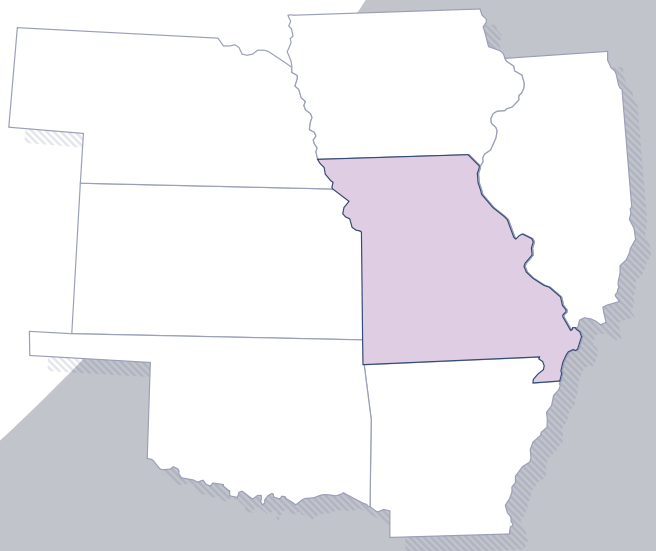
Workers' Compensation Reference Guide

Missouri



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 = 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.

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 authorized 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 statue 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-wheeld 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, if 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 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)