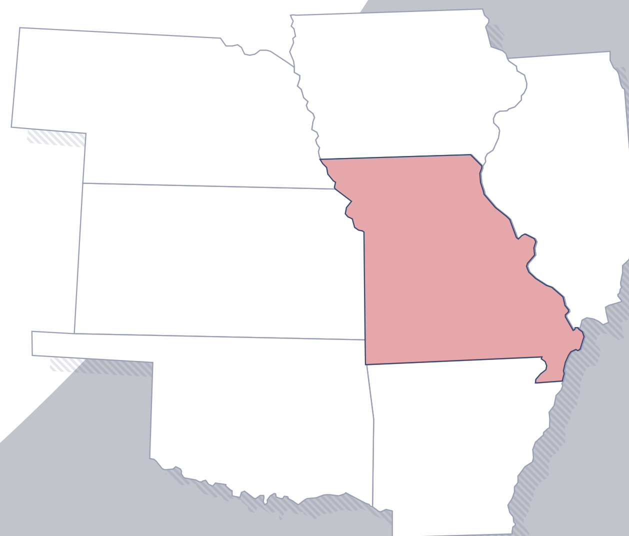
Workers' Compensation Reference Guide

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)

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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.

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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.

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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:

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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:

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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.

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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.

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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.

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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.

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2. Court of Appeals

   a. **<u>30 days to appeal LIRC decision.</u>**

   b. Review questions of law only.

3. Supreme Court

   a. **<u>30 days to appeal Court of Appeals decision.</u>**

   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.

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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.

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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."

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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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Q: ***Is an Employer's usual business defined differently at a location where it only hires independent contractors for a statutory employment analysis?***

A: No. Under strict construction of Section 287.040.1, it is not necessary for the Court to decide whether Section 287.040.1 is limited to a specific location when the statutory employee is injured when performing the usual business of the employer. The mere fact that an employer solely hires independent contractors at a single warehouse location instead of regular employees does not change its "usual business" at that specific warehouse.

In *Sebacher*, the claimant performed truck driving and delivery work as an independent contractor for the employer. The employer operated 18 warehouse distribution centers, and only hired independent contractors to perform work at the specific warehouse where claimant performed delivery work out of. The claimant worked full time delivering the employer's products out of the specific warehouse where only independent contractors worked. The claimant was assaulted by one of the employer's employees while working at the warehouse. The claimant filed a civil negligence claim against the employer and the employer filed a summary judgment motion arguing that the claimant's sole remedy was through workers' compensation because he was a statutory employee. The employer's summary judgment motion was granted.

On appeal, the claimant argued he was not a statutory employee because the court could only analyze the specific warehouse he worked at when determining what the employer's usual course of business was pursuant to Section 287.040.1. He argued that delivering products was not the employer's usual course of business at the specific warehouse he worked at because the employer never used its own employees to perform work at that warehouse. The Court held that it was not necessary to look at the specific warehouse when determining usual course of business because the usual course of business of employer was the same at every warehouse, which was shipping and delivering products. The Court determined that the mere fact the employer used independent contractors instead of regular employees at the warehouse where the claimant was injured did not change the fact that the usual course of business was being performed there. The claimant was found to be a statutory employee.

Sebacher v. Midland Paper Company, 610 S.W.3d 402 (Mo. App. E.D. 2020).

Q: ***Does a letter requesting a continuance of a dismissal setting from a claimant's attorney constitute a prima facie showing that the claimant is prosecuting his/her case when no other evidence is presented?***

A: No, more evidence of prosecution is needed or evidence of good cause for failing to prosecute. "[T]he allegations in [claimant's] application for review and in his attorney's letter – even if taken as true – failed to make a prima facie showing of good cause."

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In *Hager*, the claimant sustained a work-related injury in 1997. The claimant settled his claim with the employer/insurer in 2002 and his claim against the Second Injury Fund remained open. Until early 2019, the claimant had routinely requested continuances of pre-hearing conferences set on his claim against the Fund. A pre-hearing conference was set in May of 2019 and the notice was undeliverable to the claimant when mailed. The Division advised claimant's attorney the notice was not deliverable and requested updated contact information. The claim was set on the dismissal docket in October of 2019 and the Administrative Law Judge dismissed the claim with prejudice because neither the claimant nor his attorney appeared. Claimant's attorney appealed the dismissal to the Commission and argued that prior to the dismissal setting he had faxed a letter to the division advising he could not reach the claimant, the claimant did not receive the dismissal setting notice, and he had hired a profession investigator to locate the claimant.

On review the Court of Appeals affirmed that the case dismissal was appropriate because claimant had not presented a prima facie case that he was prosecuting his claim. The Court held that nowhere in the claimant's appeal or letter faxed by his attorney did the claimant or his attorney alleged facts that would establish a case of good cause for prosecuting the claim over the many years it had been pending.

Hager v. Treasurer of Missouri, 613 S.W.3d 87 (Mo. App. E.D. 2020).

Q: ***Does an employee's violation of a reasonable rule adopted by the employer at the time of an injury take the employee outside the course of employment?***

A: Likely no. "Employer's general argument that [claimant's] violation of the safety rule takes him outside the course of employment would render 287.120.5 (safety reduction penalty) meaningless." "The legislature is presumed not to enact meaningless provisions."

In *Boothe*, the Claimant was an installer for a satellite television company. On the date of his injury, the claimant was driving employer's van to his first customer's house for the day. While driving to the customer's location, the claimant choked while eating a breakfast sandwich, blacked out, and crashed into a pillar on the side of the highway sustaining injuries. The employer had a rule prohibiting its employees from eating or drinking while driving company vehicles. On appeal, the employer argued that the claimant was outside his course of employment because he was violating a company rule at the time the accident occurred.

The Court held that for an employee to be outside of the course of employment while violating an employer's rule, the violation of the rule must completely sever the employer-employee relationship. The Court also cited to section 287.120.5, which provides for a penalty on compensation when an injury occurs in conjunction with an employee violating a company rule. The Court determined that if an employee were held to be outside of the course of employment when violating a company rule, then Section 287.120.5's penalty

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would be rendered meaningless. Therefore, a safety penalty was applied to the claim but the claim was found to be compensable.

Boothe v. DISH Network, Inc., 2020 WL 7706398.

Q: *Will an employee's additional testimony regarding work-related occupational disease risk factors at a hearing before an Administrative Law Judge be considered when that testimony is not documented or supported by any expert opinions?*

A: No. "We found that employee's assertion that opening heavy security doors and carrying his briefcase caused or contributed to his triggering thumb was speculation and was not supported by any expert. Accordingly, the only work duty at issue in this matter that was reviewed and analyzed by a medical expert is employee's use of the keyboard."

In *Mirfasihi*, the claimant worked for the employer for 33 years in a variety of positions. 80 – 85% of the claimant's job duties involved using a computer keyboard. The claimant alleged occupational disease in the form of a trigger thumb from his job duties. The claimant obtained an expert who opined his repetitive hitting of the spacebar on the keyboard was the prevailing factor in developing his trigger thumb. The employer obtained a conflicting expert opinion which did not find his work duties to be the prevailing factor in causing the trigger thumb. At the hearing before the Administrative Law Judge, the claimant testified for the first time that he also carried his suitcase with his thumb and opened heavy security doors when going to work with his thumb. The Administrative Law Judge Held the claimant sustained an occupational disease arising out of and in the course of his employment.

On review, the Commission held the claimant did not sustain a work-related occupational disease. The Commission determined the employer's expert was more credible in finding that the mechanism of striking the spacebar on a keyboard was not the prevailing factor in developing a trigger thumb. The Commission also held that the claimant's testimony regarding additional work duties which could have posed a risk to developing a trigger thumb was speculation and not supported by any expert opinions submitted into evidence.

Jonathan Mirfasihi v. Honeywell Federal Manufacturing & Technologies, LLC, (Mo. Lab. Ind. Rel. Comm'n, Oct. 7, 2020).

Q: *Is a deceased claimant's dependent, who is over the age of 18 and enrolled at an accredited educational institution part-time for a short period following turning 18 entitled to extended death benefits until the age of 22, pursuant to 287.240(3)?*

A. No. "[Decedent] failed to satisfy the prerequisite of enrollment and *continued* attendance as a *full-time student* at an accredited educational institution as of age 18 necessary to extend her dependency status until age 22."

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In *Williams*, the claimant was killed in a work-related accident. The claimant's wife and dependents were provided death benefits following the accident. At the hearing before the Administrative Law Judge, the employer argued that the claimant's oldest daughter was not entitled to death benefits because she had turned 18 and did not qualify as a dependent under Section 287.240(3) for continuing death benefits until reaching the age of 22. The claimant's oldest daughter turned 18 years old on August 7, 2018. Evidence presented at the hearing showed that the claimant's oldest daughter was enrolled for three course credits at a community college between July 30, 2018 and December 14, 2019.

The Commission held that the claimant's oldest daughter failed to establish she was a dependent because she was not a full-time student as of age 18, nor was she continuing to attend an accredited educational institution after turning 18. The Commission also held that the statute for providing continued dependency status to children enrolled at education institutions until the age of 22 nowhere allows for a child who would otherwise qualify to revive his or her status as a dependent through later enrollment for a full-time course of study. Therefore, the dependent child must be enrolled full-time, and continue to attend an educational institution full-time after turning 18 to receive death benefits until the age of 22.

Jacob Williams v. Reeds, LLC, (Mo. Lab. Ind. Rel. Comm'n, Oct. 5, 2020).

Q: Does an employer/insurer expert physician's prevailing factor opinion for occupational toxic exposure claims use the incorrect legal standard when the physician bases the opinion in part on the lack of scientific studies showing a link between the occupation and disease (in this case mesothelioma).

A: Possibly, it is a fact intensive analysis. Here, the Court held that because the employer and insurer's physician based his prevailing factor opinion in part on the absence of scientific studies showing a link between the occupation and mesothelioma, that constituted a misapplication of law.

In 2014, the legislature added provisions to the Missouri Workers' Compensation Act allowing for claims alleging occupational exposure to toxic materials. One of the listed diagnoses required to trigger the enhanced remedy benefit statute is mesothelioma. Under the Act, § 287.063.1 states "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."

In this case, the Administrative Law Judge and Commission had ruled that the employer and insurer's doctor was more persuasive in finding that the Claimant's alleged occupational exposure to asbestos from hair dryers was not the prevailing factor in causing his mesothelioma and death. The employer and insurer's doctor advised that there were no studies showing a link between the occupation of hairdressing and mesothelioma, while also advising that there were other unknown causes of mesothelioma and indicating that the claimant used some of the same hairdryers at home

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while off work. Additionally, the Commission and ALJ noted that while the claimant was able to provide brands of hairdryers he used at each employer, he was unable to recall the specific sub model, and therefore the documents showing which sub models contained asbestos did not show definitively that the hair dryers used by the claimant contained asbestos material.

On appeal, the claimant's widow argued that because employer and insurer's doctor based his prevailing factor opinion on whether or not there were studies definitively showing a link between hairdressing and mesothelioma, he and the judicial bodies that reviewed the case, applied the incorrect legal standard for determining the prevailing factor. The Court explained that while typically medical causation is a question of fact, the misapplication of the legal standard makes it a question of law subject to the Court's review. The Court further explained that the correct standard requires the claimant show "a **probability** that the working conditions caused the disease" and by requiring studies showing a **definitive** link between hairdressing and mesothelioma, the employer and insurer's expert opinion applied a different legal standard.

In conclusion, the Court found that the Commission acted without or in excess of its powers by failing to analyze medical causation and Mr. Hayden's date of injury under the proper legal standards.

Hayden v. Cut-Zaven, Ltd., 614 S.W.3d 44, (Mo. App. E.D. 2020).

Q: Does a death under the "line of duty" portion of the Missouri Workers' Compensation Act arise out of and in the course of his employment when a police chief loading boxes onto a delivery truck while on-call suffers a heart attack?

A: Probably not. Here, the court indicated that the police chief being on-call was not enough to establish that the injury arose out of and in the course of his employment as a police officer.

The court advised that there are a line of cases indicating whether or not the officer is technically on duty and is a factor in determining whether the accident arose out of and in the course of employment, but is not dispositive. In two cases, *Spieler* and *Mann*, the court indicated that the key issues were whether the actions performed by the officers were the kind they undertook in their role as officers, or if the officers were injured in a particular situation by virtue of being a police officer.

In this case, the police chief was on the dock loading packages into a delivery truck when he had a heart attack and died. The estate argued that because he was on-call as police chief during that time, he was in active performance of his job duties under the Act. The court held that under § 287.243.2(5), the officer was not in active performance of his job duties simply by being on-call as that would expand the meaning of the statute and create a result not intended by the legislature. Therefore, the court affirmed the Commission's decision denying benefits.

Estate of Newman by Eatherton v. City of Leadwood, 611 S.W.3d 529 (Mo. App. E.D. 2020).

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Q: Whether a mom and daughter can be substituted as parties on a workers' compensation where the claimant obtained a final award for permanent total disability benefits and subsequently died from an unrelated cause?

A: No, the court held that because the final award did not specifically identify the mom and daughter as dependents, they could not be substituted as a party in order to receive the lifetime permanent total disability benefits.
In *Schoemehl*, the Missouri Supreme Court held, "that, when an employee with a permanent total disability dies of a cause unrelated to the compensable work-related injury, the disability benefits shall be paid to the employee's dependents for their lifetime because the surviving dependents are deemed to have the same rights as the employee. " *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007). The court then cites an additional case which held, "the issues of a dependent's contingent right to *Schoemehl* benefits for future determination is preserved if dependency at the time of the injury is established as a matter of law in the final award." *Edwards v. Treasurer of the State of Mo.*, 529 S.W.3d 7, 11 (Mo. App. E.D. 2017)

The court explained that use of the phrase "in the award" indicates that any evidence presented after the issuance of the final award cannot be considered. Instead, the final award must be reviewed to determine if there is sufficient information to conclude that the alleged dependents were such at the time of the injury. In this case, there was not sufficient evidence in the final award to support that position. The court indicated that in the forty-nine-page award, the mother and daughter were only referenced in a two-page section addressing "current activities" where the claimant testified about his physical limitations. The award also indicated that the claimant drove his daughter to school and that his wife performed the housework. However, the court noted that the final award did not identify the wife or daughters by name; therefore, the final award fell short of what is necessary to preserve a dependent's contingent rights to benefits. The court further indicated that once the final award was issued, the mother and daughter had lost their right to benefits despite providing additional information that supported their status as dependents.

Lawrence v. Treasurer of State - Custodian of Second Injury Fund, 609 S.W.3d 782, (Mo. App. W.D. 2020).

Q: Is a claimant's knee injury, suffered by missing a step while walking down an ordinary flight of stairs at work while conducting a security check, a compensable injury under the Missouri Workers' Compensation Act?

A: No, not here. Section 287.120.1 provides that an employer "shall be liable, irrespective of negligence, to furnish compensation under the provisions of [the Act] for personal injury ... of the employee by accident ... arising out of and in the course of the employee's employment." For an injury to be compensable it must arise "out of and in the course of ... employment pursuant to section 287.020.3(2)." *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo. banc 2012). There must be a causal connection between the injury at issue and the employee's work activity. *Id.* Section 287.020.3(2) provides that:

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"An injury shall be deemed to arise out of and in the course of the employment only if: (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 nonemployment life."

In *Marks*, the employee was working for the Department of Corrections on November 9, 2017 and was descending a staircase while conducting a security check when he misstepped and felt his right knee twist. He reported the injury involved him simply stepping off the step wrong. He later testified he was looking back at another co-worker, to ensure the worker's safety, when the accident occurred. In finding the employee's testimony not to be credible, the ALJ denied benefits, finding "the accident occurred when [Marks] missed a step and did not arise out of and in the course of employment." The LIRC affirmed the award of the ALJ denying benefits and the employee appealed. The Court of Appeals applied a two-part test, "which first requires identification of the risk source of a claimant's injury, that is, identification of the activity that caused the injury, and then requires a comparison of that risk source or activity to normal nonemployment life." In finding that the risk source of claimant's injury was descending stairs and was not entitled to an inferred heightened risk while conducting a security check, the Court found employee's injury resulted from a risk source which he is equally exposed in his nonemployment life. Thus, the Court affirmed the LIRC's denial of benefits under the Missouri Workers' Compensation Act.

Marks v. Missouri Dep't of Corr., 606 S.W.3d 159 (Mo. App. W.D. 2020).

Q: Are injuries sustained by an accidental trip and fall at a treating physician's office compensable when the claimant was treating for a work-related respiratory injury following a chemical exposure?

A: No. An injury "by accident is compensable only if the accident was the prevailing factor in causing both the medical condition and disability." Section 287.020.3(1). An injury must arise "out of and in the course of employment." Id. "For an injury to be deemed to arise out of and in the course of the employment under section 287.020.3(2)(b), the claimant employee must show a causal connection between the injury at issue and the employee's work activity." *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509-10 (Mo. banc 2012). For an injury to arise out of and in the course of her employment, an employee must demonstrate the accident is a prevailing factor of the injury and is not a risk that the claimant would have been exposed outside of and unrelated to the employment. Section 287.020.3(2)(a)-(b).

In *Schoen*, the employee appealed from the LIRC's decision denying benefits because employee failed to prove her work injury was the prevailing factor causing any permanent disability she suffered. On May 8, 2009, Employee was exposed to cypermethrin, an insecticide, while working as a charge nurse at Mid-Missouri Mental Health Center. Employee complained of throat and eye irritation; she also began coughing and wheezing. Employer sent her to the emergency room on May 11, 2009. Employee was prescribed medication and returned to work without any limitations. While attending an

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appointment at Dr. Runde's office, she tripped on a dog that had gotten loose in the office, and fell, sustaining injuries to her knees, lower back, hip, and neck. The employee filed an amended claim, asserting injuries from her fall in Dr. Runde's office.

The ALJ initially awarded benefits for both the cypermethrin exposure and the accidental fall, finding the trip and fall to be the "natural and probable consequence of" the cypermethrin exposure. Employer appealed and the LIRC reversed the award, finding the employee failed to prove the cypermethrin exposure was the prevailing or primary factor in causing any alleged injury from being tripped accidently at Dr. Runde's office. The employee appealed to the Missouri Court of Appeals and the matter was transferred to the Missouri Supreme Court.

The Court found Employee's risk of being tripped accidently is a risk she equally is exposed to outside of her employment. Any of Employee's injuries stemming from the accidental tripping did not occur because of a condition of her employment. See, e.g., *Annayeva v. SAB of the TSD of the City of St. Louis*, No. SC98122, 597 S.W.3d 196, 200, (Mo. banc March 17, 2020) (finding a teacher who slipped in the hallway of the school where she taught was not entitled to workers' compensation benefits because she was unable to prove a causal connection with her employment). The Court found the assertion of simple but-for causation by the employee insufficient to establish a causal connection with her work. The Supreme Court affirmed the LIRC's denial of benefits for the accidental tripping incident while claimant was in the physician's office for treatment involving her cypermethrin exposure.

Schoen v. Mid-Missouri Mental Health Ctr., 597 S.W.3d 657 (Mo. 2020).

Q: Whether the LIRC, in determining the Second Injury Fund's (SIF) liability for an employee's permanent total disability, was required to determine that employee's preexisting disease was symptomatic at the time of the employee's primary compensable injury?

A: No. Section 287.220.2 provides for SIF liability for workers who are permanently and totally disabled by a combination of past disabilities and a primary work injury. *Payne v. Treasurer of State, Custodian of Second Injury Fund*, 417 S.W.3d 834, 847 (Mo. App. S.D. 2014). Section 287.220.2 provides: "*If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed,* ... and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the

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last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund." "The determination of whether a claimant is permanently and totally disabled is based upon the claimant's ability to compete in the open labor market." *Brashers v. Treasurer of State as Custodian of Second Injury Fund*, 442 S.W.3d 152, 155 (Mo. App. S.D. 2014). There is no explicit requirement that a pre-existing condition be symptomatic at the time of the subsequent, primary injury.

In *Atchison*, the employee suffered a primary injury involving a herniated disc at L4-L5 following a compensable slip and fall at work. This fall, in isolation, created a 35% permanent partial disability to the body as a whole. The employee suffered from preexisting condition including both degenerative disc and degenerative joint disease from L2-L3 through L5-S1 which was a permanent and potentially disabling medical condition. This pre-existing degenerative condition created a 65% permanent partial disability to the body as a whole. The employee was held to be permanently and totally disabled following the work-related injury, which rendered his pre-existing condition symptomatic and severely debilitating. On appeal, the SIF acknowledged the factual findings of the ALJ and LIRC, but argued the LIRC mis-applied the law as pre-existing permanent partial disability was not symptomatic and, therefore, not compensable. The Court of Appeals found no requirement in the statute that any of the preexisting injuries be "symptomatic" prior to the primary work injury in creating SIF liability for a permanent total disability claim. The requirement is simply that the Commission must find that the combination of the last injury and the preexisting disabilities resulted in permanent total disability. In finding no requirement that pre-existing disabilities must be symptomatic at the time of the second, primary injury, the Court of Appeals upheld the award of permanent total disability against the SIF.

Atchison v. Missouri State Treasurer, 603 S.W.3d 719, 724 (Mo. App. S.D. 2020).

Q: Did an obese employee (deceased) suffering from a heat stroke while working outside suffer a compensable workers' compensation injury despite his obesity being asserted as an idiopathic condition causing his injury?

A: Yes, when there is substantial credible evidence to support working in extremely hot weather constituted an unexpected traumatic event or an unusual strain and was the prevailing factor in causing the employee's heat stroke and resulting death. *Tyler Halsey (Deceased) v. Townsend Tree Serv. Co., LLC*). The exclusion from the category of compensable injuries of an injury resulting directly or indirectly from idiopathic causes is in the nature of an affirmative defense to the employer and is not the employee's burden to prove.

In *Halsey*, the 23-year-old claimant was working outside on July 22, 2016, trimming trees and chipping and hauling brush in extreme heat. Claimant had just been hired and began working for respondent just three days prior to his accident, and previously had not worked in four years. The temperatures during the afternoon of July 22, 2016 in Poplar

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Bluff ranged from 111 degrees to 114 degrees Fahrenheit. While working, claimant passed out and was unresponsive. It was later determined he had a heat stroke. Claimant sadly passed away the following day while in the hospital. Claimant's preexisting conditions included morbid obesity, bipolar disorder, and psychosis. Both physicians performing autopsies on claimant opined he died of hyperthermia, or abnormally high body temperature.

The court found claimant's heat stroke was an "accident" under 287.020.2, being both "an unexpected traumatic event" and an "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." Medical experts testified that although claimant was extremely obese, claimant's occupational activities and the extreme heat on July 22, 2016 were the prevailing factor which caused employee's diagnosed heat stroke and ultimate death.

Interestingly, claimant's counsel argued his claim is not subject to the Missouri Workers' Compensation Act because his obesity qualifies as an idiopathic condition under 287.020.3(3), which provides "An injury resulting directly or indirectly from idiopathic causes is not compensable." The court reviewed idiopathic condition arguments from past cases. They applied the following reasoning and rule:

> [I]n order for an idiopathic condition to qualify for the current workers' compensation exception, the employee's injury must be entirely idiopathic in nature such that no other factor precipitates the injury. In other words, an idiopathic condition qualifies for the exclusion only if it exposes the individual employee to a special risk of injury that only exists because of the presence of the idiopathic condition in that employee.

Because all of the employees of respondent working in the heat on the date of accident were also suffering from heat exhaustion symptoms and were equally exposed to the possibility of heat stroke by their shared working conditions, claimant's injury did not result directly or indirectly from an idiopathic condition. Therefore, the Commission affirmed the award of compensation.

Tyler Halsey (Deceased v. Townsend Tree Serv. Co., LLC Insurer: Ace Am. Ins. Co., Injury No. 16-053905, 2020 WL 1903334 (Mo. Lab. Ind. Rel. Comm'n Apr. 9, 2020)

Q: Whether an employee grabbing the shirt of a co-worker prior to being hit multiple times in the head by that co-worker has suffered a compensable injury under the Act?

A: No. Under RSMo 287.120.1, every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment. The term "accident" as used in this section shall include, but not be limited to, injury or death of the

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employee caused by the unprovoked violence or assault against the employee by any person. Since 1969, Section 287.120.1 has included "unprovoked assaults" within the statutory definition of "accident." The Missouri Court of Appeals has held that it logically follows that injuries from provoked assaults are not compensable. *Van Black v Trio Masonry, Inc.*, 986 SW 2nd 200 (Mo. App. WD 1999).

In *Ford*, Claimant worked as a yard equipment operator for respondent for about a year prior to his alleged work-related injury. There is conflicting testimony in the record from the alleged assailant co-worker and the claimant on the specific events surrounding the physical altercation that took place on June 7, 2015. The testimony that is not contradicted by Claimant, is that both men had sat in a work truck, and that Claimant had requested to ride with his co-worker, Mr. Rhoads during their shift. Mr. Rhoads testified he didn't want to listen to claimant complain about his job, and told claimant to get out of his truck. The two employees exchanged some argumentative and explicative words. Mr. Rhoads testified, and claimant did not deny, that after they were arguing and got out of the truck, claimant grabbed Mr. Rhoads by the collar, and then Mr. Rhoads struck claimant in the head and jaw. Claimant was evaluated by several physicians with complains of dizziness and headaches, but objective findings were inconclusive of a concussion. Claimant then sought workers' compensation benefits for his injuries from the fight with his co-worker.

The Commission affirmed the ALJ's denial of benefits, finding the substantial credible evidence supported the finding that Claimant provoked Mr. Rhoads prior to the assault and fight which subsequently ensued. The LIRC affirmed the denial of benefits and upheld the rule that if an employee physically places his or her hands on another employee prior to being injured in an assault or fight, the employee has provoked the assault and has not suffered a compensable "accident" under Section 287.120.1.

Nathan Ford v. Associated Elec. Coop. Inc. Insurer: Self-Insured, Injury No. 15-047091, 2020 WL 3130119 (Mo. Lab. Ind. Rel. Comm'n June 4, 2020).

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

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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 investigatefacts 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

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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 WL2345247 (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).

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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).

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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),

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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 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).

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Notes Pages

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