whole. In the context of cases involving osteoarthritis the Court concluded that the legislative intent is that osteoarthritis resulting from the natural results of aging is not compensable unless the employment is the major cause of the deterioration or degeneration and such a finding is supported by objective medical evidence. The Court indicated that this standard applied to both knees.

Sequel Youth & Family Services, LLC v. Ayisi, 2018 OK CIV APP 7

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¹ b. "Compensable injury" does not include: (6) any preexisting condition except when the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment.

² b. "Compensable injury" does not include: (5) any strain, degeneration, damage or harm to, or disease or condition of, the eye or musculoskeletal structure or other body part resulting from the natural results of aging, osteoarthritis, arthritis, or degenerative process including, but not limited to, degenerative joint disease, degenerative disc disease, degenerative spondylosis/spondylolisthesis and spinal stenosis

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We're Closed: Strategies for Closing Cases Quickly and Efficiently

I. Get the employee to MMI

- a. Conduct all investigation necessary to determine if compensable as quickly as possible.
- b. Begin medical treatment with a reputable medical provider as quickly as possible to move the medical treatment forward.
- c. Authorize physical therapy and medications timely where appropriate so there are no unnecessary delays in medical treatment.
- d. Consider transitional work assignments if the employer is unable to accommodate restrictions. Studies have shown that employees that return to some form of light duty work will return to full duty work and reach MMI more quickly than those who stay at home for the duration of the recovery period.

II. Pro Se Employees

- a. If the employee remains pro se, typically the case can be settled more quickly and for less money than if the employee hires an attorney and files a formal claim for compensation or application for benefits.
 - i. Timely and consistent TTD payments, payment of mileage benefits, direction of medical treatment, and communication with the employee are all frequently cited factors by claimants' attorneys as to issues that bring claimants to their offices to file formal claims.
- b. Once the employee reaches MMI, if appropriate, request a disability rating from the treating physician right away. Some jurisdictions require a rating to obtain approval of a pro se settlement. A disability rating can help negotiations with both pro se employees and represented employees. It may not be necessary on minor strain or contusion cases.
- c. Once you have the disability rating, make a good faith offer to the employee to resolve the case. Discuss the rationale behind your offer (good result from surgery, full strength, full range of motion, etc.).
- d. Once an agreement has been reached, refer to counsel as quickly as possible so a settlement conference can be set.
 - i. In some jurisdictions, we can request a walk-in settlement conference, which typically will get the settlement conference set even faster.

III. Considerations for Represented Employees

- a. Once an employee hires an attorney, the case can still be settled quickly.
 - i. Early communication with claimant's counsel: Advise claimant's counsel of your desire to settle the case without ratings. Forward all medical records as soon as received from the provider, and request a settlement demand.
 - ii. Make an offer: It is not necessary to wait for the claimant's attorney to make a demand. Making a good faith offer early in the case can move the case to settlement more quickly.

- iii. Avoid the IME: A good faith opening offer can keep the claimant's attorney from obtaining their own IME. A claimant's IME can delay settlement if the IME physician takes a long time to complete the report, or worse, if the IME physician recommends additional treatment.
- b. Discuss any potential issues that could lead to a delay in resolving the case early with opposing counsel.
 - i. Examples: low PPD rate, TTD overpayment, prior accidents. These are all issues that if a claimant's attorney is not aware of at the onset of the case, it can delay negotiations. Claimant's attorneys often have to manage the claimant's expectations, which can often be unrealistic. Raising these issues with opposing counsel early can help opposing counsel manage any unrealistic expectations.
- c. Get input from the judge or arbitrator where appropriate.
 - i. We can get the judge or arbitrator to weigh in at a formal setting or informally if the parties agree. If the parties are at an impasse, a recommendation from a judge or arbitrator can help move the matter forward much more quickly than waiting for a formal hearing on the issue.

IV. Settlement Negotiation Strategies to Move Cases Quickly and Efficiently

- a. Keep an eye out for any indication from claimant's counsel that the case could be resolved quickly, even before MMI has been reached. Examples include:
 - i. Hesitation from the employee in proceeding with medical treatment: If the employee is requesting additional time to consider whether or not to proceed with an authorized medical procedure, it may indicate that they would be open to settling the case, even if they are not at MMI. A good faith offer with some consideration for additional medical treatment can often get such cases resolved before the employee has reached MMI.
 - ii. Dissatisfaction with the treating physician: If an employee expresses that he or she does not like the chosen treating physician, a good faith offer with some consideration for additional medical treatment with the suggestion that the employee can use that money to treat wherever he or she would like may be able to resolve the case quickly.
 - iii. Depositions: If the claimant's counsel sets a deposition or indicates he or she is going to set a deposition, it may be a good time to make an offer, so they can have the opportunity to save on the cost of the deposition.
- b. Provide Defense counsel with sufficient authority at the beginning of negotiations.
 - i. Defense counsel should always try and resolve the case for as little as possible. However, not having to go back and forth for additional authority can make the negotiations run more smoothly and much more quickly.
 - ii. Set a target outcome amount with defense counsel and provide that authority. Defense counsel can then speak more openly and candidly with opposing counsel about where the defense is valuing the case to try and resolve the case more quickly.
- c. Set a time limit for opposing counsel to respond to a settlement offer when appropriate.

- d. Follow up frequently with opposing counsel once an offer has been made. If there is a significant delay in getting a response from opposing counsel, advise opposing counsel that we will be pushing for a dismissal for failure to prosecute.
- e. Continue to point out the strength of your case and the weaknesses of your opponent's case during negotiations. Just because you may not believe your defense will prevail at trial does not mean you should discard them during negotiations.

V. Settlement vs. Litigation

- a. Determine early on if the case is one you want to try and settle or push to a final hearing. If the decision is made to litigate the case:
 - i. Explore any potential way to resolve the dispute and settle if possible. Example: If it is a denied case, and there is a third party lawsuit involved for the injury, it may be possible to resolve an otherwise disputed claim by waiving any subrogation interest.
 - ii. Try and learn from opposing counsel what the claimant's concerns are with resolving the case, if applicable.
 - iii. Set the employee's deposition, if necessary, early on in the litigation to begin the process of gathering any prior treatment records or conducting further discovery.
 - iv. Proceed with obtaining any IMEs and deposing those experts to ensure admissibility of any and all reports.
 - v. Proceed with a mediation: some jurisdictions require a mediation before a request for hearing can be made.
 - vi. Make a cost of defense offer to try and resolve short of a final hearing.
 - vii. Educate claimant's counsel on the effect of an award on social security disability benefits if applicable.

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RESIGNATION AND RELEASE BENEFITS AND PITFALLS

For many years, employers have considered offering additional consideration for an injured worker to execute a General Release and Resignation Agreement at the time the offer is extended to resolve the workers' compensation claim. These release and resignation documents are negotiated separately, and separate consideration is paid by the employer for the release. The payments cannot be issued by the workers' compensation insurance carrier or self-insured as a work comp payment as they are not "workers' compensation" benefits. The respective state Division of Workers' Compensation has no jurisdiction over a Release and Resignation Agreement and will not sign off on such a document or weigh in on the reasonableness of such a document. The motivations for employers to propose a release and resignation for an employee who is in the process of resolving his or her workers' compensation claim vary and can include the following:

1. The workers' compensation settlement contemplates some aspect of either a temporary or permanent wage loss;
2. Where the employer has a legitimate concern that there is additional civil exposure under the ADA based upon their potential inability to accommodate the permanent work restrictions from the workers' compensation claim, even with reasonable accommodations. Litigation expenses on these types of cases can be expensive and sometimes it is preferred to deal with the issue pre-suit as opposed post-suit;
3. The claimant has already been separated from employment (voluntarily or involuntarily) and the employer wants a clean well-documented separation with regard to former employees;
4. Standard corporate policy.

Workers' compensation benefits in Kansas, Missouri, Illinois, Iowa, Nebraska, Oklahoma, and Arkansas are state entitlements. In other words, if a claimant sustains a compensable accident arising out of and in the course of his/her employment, the injured worker is guaranteed certain benefits per statute. The worker does not have to resign in order to receive his/her workers' compensation benefits. In light thereof, the employer cannot force the claimant to quit his or her job in order to receive the workers' compensation benefit entitlement.

As noted above, employers have been offering additional consideration in order to entice employees to execute Release and Resignation Agreements for years. Recently, however, some employers have begun **insisting** that a claimant resign in order to receive his/her workers' compensation benefit entitlement. In some states, this is the norm and not looked upon unfavorably by the Division of Workers' Compensation or the claimant's bar. In our midwestern states listed above, however, it is not standard operating practice to demand that an employee resign and execute a general release in order to receive his/her workers' compensation benefits in every case.

The workers' compensation systems are designed to run smoothly with a vast percentage of compensable claims settling without requiring significant litigation. Refusing to pay permanent impairment or permanent disability benefits pursuant to the rating of the authorized treating physician or refusing to engage in reasonable settlement negotiations (absent a legitimate reason for doing so) between the rating of the treating physician and the rating of the claimant's attorney's rating physician is met with open hostility by our judges. This is viewed as an impediment to the appropriate functioning of the respective Workers' Compensation Act and, depending upon the respective state statute, could be viewed as a fraudulent or abusive act or expose the employer and/or carrier to additional penalties.

For example, in **Kansas**, K.S.A. 44-5,120 describes fraudulent or abusive acts or practices as including denying or attempting to deny payments of workers' compensation benefits for any person. The list of acts could be interpreted broadly to include not paying the treating doctor's impairment rating when there is no legitimate dispute for not paying it. K.S.A. 44-5,125 even provides potential criminal penalties depending upon the amount of benefits in question. K.S.A. 44-512b provides an avenue for the Administrative Law Judge to award interest as a penalty if the judge finds that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation due. The statute provides that such interest shall be assessed against the employer or insurance carrier and shall accrue from the date such compensation was due. The interest is considered a penalty and shall not be considered a loss or a loss adjustment expense by the insurance carrier with regard to rates. Some lawyers will demand payment of the lowest rating and trigger the statute when there are no other issues in dispute.

In **Missouri**, R.S.M.O. section 287.128 provides that it is unlawful for any insurance company or self-insurer in the state to knowingly and intentionally refuse to comply with known and legally indisputable compensation obligations and provides criminal penalties for violation thereof. R.S.M.O. section 287.780 specifically provides that no employer or agent shall discharge or discriminate against any employee for exercising any of his/her rights under the Missouri Workers' Compensation Act when the exercising of such rights is the motivating factor in the discharge or discrimination. Any employee who has been discharged or discriminated against in such manner shall have a civil action for damages against his/her employer. The statute provides that for the purposes of this section, "motivating factor" shall mean that the employee's exercise of his/her rights under the Missouri Workers' Compensation Act actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination.

The **Illinois** Workers' Compensation Act provides that it shall be unlawful for any employer, insurance company, or adjustment company to interfere with, restrain, or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by the Workers' Compensation Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of

his/her exercise of the rights or remedies granted to him/her by the Workers' Compensation Act. 820 ILCS 305/25.5(h)

Certainly, nothing mentioned above should be construed to mean that an employer cannot offer additional consideration to entice the claimant to sign the Resignation and Release Agreement. The key in negotiating these releases and resignations is communicating that it is a separate and independent offer from the workers' compensation settlement offer. Furthermore, such releases and resignations are more likely to be accepted, if not expected, when they are offered when the claimant is already no longer working for the employer or when there is a nexus between wage loss and the value of the workers' compensation claim.

In the sections below, we point out those circumstances where there would be a nexus between the workers compensation benefit settlement amount and an element of wage loss:

Kansas:

Certain types of benefits payable under the Kansas Workers' Compensation Act do contemplate the fact that the injured worker has either a partial or complete wage loss as a direct result of the work accident. Those types of benefits are generally referred to as work disability benefits or permanent total disability benefits.

An injured worker in Kansas is entitled to work disability benefits if he/she has sustained a greater than 7.5% impairment to the body as a whole as a result of the work accident. An injured worker is also entitled to work disability benefits if their overall impairment exceeds 10% to the body as a whole in cases where there is preexisting functional impairment, and the injured worker sustains a post-injury wage loss attributable to the work accident of at least 10%. In these cases, the injured worker may have returned to work for the employer against whom the claim is being pursued but at a lower wage rate or may be alleging that there is no work available to him/her with that employer and that he/she will have a wage loss when seeking his/her next job.

In Kansas, there would also be a nexus between wage loss and the workers' compensation benefit entitlement when the injured worker claims that they are permanently and totally disabled from any type of employment. In these circumstances, the claimant and the claimant's employer are more likely to agree to a release and resignation at a low consideration level. Of course, if the injured worker's attorney believes that the employee has valid claims against the employer outside of the workers' compensation system under the ADA, FMLA, or other state/federal action, then the nexus noted above alone will not be enough to encourage the release/resignation for a relatively low consideration.

Missouri:

Missouri workers' compensation benefits are described in terms of overall disability and are not separated between impairment and work disability. Awards for the injured worker's disability take into consideration both the nature of the injury and the impact of that injury on the person's ability to earn comparable wages. The Administrative Law Judges are more likely to nudge up the award of disability if the injury prevents the claimant from doing his/her former job and earning the same type of wages that were earned pre-accident. This simply is not a mathematical formula based upon a specific percentage of wage loss.

In Missouri permanent total disability cases, however, the injured worker is formally alleging that he/she is unable to engage in any substantial and gainful employment. In these situations, absent other civil liability concerns, the injured worker and his/her attorney would tend to be more agreeable to executing a general release and resignation at a lower level of consideration.

Illinois:

In Illinois, if a petitioner sustains a reduction in earnings capacity due to the work injury and is unable to return to their "usual and customary" line of employment, they could be entitled to wage differential benefits. Wage differential benefits are weekly benefits to be paid at two-thirds of the difference between the petitioner's pre-injury and post-injury earnings' capacity. These weekly payments are made to the petitioner for five years or until they are 67 years old, whichever is longer. Along with that, the petitioner could be entitled to formal vocational retraining or rehabilitation to be provided by the employer/insurer.

Additionally, if the work injury prevents the petitioner from returning to their "usual and customary" line of employment but does not reduce their earnings capacity, they could be entitled to a loss of occupation or loss of trade claim, which substantially increases the arbitrator's permanency award. Loss of occupation cases are valued as unscheduled, body as a whole (500 weeks), injuries rather than scheduled injuries. This, in turn, increases the value of the claim.

Permanent total disability means the petitioner is alleging he is permanently incapable of obtaining any type of gainful employment in the labor market. In all of these situations, absent other civil liability concerns, the petitioner/petitioner's counsel, would tend to be more agreeable to executing a general release and resignation at a lower level of consideration, given that the petitioner already cannot return to work at their former employer.

Iowa:

Wage or job loss in Iowa comes into play primarily in a few different scenarios. First, injured workers in Iowa who have suffered a body as a whole injury before July 2017 (which includes shoulder injuries) are entitled to industrial disability benefits regardless of

their employment status with the employer for which they were employed at the time of the injury. Industrial disability is a determination of the injured workers loss of earning capacity and consideration may be given to a number of different factors including functional impairment, the workers' age, education, qualifications, experience and his inability to perform work for which the worker is suited. Not all pre-July 2017 injuries will result in higher industrial disability as a result of actual wage or job loss since the determination is based on the loss of earning *capacity*, not necessarily loss of actual earnings. The reason for the wage or job loss would be one factor in the overall determination of industrial disability.

Whole body injuries occurring after July 1, 2017 are handled differently with no automatic right to industrial disability. Iowa Code Section 85.34 (2)(v) states that "if an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity." But, if the employee returns to his job and is later terminated, a reopening proceeding may be commenced for a determination of a reduction of the employee's earning capacity. These are new provisions in the Iowa Workers' Compensation laws that have not yet been subject to any judicial interpretation.

When shoulders were removed from body as a whole injuries in the 2017 amendments, they received a separate section in the Iowa Workers' Compensation laws that states that if injured worker suffers a shoulder injury after July 1, 2017 and is unable to return to work because of the disability they may be entitled to extensive vocational rehabilitation benefits including evaluation for career opportunities in specific fields, specific education programs at community colleges, and financial support for participation in the education program up to \$15,000 for tuition, fees and supplies.

Finally, permanent total disability benefits are nearly always alleged and potentially in play for a whole body injury if the injured worker is unable to return to work and can connect that to the work injury. In Iowa there is no particular type of case that would be more likely to result in a resignation and release. Generally, these agreements are included in the settlement discussions when it is apparent that the employment relationship has broken down in some capacity or if it is clear the injured worker either already intends to resign. However, if there appears to be a potential valid claim under employment laws, the resignation and release may become a significant issue in the negotiations, requiring substantial participation and consideration, often at mediation, from the employer.

Nebraska:

Wage loss resulting from a non-scheduled injury in Nebraska is a factor in determining the extent of permanent partial disability (PPD) which is measured by Loss of Earning Power (LOEP).

There are four factors taken into consideration when determining LOEP, as follows:

- 1) Loss of ability procure employment generally;
- 2) Loss of ability to earn wages;
- 3) Loss of ability to perform the tasks of the work; and
- 4) Loss of ability to hold a job obtained.

It is possible for the injured worker to have a LOEP even if the worker returns to work for the same employer at the same or higher wage because of the other factors considered when determining LOEP. Thus, not every non-scheduled injury and finding of LOEP involves a wage loss, but often a wage loss is involved and due to permanent work restrictions assigned for the injury. A finding of a 100% LOEP is a finding of permanent total disability (PTD) and thus will always include an element of wage loss. Injured workers in Nebraska are often willing to consider a release/resignation for a nominal amount in cases of PTD and in those cases of PPD where the injuries do not allow for return to work for the employer on date of accident.

Oklahoma:

In Oklahoma, like Missouri, permanent disability is not separated between physical impairment and loss of wage earning capacity. Under Title 85 Section 2 permanent disability is defined as, “permanent disability or loss of use after maximum medical improvement has been reached which prevents the injured employee, who has been released, to return to work by the treating physician, from returning to his or her pre-injury or equivalent job. All evaluations of permanent disability must be supported by objective findings.”

Based on this definition, only physical impairment can be considered. However, also under Section 2 of Title 85A, disability is defined as, “incapacity because of compensable injury to earn, in the same or any other employment, substantially the same amount of wages the employee was receiving at the time of the compensable injury.” Many claimant’s attorneys are arguing that this gives a rise to damages in the nature of lost wages. To this date, that has not been successfully pled.

Additionally, Oklahoma can grant vocational training if the employer is unable to put the claimant back to work within a reasonable accommodation. Certainly, the Administrative Law Judges have some discretion on the permanent disability awarded. If the claimant was unable to return to work, we generally see the permanent disability a little higher, or even if they are able to return to work but have some permanent restrictions and require accommodation. For injuries resulting in permanent restrictions where the employer is

not able to accommodate, claimants and attorneys are usually more open to a release and resignation generally for a bonus or additional funds for re-training or job placement

Arkansas:

Injured workers in Arkansas are evaluated for purposes of determining both impairment, as well as permanent disability, in the contexts of either permanent total disability, or wage loss situations. Scheduled injuries are calculated pursuant to the statute, and typically, the Commission is not able to consider wage-loss factors when assigning permanent impairment. Impairment will be determined based upon use of the American Medical Association's Guide to the Evaluation of Permanent Impairment, 4th Edition.

However, injured workers in Arkansas can be entitled to wage loss benefits when they have suffered an unscheduled injury, and the evidence is established by a preponderance of the evidence that when viewing additional factors including age, education, and future earning capacity, there is disability above and beyond the value of the impairment.

Employers may wish to seek a resignation and release in situations where this nexus exists between the wage-loss and the worker's compensation benefit entitlement. However, that being said, employers must be very careful when seeking a resignation and release.

Ark. Code Ann. 11-9-107 outlines penalties against employers for either discrimination or retaliation against an injured worker for filing a workers' compensation claim or seeking benefits under the statute. Penalties can include fines up to \$10,000, as well as a finding that the employer is guilty of a class D felony. Accordingly, when there is an interest in seeking a resignation and release, employers should be careful to only request that separate agreement for additional consideration paid, as opposed to making it a requirement or a condition precedent of settlement of the underlying workers' compensation claim.

Pitfalls of the Resignation and Release Offer:

If the injured worker accepts the additional consideration for the separate release and resignation, then the employer gets a full release of all potential outstanding claims against them and obtains a clean separation of employment. The claimant receives the additional consideration offered by the employer and formally executes the Release and Resignation Agreement document. In certain situations, however, the injured worker may not want to resign or execute a general release and the mere fact that the employer offered the release and resignation can be used against the employer later when an individual is terminated.

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TRAUMATIC BRAIN INJURIES

I. What is a Traumatic Brain Injury?

The Centers for Disease Control and Prevention (CDC) defines a Traumatic Brain Injury as a disruption in the normal function of the brain that can be caused by a bump, blow, or jolt to the head, or penetrating head injury. Everyone is at risk for a traumatic brain injury. Not all blows or jolts result in a traumatic brain injury and the severity can range from “mild” – meaning a brief change in mental status or consciousness to “severe” – an extended period of unconsciousness or amnesia after the injury.

II. Causes

The causes of traumatic brain injuries can vary, but generally are one of the following:

- a. Falls
- b. Vehicle-related collisions
- c. Violence
- d. Sports injuries
- e. Explosive blasts and other combat injuries

III. Symptoms and Signs

The signs and symptoms of a traumatic brain injury can vary, but they generally fall into four categories: Thinking/Remembering, Physical, Emotional/Mood, and Sleep. While these are not all-encompassing, they are the most common symptoms associated with a traumatic brain injury. If these symptoms follow a cause (such as the above listed), there is a good chance a traumatic brain injury has been sustained.

- a. Thinking/Remembering
 - i. Difficulty thinking clearly
 - ii. Feeling slowed down
 - iii. Difficulty concentrating
 - iv. Difficulty remembering new information
- b. Physical
 - i. Headache
 - ii. Fuzzy or blurry vision
 - iii. Nausea or vomiting (early on)
 - iv. Dizziness
 - v. Sensitivity to noise or light
 - vi. Balance problems
 - vii. Feeling tired
 - viii. Having no energy
- c. Emotional/Mood
 - i. Irritability
 - ii. Sadness

- iii. More emotional
 - iv. Nervousness
 - v. Anxiety
- d. Sleep
 - i. Sleeping more than usual
 - ii. Sleeping less than usual
 - iii. Trouble falling asleep

IV. Treatment

Prompt treatment of traumatic brain injuries is critical as they can quickly become more serious if left untreated. If there is any suspicion of a traumatic brain injury, a medical professional should be consulted. Even if it is believed to be a mild injury, this is still serious and requires prompt attention and an accurate diagnosis.

- a. A CT scan is usually performed first – this can visualize fractures and uncover bleeding in the brain, blood clots, bruised brain tissue, and brain tissue swelling.
- b. MRIs can also be used after conditions stabilize or if symptoms don't improve quickly after the injury.
- c. Medications
 - i. Diuretics
 - ii. Anti-seizure drugs
 - iii. Coma-inducing drugs
- d. Surgery
 - i. Removing clotted blood
 - ii. Repairing fractures
 - iii. Surgical intervention to stop brain bleeds
 - iv. Pressure reduction through opening skull windows
- e. Rehabilitation
 - i. Physiatry
 - ii. Occupational therapy
 - iii. Physical therapy
 - iv. Speech and language pathology
 - v. Neuropsychology

V. How to Handle a Potential Traumatic Brain Injury

What can you do as an adjustor to ensure that a traumatic brain injury that is sustained during the course of employment is treated properly?

- a. What to Ask?
 - i. How did the injury occur?
 - ii. Did the person lose consciousness?
 - iii. How long was the person unconscious?
 - iv. Did you observe any other changes in alertness, speaking, coordination or other signs of injury?

- v. Where was the head or other parts of the body struck?
 - vi. Can you provide information about the force of the injury?
 - vii. Was the person's body whipped around or severely jarred?
- b. How to Help Diagnose
 - i. Because traumatic brain injuries are such serious injuries, if there is a suspicion, it should be examined by a medical professional in an emergency room. The use of a CT scan can be very helpful in ensuring the problems do not escalate.
- c. How to Move the Treatment Along
 - i. Experts
 - 1. Physiatrist for overall medical rehabilitation management
 - 2. Occupational therapist to relearn or improve skills following a traumatic brain injury
 - 3. Physical therapist to help with mobility and relearning movement patterns, balance, and walking
 - 4. Speech and language pathologist to help improve communication skills or use assistive communication devices if necessary
 - 5. Neuropsychologist to assess cognitive impairment and performance and provide psychotherapy as needed for emotional and psychological well-being
 - 6. Vocational counselor to assess the ability to return to work and appropriate vocational opportunities
 - ii. Testing
 - 1. Vocational rehabilitation testing

VI. Outcome

- a. In most cases, patients with mild head injuries can experience lasting symptoms such as headaches, dizziness, or irritability, but these gradually improve in most cases.
- b. Moderate head injuries typically result in 60 percent positive recoveries while 25 percent are left with a degree of disability and 7-10 percent result in death or persistent vegetative states. The remainder will have a severe degree of disability.
- c. Severely injured persons only have a 25-33 percent positive outcome. Moderate disability is more common and approximately 33 percent of those patients do not survive. The remainder are persistently vegetative.
- d. It is very difficult to say how a person will respond, but prevention is key as brain injuries are extremely serious.

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TOXIC TORTS IN MISSOURI WORKERS' COMPENSATION

History

- Pre-2005: the exclusive remedy provisions of the workers' compensation statute applied to both accident claims and occupational disease/injury claims. Benefits in accident and occupational disease cases including PTD, TTD, PPD, Death
 - Accident—traumatic event that happens in one work shift
 - Occupational disease—repeated exposure causes disease or injury to develop over time
- After 2005: under strict construction, courts held that since the statute only specifically discussed “accident” cases falling under the exclusive remedy, occupational disease causes such as carpal tunnel syndrome and silicosis could be litigated either through workers' compensation or through the civil courts.
 - Benefits remained the same in accident cases
 - In occupational disease cases the claimant could elect for workers' compensation benefits OR civil remedy
- 2014: a tradeoff was negotiated which provided that toxic exposure cases could be protected under exclusive remedy of the workers' compensation system but an enhanced benefit would be provided.
 - Enhanced Remedy Benefits include additional amounts in addition to the pre-2014 benefits.

Background

On January 1, 2014, a new category of occupational disease was added to the coverage afforded under the Missouri Workers' Compensation law. These diseases, known as “occupational diseases due to toxic exposure” which result in permanent total disability or death, are provided pursuant to RSMo §287.200.4.

Occupational Diseases Due to Toxic Exposure

- Mesothelioma - Cancer of the pleura. It's a deadly form of cancer generally caused by exposure to asbestos.
- Asbestosis - Lung disease resulting from the inhalation of asbestos particles, marked by severe fibrosis and a high risk of mesothelioma.
- Berylliosis - Chronic allergy-type lung response and disease caused by exposure to beryllium.
- Coal Workers' Pneumoconiosis - Accumulation of coal dust in lungs
- Bronchiolitis Obliterans - Popcorn lung, results in obstruction of the smallest airways of the lungs due to inflammation.

- Silicosis - Type of pneumoconiosis marked by inflammation and scarring in the form of nodular lesions in the upper lobes of lungs. Caused by inhalation of crystalline silica dust.
- Silicotuberculosis - Silicosis associated with tuberculous pulmonary lesions
- Manganism - Toxic condition resulting from chronic exposure to manganese
- Acute Myelogenous Leukemia - Cancer of blood and bone marrow link to exposure to certain chemicals, such as benzene.
- Myelodysplastic Syndrome - Group of disorders caused by poorly formed or dysfunctional blood cells associated with exposure to tobacco smoke, pesticides, industrial chemical, and heavy metals like lead and mercury.

RSMo§287.200.4

For all claims filed on or after 1/1/14, for occupational diseases due to toxic exposure which result in a permanent total disability or death, benefits in this chapter shall be provided as follows:

(1) Notwithstanding any provision of law to the contrary, such amount as due to the employee during said employee's life as provided for under this chapter for an award of permanent total disability and death, except such amount shall only be paid when benefits under subdivisions (2) and (3) of this subsection have been exhausted;

(2) For occupational diseases due to toxic exposure, but NOT INCLUDING MESOTHELIOMA, an amount equal 200% OF THE STATE'S AWW AS OF THE DATE OF DIAGNOSIS FOR 100WEEKS paid by the EMPLOYER; and

(3) In cases where occupational diseases due to toxic exposure are DIAGNOSED TO BE MESOTHELIOMA:

For employers that have ELECTED to ACCEPT MESOTHELIOMA LIABILITY under this subsection, an additional amount of 300% OF THE STATE'S AWW FOR 212 WEEKS SHALL BE PAID BY THE EMPLOYER or

For employers who REJECT MESOTHELIOMA COVERAGE under this subsection, then the EXCLUSIVE REMEDY PROVISIONS UNDER SECTION 287.120 SHALL NOT APPLY TO SUCH LIABILITY...and

(4) The provisions of subdivision (2) and paragraph (a) of subdivision (3) of this subsection shall not be subject to suspension of benefits as provided in subsection 3 of this section; and

(5) Notwithstanding any other provision of this chapter to the contrary, should the employee die before the additional benefits provided for in subdivision (2) and paragraph (a) of subdivision (3) of this subsection are paid, THE ADDITIONAL BENEFITS ARE PAYABLE TO THE EMPLOYEE'S SPOUSE OR CHILDREN, NATURAL OR ADOPTED, LEGITIMATE OR ILLEGITIMATE, IN ADDITION TO

BENEFITS PROVIDED UNDER 287.240. If there is no surviving heirs.....the remainder of such additional benefits shall be paid as a single payment to the estate of the employee;

(6) The provisions of subdivision (1) of this subsection shall not be construed to affect the employee's ability to obtain medical treatment at the employer's expense or any other benefits otherwise available under this chapter.

Electing Coverage

§287.200.4 requires that an employer ELECT coverage under the statute. This causes a variety of different issues in situations where:

- Multiple different employers existed
- Employer has been bought out multiple times
- Employer no longer exists
- Multiple different insurance companies have insured the employer over the years.
- Multiple different insurance companies have owned employer's policy

What Qualifies as Exposure?

As with the traditional categories of occupational disease, in toxic exposure cases an employee shall be deemed to have been exposed to the hazards of an occupational disease when he is employed in an occupation or process in which the hazard of the disease exists. RSMo. §287.063; see *Casey v. E.J. Cody Co., Inc.*, 2017 WL 465992 (Mo. Ind. Rel. Com.) (*affirmed in part by Accident Fund Insurance Co. v. Casey*, 2018 WL 2311331 (Mo. banc 2018)).

Just as a claimant in a repetitive trauma case would have to prove his employer exposed him to the hazards of repetitive trauma, a claimant in a toxic exposure case would have to prove that his job duties exposed him to the toxins that allegedly caused his disease.

This can be accomplished by analyzing company records, job descriptions, obtaining industrial hygienist, or deposing the claimant regarding products he worked with and jobs he worked on.

§287.200.4(2) Occupational Diseases NOT Including Mesothelioma

For compensable claims of permanent total disability involving asbestosis, berylliosis, coal worker's pneumoconiosis, bronchiolitis obliterans, silicosis, silicotuberculosis, manganism, acute myelogenous leukemia, and myelodysplastic syndrome benefits are owed at the rate of 200% of Missouri's AWW at the TIME OF DIAGNOSIS for 100 weeks.

- Note that the benefits are calculated at the time of diagnosis and NOT the time of last exposure to the risk.

- Note that the ER/IR will still be liable for past medical bills and past TTD (if applicable) in addition to these benefits.
PTD Benefits under 287.200.1 must still also be provided for

For compensable death claims involving asbestosis, berylliosis, coal worker's pneumoconiosis, bronchiolitis obliterans, silicosis, silicotuberculosis, manganism, acute myelogenous leukemia, and myelodysplastic syndrome benefits are owed at the rate of 200% of Missouri's AWW at the TIME OF DIAGNOSIS for 100 weeks

- PLUS § 287.240 Death Benefits: reasonable expenses of the burial of the deceased employee NOT exceeding \$5,000, lifetime benefits for total dependents (spouse/children) calculated using the employee's AWW during the year immediately preceding the injury that results in the death.
 - Case law isn't clear yet on this but generally "the year immediately preceding the injury" is the last year the employee was exposed to the hazard.

§287.200.4(3) Mesothelioma

MESOTHELIOMA benefits are owed at the rate of 300% of Missouri's AWW for 212 weeks IF the employer has elected to accept mesothelioma liability.

If the employer did not elect coverage they are subject to civil liability and the exclusive remedy provision of the statute does not apply.

Note that the ER/IR will still be liable for past medical bills and past TTD (if applicable) in addition to these benefits.

Note: the "triggering occurrence," or the event which commences liability, is the **filing of a claim**. Liability attaches for enhanced benefits at the time the claim is filed. See *Accident Fund Insurance Co. v. Casey*, 2018 WL 2311331 (Mo. banc 2018).

PTD Benefits under 287.200.1 must still also be provided for

For compensable **death** claims involving **MESOTHELIOMA** benefits are owed at the rate of **300%** of the state AWW for **212 weeks** IF the Employer has elected to accept mesothelioma liability.

- If the employer did not elect coverage they are subject to civil liability and the exclusive remedy provision of the statute does not apply.
- Note that the ER/IR will still be liable for past medical bills and past TTD (if applicable) in addition to these benefits.

PLUS 287.240 Death Benefits: reasonable expenses of the burial of the deceased employee NOT exceeding \$5,000, lifetime benefits for total dependents (spouse/children) calculated using 2/3 of the employee's AWW during the year immediately preceding the injury that results in the death.

- Case law isn't clear yet on this but generally "the year immediately preceding the injury" is the last year the employee was exposed to the hazard.

Which Employer/Insurer is liable?

In amending the statute to include cases of toxic exposure, the Legislature failed to outline whether the insurer at the last exposure would be liable for benefits or whether the insurer as of the “date of first significant effects,” “date of disability,” “date of diagnosis,” “date of death,” “date of injury,” or some other date would be liable for benefits.

The Missouri Supreme Court has held that the insurer providing a policy which elects in to coverage on the date the claim is filed will be the one liable for the enhanced benefits under 287.200(3)(4). See *Accident Fund Insurance Co. v. Casey*, 2018 WL 2311331 (Mo. banc 2018).

It has not been decided whether the insurer at last exposure would be liable for any other benefits such as burial expenses or death benefit.

The Last Exposure Rule 287.063(2), does not apply to carrier liability in enhanced remedy cases. Prior to the Missouri Supreme Court’s decision, the Commission concluded the insurer as of the “date of disability” or “date of diagnosis” would have been liable for enhanced benefits.

The Missouri Supreme Court’s Decision in Casey

Accident Fund Insurance Co. v. Casey, 2018 WL 2311331 (Mo. banc 2018).

In *Casey*, the decedent worked for the employer from 1984 to 1990 installing and repairing floor tile. He was diagnosed with mesothelioma on November 5, 2014. The decedent filed a claim for workers’ compensation benefits against his employer in February 2015 and died from the disease on October 11, 2015. The Accident Fund insured the employer’s Workers’ Compensation coverage from March 16, 2014 through March 16, 2016 which included the dates the decedent was first diagnosed with mesothelioma and the date of death. At hearing, the decedent was only seeking an award of enhanced mesothelioma benefits and not any additional compensation he may have been entitled to under the statute. The decedent prevailed, and the case was ultimately appealed to the Missouri Supreme Court by the insurer, Accident Fund Insurance Company. This case was the first decision issued which provided binding precedent related to 287.200.4.

On appeal to the Missouri Supreme Court, Accident Fund contended that they did not cover liability for the enhanced benefit. Accident Fund argued that the last exposure rule under Section 287.063.2 meant that the insurer in 1990 when the decedent retired, was liable for the enhanced benefit under the new law.

The Court held that the last exposure rule was immaterial in enhanced benefit claims where an employer purchased a policy explicitly covering benefits under 287.200.4.

- The Court noted that the insurance policy's endorsement did not contain any qualifying language regarding the last exposure rule.
- The Court also noted the only qualifying language in the endorsement limited coverage to claims filed after 1/1/14

The relevant inquiry in the matter was not under whose employment the employee was last exposed, but whether the terms of the employer's policy provided coverage for 287.200.4. Because the insurer expressly adopted 287.200.4 into its endorsement, it provided coverage for the enhanced remedy.

- Essentially, the Court held that the endorsement was not an occurrence policy but rather a claims made policy.

The Court held that since 287.200.4 made no reference to the last exposure rule. It did not apply to insurers in enhanced remedy cases. The court went on to find that the insurer at the time the claim for compensation is filed is the one liable for enhanced remedy benefits.

- The Court advised that applying the last exposure rule would allow for insurers to sell "illusory, hollow" policies because essentially nobody after 2014 has been exposed to asbestos.

Enhanced Benefits Decisions Currently Pending on Appeal

Hegger v. Valley Farm Dairy Co., 2019 WL 2181663 (Mo. App. May 21, 2019)

The Court of Appeals held that an employer who was no longer in existence on January 1, 2014, when the law was enacted, could still be liable for enhanced remedy benefits for mesothelioma, reversing the ALJ and Labor and Industrial Relations Commission (LIRC) decisions.

ALJ and Commission Findings

The ALJ and Commission both found:

- (1) Claimant's exposure to asbestos at work was the prevailing factor in his diagnosis of mesothelioma;
- (2) Hegger was last exposed to the hazards of asbestos working for Valley Farm Dairy; and
- (3) Claimant did not meet his burden of proving entitlement to the benefits provided in 287.200.4 because Valley Farm Dairy was not in existence as of January 1, 2014, and therefore could not "elect to accept" coverage under section 287.200.4 (3)(a).

Court of Appeals Findings

The Court of Appeals held that the employer, although not in existence on January 1, 2014, did elect to accept coverage for enhanced remedy benefits by insuring their liability when the claimant was last exposed to the hazards of asbestos in 1984.

A dissenting opinion was filed by Judge Odenwald. He found that an employer simply insuring their liability at a point when the claimant last worked for them or when last

exposed did not constitute an election to accept enhanced remedy benefits under the Workers' Compensation Act. Therefore, an employer not in existence as of January 1, 2014 would not be liable for enhanced remedy benefits under the Workers' Compensation Act because they could not make an election to accept workers compensation coverage for these benefits.

This case has been appealed to the Missouri Supreme Court.

Marc Hayden v. Cut Zaven Ltd., and Papillion Ltd., Injury No.: 14-103077

Hayden is another recent enhanced remedy case set for review by the Labor and Industrial Relations Commission. In *Hayden*, the presiding ALJ denied benefits due to the Employee being unable to establish medical causation between his diagnosis of mesothelioma and his work for numerous years as a hairdresser. The Employee contended that certain hairdryer models contained asbestos and he was exposed to that asbestos because he used these models, which emitted the fibers. The Employee was unable to recall specific models, and did not have any studies or scientific evidence to support the contention that asbestos containing hairdryers were linked to mesothelioma diagnoses in those who used them.

In finding the Employee's exposure to hair dryers was not the prevailing factor behind his mesothelioma diagnosis, the ALJ referred to the opinion of one of the Insurer's doctors stating; "[There] was good probability Employee was never subject to the risk of asbestos exposure because only certain models and serial numbers of the hairdryers he recalled using contained asbestos. [Insurer's doctor] testified there were no studies linking employment as a hairdresser to an increase in developing mesothelioma."

The appeal of *Hayden* is the first case that requires the application of not only enhanced benefits, but also traditional benefits on a toxic exposure claim of mesothelioma.

Enhanced Remedy Questions Which Remain Unanswered

Only the surface of questions involving the enhanced remedy statute has been scratched to this point. A number of questions regarding how an Administrative Law Judge or the Commission will rule in these types of cases still remain unanswered. These questions likely will be answered in the future when issues involving them are litigated. Some of these questions include:

- Party responsible for traditional benefits
- The date of injury
- Subrogation interests for traditional benefits

- The standard to establish causation
- How exposure can be shown
- How the notice provision will operate
- Whether the last exposure rule will apply to traditional benefits
- If defendant insurers will have the ability to bring in other insurers to the claim
- How wages will be calculated for traditional benefits, permanent total disability benefits, and death benefits

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WORKERS' COMPENSATION AND MENTAL HEALTH

I. Types of Mental Stress Claims in Workers' Compensation

- Physical injury - Mental Stress
 - Standard of Causation: Was the work accident the prevailing factor in the development of the medical condition and disability?

Example: Claimant, an OTR truck driver, is in a MVA and rolls his rig over a guard rail and down an embankment. He suffers multiple fractures and is now afraid to return to truck driving for fear of another accident.
- Mental Stress – Mental Stress
 - Standard of Causation for Occupational Disease: Is the mental stress caused by extraordinary or unusual stress?
 - A MS claim cannot be based on termination, demotion or lack of promotion. 287.120 (9)
 - Until recently the stress exposure had to be extraordinary/unusual compared to the occupation. This changed to a reasonable person standard.

Example: Claimant alleges anxiety and depression from co-workers and supervisors yelling at him over a 5 year period at work on a constant basis.
- Mental Stress – Physical Injury
 - Less common situation in WC and sometimes overlaps with civil actions for harassment, retaliatory discharge, discrimination, etc.
 - Standard of Causation: Was the mental stress the PF in the development of the medical condition and disability.

Ex.: Claimant works long hours with many deadlines to meet in high pressure job as a surgeon, criminal lawyer, air traffic controller, WC claims rep, etc. and suffer a rash, heart attack, etc.

II. Is a Physical Injury Required to have mental stress?

- It Depends.
- Unlike some states, MO WC does not require a physical injury to have a mental stress claim.
- Nebraska – Must be a proximate cause of the underlying *injury*, except for first responders.
- Illinois – must be able to be tied to a time, place, and cause. No physical injury needed.
- Iowa – Must be primarily caused by work.
- Kansas – Must be associated with a physical injury.
- Oklahoma – Must be associated with a physical injury.
- Arkansas – Must be associated with a physical injury.

III. The Psychiatric IME

The Clinician

- First, Do No Harm
- Beneficence
- Confidential
- May seek collateral sources of information to provide good care, but care not withheld if the sources are not available

Forensic Examination

- Medical and psychiatric knowledge required to help answer a legal question
- Collateral sources of information are required
- Non-confidential
- Opinion may be harmful or at least not helpful

Challenges for Forensic Psychiatry IME

- Diagnostic challenges with manual-based syndromes
- Lack of full longitudinal history
- No laboratory or imaging findings
- Everyone thinks they are a psychiatrist

First Steps

- Define the question
- Records, records and more records!
- Engage the expert

Experts

- Psychiatrist
- Psychologist
- Neurologist
- Neuropsychologist
- Nurses
- Social Workers

History

- Personal History
- Education
- Work History
- Past Medical/Surgical History/Medication/Allergies/ROS
- Past Psychiatric/Substance Use History
- Legal History
- Family History

Examination

- General Appearance and Behavior
- Speech
- Psychomotor Activity
- Content of Thought
- Flow of Thought
- Mood/Affect
- Insight/Judgment
- Sensorium/Intellect

IV. Common Psychiatric Illnesses in Workers' Compensation

Personality Disorders

- Enduring pattern of inner experience and behavior that deviates from one's culture and manifests cognition, affect, interpersonal function and impulse control
- Pattern is inflexible and pervasive across a broad range of personal and social situations
- Pattern leads to clinically significant distress or impairment in social, occupational, or other important areas of function

Posttraumatic Stress Disorder

- Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:
 1. Directly experiencing the traumatic event(s).
 2. Witnessing, in person, the event(s) as it occurred to others.
 3. Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.
 4. Experiencing repeated or extreme exposure to aversive details of the traumatic event(s)
 5. Note: Criterion A4 does not apply to exposure through electronic media, television, movies, or pictures, unless this exposure is work related.
- Presence of one (or more) of the following intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred:
 1. Recurrent, involuntary, and intrusive distressing memories of the traumatic event(s).
Note: in children older than 6 years, repetitive play may occur in which themes or aspects of the traumatic event(s) are expressed.
 2. Recurrent distressing dreams in which the content and/or effect of the dream are related to the traumatic event(s).
Note: In children, there may be frightening dreams without recognizable content.
 3. Dissociate reactions (flashbacks) in which the individual feels or acts as if the traumatic event(s) were recurring
Note: In children, trauma specific reenactment may occur in play.
 4. Intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).
 5. Marked physiological reactions to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).

- Persistent avoidance of stimuli associated with the traumatic events(s), beginning after the traumatic event(s) occurred, as evidenced by one or both of the following:
 1. Avoidance of or efforts to avoid distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).
 2. Avoidance of or efforts to avoid external reminders (people, places, conversations, activities, objects, situations) that arouse distressing memories, thoughts, or feelings about or closely associated with the traumatic events(s).
- Negative alterations in cognitions and mood associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following:
 1. Inability to remember an important aspect of the traumatic event(s).
 2. Persistent and exaggerated negative beliefs or expectations about oneself, others, of the world.
 3. Persistent, distorted cognitions about the cause or consequences of the traumatic event(s) that lead the individual to blame himself/herself or others.
 4. Persistent negative emotional state.
 5. Markedly diminished interest or participation in significant activities.
 6. Feelings of detachment or estrangement from others.
 7. Persistent inability to experience positive emotions.
- Marked alterations in arousal and reactivity associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following:
 1. Irritable behavior and angry outbursts (with little or no provocation) typically expressed as verbal or physical aggression toward people or objects.
 2. Reckless or destructive behavior.
 3. Hypervigilance.
 4. Exaggerated startle response.
 5. Problems with concentration.
 6. Sleep disturbance.

Major Depressive Disorder

Five or more of the following present during a two-week period, representing a change from previous functioning.

1. Depressed mood most of the day, nearly every day
2. Markedly diminished interest or pleasure in all, or almost all activities most of the day, nearly every day
3. Significant weight loss or weight gain
4. Insomnia or hypersomnia
5. Psychomotor agitation or retardation
6. Fatigue or loss of energy
7. Feelings of worthlessness or excessive or inappropriate guilt

8. Diminished concentration or indecisiveness
 9. Recurrent thoughts of death or suicidal ideation or plan
- Symptoms must cause clinically significant distress or impairment.

V. Treatment Recommendations & Long Term Prognosis

- What treatment currently receiving? Medication, Psychotherapy, Specialized treatments.
- Is it working? Why not?
- How often?
- How long will be needed?
- What happens if not received?
- Prognosis
 - Based on duration and severity of symptoms, response to treatment, compliance with treatment recommendations

VI. Mental Health at Work

- What Employers Can Do
 - Be open about it
 - Support employees' health and finances
- Mind-Body Connection
 - Mental health problems take a physical toll
 - Health fears are the #1 factor impacting the majority of employees' well-being
 - 1/25 people lives with a mental illness severe enough to interfere with major life activities
- 11 Ways to Help Employees
 1. Eliminate the Stigma
 2. Create Employee Assistance Programs
 3. Accept that nobody is immune to it
 4. Make it easier to get checked
 5. Create policies and procedures
 6. Offer insurance to cover it
 7. Encourage self-care
 8. Allow them to take mental health days
 9. Use alternative schedules for unexpected events
 10. Set a clear return-to-work roadmap
 11. Teach managers the warning signs

Pre-existing Mental Conditions

- Importance: must know all the prior diagnosis, treatments, and recovery from mental health conditions.
- Important to know the functional abilities just prior to work accident.
- Know claimant's participation in hobbies, organizations, clubs, social groups
- Comp v. Non comp psychiatric patients

Mantia v. MoDot, 2016 WL 3269890 (Mo. App. E.D. 2016)

- The claimant experienced horrific things while working for the Missouri Department of Transportation.
- The ALJ denied the psych claim because she did not present evidence of similarly situated employees as required under the old law.
- The Commission reversed, noting strict construction requires the Court to use objective standards in determining whether a claimant's work-related stress was extraordinary and unusual.
- The Court of Appeals affirmed the Commission, setting the precedent that the extraordinary and unusual standard is to be viewed in comparison to other employees, in general, not other employees in the same employment as the claimant.

Manita at the Supreme Court 529 S.W.3d 804

- The Employer appealed to the Missouri Supreme Court arguing that the Commission misapplied the law in its award.
- The Supreme Court agreed.
 - "Accordingly, the objective standard for determining whether Employee's stress was compensable is whether the same or similar actual work events would cause a reasonable highway worker extraordinary and unusual stress."
 - "Individualized, subjective reactions to those circumstances are irrelevant."
- The Supreme Court took issue with the Commission noting the need for "objective" standards, but not applying them appropriately.
 - "The Commission recognized section 287.120.8 required Employee to meet an objective standard for recovery, but it failed to apply the legal meaning of 'objective.'"

Other States

- Arkansas
 - *Hope Livestock Auction Co. v. Knighton*, 992 S.W.2d 826
 - Employee had multiple injuries to his back and legs.
 - Continuing pain brought on depression, which turned into Bipolar 1 Disorder.
 - Based on Employee's expert's testimony, Employee was awarded benefits for Bipolar 1 Disorder.
- Kansas
 - *Followill v. Emerson Elec. Co.*, 674 P.2d 1050
 - Employee saw his friend and coworker's head crushed in a press.
 - Employee had no physical injury, but was diagnosed with PTSD.
 - Kansas Supreme Court held it was not a compensable personal injury.
- Illinois
 - *Chicago Transit Authority v. Illinois Workers' Compensation Com'n*, 989 N.E.2d 608
 - Employee bus driver hit a passenger and later learned that passenger died.
 - Upon learning of the death, Employee had psychological trauma.
 - Employee awarded benefits.

- Psychological injury need not be immediately apparent, but traceable to a definite time, place, and cause.
- Iowa
 - *Dunlavey v. Economic Fire and Cas. Co.*, 526 N.W.2d 845
 - Employee must show:
 - Factual or medical causation; and
 - The mental injury was caused by stress of greater magnitude than other workers in similar jobs.
 - Employee, a supervisor, worked at Company A while it merged with Company B.
 - Merger caused greater workload and criticism from new supervisor.
 - Worked 12 hour shifts and on weekends.
 - Was diagnosed with severe depression.
 - Reversed in part to determine stress vs. similarly situated employees.
- Nebraska
 - *Hynes v. Good Samaritan Hospital*, 869 N.W.2d 78
 - Employee was a nurse who suffered three assaults while working in a mental health unit.
 - Employee was diagnosed with major depressive disorder and PTSD.
 - Employee was found to be PTD from her mental injury arising from her underlying physical injuries.
- Oklahoma
 - *Fenwick v. Oklahoma State Penitentiary*, 792 P.2d 60
 - Employee worked in the OK State Penitentiary during a hostage situation.
 - Employee was eventually released without injury.
 - Employee developed PTSD.
 - As there was no underlying physical injury, benefits were denied.

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