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**101**

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# Jurisdiction

- Missouri Obtains Jurisdiction in Three Ways:
  - The injury occurs in Missouri;
  - All injuries and occupational diseases regardless of the location sustained or contracted, provided the contract of employment was entered into the state, unless the contract otherwise provides; and
  - All injuries sustained and occupational diseases contracted outside the state provided that the employment of the injured employee was principally located in the state within 13 calendar weeks of the injury or diagnosis of an occupational disease.

# Employee and Employer Relationship (Who is Covered?)

- Every employer with 5 or more employees (or 1 employee for the construction industry)
- Volunteer: Volunteers of a tax-exempt organization that operates under standards of I.R.C. §501(c)(3) generally are not covered by the Act.
- Numerous exceptions: Is injured individual otherwise employed by the organization and were they paid wages?
- Independent Contractors: Generally, independent contractors are not covered under the Act. However, if the fact pattern indicates that the injured worker truly was not independent but was under the obvious control of the employer at the time of the work incident, then the law is extremely liberal in allowing benefits for the injured worker.
- Temporary Agency Employee: The statutory employer (client) is primarily liable under law for the injury sustained by a temporary agency employee. However, as a practical matter, there is generally an indemnification agreement between the temporary agency and the statutory employer (client) that curtails most litigation in that regard.

# Notice of Injury

- Written notice must be given within 30 days of an accident and bars a claim unless the employee can prove that the employer was not prejudiced by failing to receive the notice.
- Occupational disease and repetitive trauma cases must give written notice within 30 days of diagnosis of the alleged work-related condition or prove the employer was not prejudiced by late notice.

# Claim for Compensation

- Whether or not the employee is disputing the benefits provided, the employee may file a Claim for Compensation (usually with the assistance of an attorney).
- The employee's attorney is entitled to a maximum fee of 25% of the recovery plus costs and expenses.
- An Answer to Claim for Compensation must be filed within 30 days of the Division's notice to the employer. If a timely Answer is not filed, all alleged facts listed on the Claim for Compensation are deemed admitted by the employer.
- However, even with a late answer, jurisdictional legal issues may not be waived.
- In Missouri, an attorney on behalf of the employer/insurer must file an Answer and enter his appearance on behalf of the employer/insurer. In order for the employer to settle a case with the employee, the Division requires that the employer be represented by counsel.

# Statute of Limitations

- If a timely Report of Injury is on file with the state, the formal Claim for Compensation must be filed within two (2) years from the date of injury or within (2) years from the last payment of compensation/benefits, whichever is later. If employer did not file Report of Injury within 30 days from the incident, then the employee has three (3) years from date of injury or last payment within which to file a Claim for Compensation. Of course, if the employer never had knowledge of the alleged incident, then the 2 year statute of limitations may apply.
- The statute of limitations in occupational disease cases shall not begin to run until it becomes “reasonably discoverable and apparent” that an injury has been sustained “related to such exposure.”

# Premises Liability

- An accident is compensable if it occurs on property owned or controlled by the employer. The extension of premises doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual, or accepted routes used by the employee to get to and from their place of employment.
- In addition, there must be a clearly identifiable reason for why an employee slipped and fell at work. The fact that an employee falls at work merely from walking is generally not held to be compensable. “Equal exposure in non-employment life,” therefore not compensable.
- Idiopathic falls: An injury resulting directly or indirectly from idiopathic causes is not compensable by law. Recent expanded judicial interpretations.
- Unexplained Falls: Likewise, per above, unexplained falls are generally not compensable.



# Traveling Employee

- Generally, a traveling employee is covered for workers' compensation injuries that occur from the moment that the employee leaves to the moment that employee gets back from traveling.
- Special Errand: Special errands are generally covered as compensable unless the employee takes a deviation during the errand and the incident occurs before the employee returns to his route back to work. However, this law is liberally construed in favor of the injured employee during a special errand.
- Going and Coming Rule: Generally, injuries that occur while going and coming from the employee's home to the principal place of business or office are not compensable. Injuries in company owned or subsidized automobiles that occur while traveling from the employee's home to the employer's place of business or vice versa are generally not compensable.

# Workplace Assaults/Horseplay

- Unprovoked (claimant neutral) → Compensable
- Claimant is the aggressor → Not compensable
- Private quarrels → Not compensable
- Work related quarrels → Case by case facts
- Mutual horseplay → Not compensable

# Mental Stress

- A general mental stress condition is only compensable if the stress of the job duties were “extraordinary and unusual,” there have been very few reported compensable mental-mental stress cases. General work stress is not compensable.
- Mental stress from a physical injury or single traumatic event is compensable if the incident was the “prevailing factor” in the cause of the condition.

# Recreational Activities

- An injury resulting from a recreational activity is compensable if the employee is: (1) directly ordered by the employer to participate in the recreational activity, or (2) paid wages or travel expenses while participating in the recreational activity, or (3) injured on the employer's premises due to an unsafe condition for which the employer had actual knowledge of while participating in a recreational activity.

# Medical Care and Control

- In Missouri, the employer has the absolute right to direct medical care.
- The employer also has the right to timely independent medical exams and second opinions.
- The only restriction is that of a “reasonable” standard on the number and choices for IME/second opinions. The appearance of doctor shopping is frowned upon.
- Future medical can be awarded against the employer which could involve attendant care and home modifications.
- The employee must submit to all reasonable and necessary treatment and if the employee does not cooperate with reasonable and necessary treatment, benefits can be jeopardized.

# Medical Records

- In terms of medical authorizations, the employee should provide a medical authorization to the employer for related and relevant treatment records, if not, the Division has tools such as a medical authorization form that can be sent to a provider as well as subpoena power for records.

# Medical Authorization Required

- Under Missouri law, the employee must obtain authorization from the employer before going forward with medical care or else the employee's non-authorized medical expenses may not be recovered. The exceptions are for necessary emergency treatment or medical treatment that was wrongly denied by the employer/insurer.

# Medical Fees

- There is no medical fee schedule in Missouri.
- The standard is whether or not the fees were usual, customary and necessary.
- Missouri does allow for utilization review to argue that the fees were not customary and usual or were excessive.
- Statutory remedies/proceedings: Medical Fee Disputes and Application for Payment of Additional Reimbursement of Medical Fees.



# Additional Medical/Vocational Issues

- In terms of settlement, future medical is allowed to be closed out unless specifically left open by the parties. At trial, future medical may be left open for the remainder of the employee's life if awarded.
- The employee must submit in person to an interview by a vocational expert. However, there is no mandatory requirement for vocational rehabilitation.

# Medical Causation “Prevailing Factor”

- The accident must be “the prevailing factor” in causing the injury and “the prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
- Tillotson v. St. Joseph Medical Center (Mo. App. 2012): Allows for ongoing medical treatment if the medical treatment is “reasonably required to cure and relieve the effects of the injury.” Problematic in total knee/shoulder/hip replacement cases.

# Average Weekly Wage (AWW)

- Wages paid for a full 13 weeks prior to the date of injury / 13 = AWW.
- A full week is 5 days of work, if not reduce denominator by 1 week.
- If a bonus was paid during these 13 weeks, deduct up to 3% of the employee's annual salary.
- Two wage statements of similar employees can be used to calculate AWW for new hires.
- For part-time employees minimum calculation of AWW may be the hourly rate multiplied by 30 hours.

# Waiting Period

- The waiting period for payment of temporary total disability is 3 days.
- The 3 day waiting period shall include any day for which the employer is open for business.
- If the disability lasts longer than 14 days payment for the first 3 days shall be made (paid) retroactively to the employee.

# Temporary Total Disability (TTD)

- This rate is equal to 2/3rds of the employee's average weekly wage up to a state maximum.
- TTD is paid during the employee's healing period when the employee is completely disabled per a doctor's note and paid before the employee reaches maximum medical improvement (MMI).
- An employee is barred from TTD benefits during any period of time in which employee receives unemployment compensation.

# Temporary Partial Disability (TPD)

- Equal to 2/3rds of the difference between what the employee was making before the injury and what the employee is making currently with the employer at a lesser paying job during employee's period of temporary disability.
- TPD is only paid during the healing period and before MMI when the employee's work restrictions place the employee in a job with less pay.

# How Layoff, Resignation or Termination Impacts Workers' Compensation Benefits

- If an employee is laid off before he reaches maximum medical improvement, then the case law generally provides that the employer is liable for continued temporary total disability benefits until the employee reaches maximum medical improvement, especially if the restrictions are severe.
- As of August 28, 2017, if the employee voluntarily quits his position at a time when the employer made work available for the employee which was in compliance with any medical restriction imposed upon the employee as a result of an injury, neither temporary total disability nor temporary partial disability benefits shall be payable to the employee. In addition, if the employee is terminated and the employer can show that there was post-injury misconduct or, but for the termination, light duty work would have been available within his restrictions, then an argument can be made that no temporary total disability benefits are payable despite the fact the employee has not reached medical maximum improvement.

# Maximum Medical Improvement (MMI)

- The end of healing is also defined as maximum medical improvement.
- This is generally decided by the treating physician who opines at some point in time that the employee's healing period has ended.



# Permanent Partial Disability (PPD)

- Rate is 2/3rds of the employee's average weekly wage up to a state maximum.
- PPD is paid in a lump sum via settlement or award, after the employee reaches maximum medical improvement (MMI).

# Statutory Benefits i.e. Amputation, Closed Head Injury

- Missouri has a set of scheduled losses.
- For loss of any digit or joint in addition to the compensation payable for scheduled loss, the law provides for an additional 10% compensation to the employee.
- Neck, back, head, face and internal organs are evaluated on the body as a whole (400 week level)
- Max for disfigurement is 40 weeks (head, face, neck, arms ONLY). An employee may receive both permanent disability and disfigurement.

# Impairment Rating

- Allowable in Missouri.
- Based solely on objective findings.
- Missouri does not rely upon the American Medical Association's (A.M.A.) Rating Guide.

# Impairment Rating Continued

- An impairment rating is not required in all cases, such as minor injuries. However, an impairment rating is a good guide for the judge to determine at trial the degree of permanent disability; although, the judge has discretion within the framework of admissible evidence to decide the degree of permanent disability awards.

# Compromised Settlements After MMI

- As of August 28, 2017:
- For all compromised settlements offered after a claimant has reached maximum medical improvement, such claimants have 12 months after receiving an initial permanent disability rating from the employer's physician to acquire a rating from a second physician of his or her own choosing.
- Absent extenuating circumstances, if after 12 months the claimant has not acquired a second rating then any compromise settlement entered into shall be based upon the initial rating. Employee's remedy: Cases will go to hearing.
- Employers may waive these provisions with or without stating a reason.

# Permanent Total Disability (PTD) /Second Injury Fund

- If it is determined that the employee is unemployable in the open labor market, then the employee is deemed to be permanently and totally disabled.
- Second Injury Fund (SIF): Generally SIF is held liable for PTD benefits to the employee if it can be shown that a “qualifying” pre-existing injury was a hindrance or obstacle to the employee’s employment or re-employment and if the primary injury combined with a prior qualifying injury to create a greater disability than the last injury alone.
- If an employee is awarded permanent total disability benefits and later dies from non work injury causes, the permanent total disability benefits cease under more recent statutory provisions (2008).

# Death Benefits

- Employee's dependents are entitled to death benefits at a rate equal to 2/3rds of the employee's AWW up to state maximum for PTD. Burial Benefit: \$5,000.00.
- Employee's widow or widower is entitled to death benefits until he or she remarries.
- The remarried widow or widower then is entitled to immediate lump sum of 2 years of the full weekly death benefit.
- Thereafter, the remaining eligible children continue to receive the full weekly death benefit.

# Death Benefits Continued...

- If there is no widow or widower, the deceased's children or dependents are entitled to the death benefits.
- A child over the age of 18 can continue to receive benefits until the age of 22 if the child is in attendance and remains a full-time student in any accredited educational institution.
- A child can also receive an additional 4 years of benefits after the age of 18 if the child is in active duty in the military.
- An incapacitated child (at the time of incident) may receive benefits for the child's life.



# Death Benefits: Dependents

- Dependent means only the claimant's spouse or the claimant's natural, posthumous, or adopted child or children, including any stepchild claimable by the deceased on his or her federal tax return at the time of the injury. The stepchild/tax return provision was added as of August 28, 2017.
- Partial dependents are not included as of August 28, 2017.

# Hearing Loss

- Missouri provides for compensation for traumatic and occupational hearing loss; however, an employee may not file a claim for occupational hearing loss until employee is removed for one month from the alleged noisy exposure. Generally, we do not see hearing loss claims until after the employee has retired from a noisy exposure job.

# Alcohol and Non-Prescribed Controlled Drugs

- If (1) an employee fails to obey any rule or policy adopted by the employer “relating to a drug-free workplace or the use of alcohol or non-prescribed controlled drugs in the workplace,” and (2) an injury is sustained “in conjunction with the use of alcohol or non-prescribed controlled drugs” the compensation shall be reduced by 50%.
- If the use of alcohol or non-prescribed controlled drugs is in violation of the employer’s rule or policy and it is the proximate cause of the injury, benefits shall be forfeited.
- With regard to blood alcohol level, a rebuttable presumption is created that the employee’s intoxication was the proximate cause of the injury resulting in a forfeiture of all benefits if the blood alcohol content is more than the legal limit (.08 BAC). An employee’s refusal to take a drug or alcohol test at the employer’s request results in benefit forfeiture if: (1) “the employer had sufficient cause to suspect” drug or alcohol use **OR** (2) the employer’s policy authorizes such post-injuries testing.

# Alcohol and Non-Prescribed Drugs

## Continued

- As of August 28, 2017, with regard to positive test for a non-prescribed controlled drug or the metabolites of such drug from an employee shall give rise to a rebuttable presumption that the tested drug was in the employee's system at the time of accident or injury and that the injury was sustained in conjunction with such drug if: (1) the initial testing was administered within 24 hours of the accident; (2) notice was given to the employee of the test results within 14 days of the insurer receiving actual notice of the results; (3) the employee was given an opportunity to perform a second test on the sample; and (4) the initial or any subsequent testing which forms the basis of the presumption was confirmed by mass spectrometry using generally accepted medical or forensic testing procedures.

# Safety Penalty

- Where the injury is caused by the failure of the employee to use safety devices provided by the employer or by employee's failure to obey any reasonable safety rule adopted by the employer, compensation and death benefits shall be reduced at least 25% but not more than 50%.
- It need only be shown that employee had actual knowledge of the rule so adopted by the employer and that employer, prior to the injury, made a reasonable effort to cause the employee to use the safety device or devices or to obey or follow the rule so adopted.

# Triggering Coverage on Repetitive Trauma Claims

- The last employer who exposed the employee to the hazard, “prior to evidence of disability,” is liable. Recent case law from the Commission has held that defining acts for liability is the date in which a doctor suggests that surgery is necessary, date of modified duty, or date of lost time for a condition. The employer with whom the employee was employed on that date was held liable.
- Exception: “Three Month Rule,” if employee was not employed by employer for three months prior to evidence of disability, the immediate prior employer may be liable if prior employment was the “prevailing factor” in the cause of the employee’s condition. The same general rules apply to insurance company versus insurance company liability, but likely with no “Three Month Rule” exception being applied.

# Credits

- There are no everyday credits against workers' compensation liability.
- The only statutory credit is the Professional Athlete Credit.
- Employers of professional athletes are entitled to a dollar-for-dollar credit for contractual wages paid post-injury against workers' compensation benefits payable. *Dubinsky v. St. Louis Blues* (Mo. App. 2007)

# Administrative Proceedings

- Settlement Conference: Available for pro se employees and employer/insurers. An attorney must attend on behalf of the employer/insurer.
- Pre-Hearing: Pre-trial system which is non-binding which attempts to diffuse further litigation.
- Mediation: There is non-binding mediation at the Division of Workers' Compensation during the litigation process.
- Hardship Hearings Following Termination of Workers' Compensation Benefits: The Division is required to set a hardship hearing for any dispute over termination of workers' compensation benefits within 30 days of an employee making a request for hearing.
- Final Hearing: If a matter cannot be resolved through pre-hearing or mediation, a hearing on the record is held to determine award or denial of benefits.



# Recorded Statements

- Recorded statements are allowed.
- If requested by employee (via certified letter pursuant to §287.215 RSMo.), the employer must release to the employee a copy of any and all statements that the employee made in order for such statements to be used at trial against the employee. These statements must be released to the employee within 30 days of the receipt of the certified request. Surveillance video is not a statement under § 287.215 RSMo.

# Surveillance

- Surveillance is permissible in Missouri.
- Surveillance is no longer considered a statement of the employee pursuant §287.215 RSMo.
- However, case law provides for discovery of surveillance video via subpoena deposition of the employer/insurer or their agents.

# Subrogation

- How to Calculate Recovery Lien/Ruediger Formula:
- $$\frac{\text{TTD} + \text{Meds} + \text{PPD}}{\text{Gross or Total 3}^{\text{rd}} \text{ Party Recovery}} = X\% \times \text{Net 3}^{\text{rd}} \text{ Party Recovery} = \text{Comp Lien Entitlement}$$

(Gross or Total of 3<sup>rd</sup> Party Recovery Minus Attorney's Fees and Costs)
- Subrogation Statute of Limitations: Generally, there is a five year statute of limitations for prosecution of personal injury actions and products liability cases. If the employee does not pursue a viable third party claim, the employer may step into the shoes of the employee and pursue the civil claim and the assistance of the employee is mandatory.
- Contribution/Apportionment: None. Missouri has a “no fault” workers’ compensation system.

# Bad Faith and Penalties

- Under §287.203 an award of costs and attorneys' fees may be given to either party in a hardship proceeding where TTD was terminated.
- Under §287.510 the amount of compensation ordered and unpaid may be doubled if the employer does not comply with the temporary award.
- Under §287.560 either party may be subject to attorneys' fees and costs if a frivolous action is brought or defended.
- There are also numerous fraud provisions that could affect the employee, employer/insurer, providers, and anyone involved with workers' compensation system.

# Discharge and Discrimination

- As of August 28, 2017, no employer or agent shall discharge or discriminate against any employee for exercising any of his or her rights under workers' compensation statutes when the exercising of such rights is the motivating factor in the discharge or discrimination.