

EVANS & DIXON
ATTORNEYS AT LAW

MISSOURI WORKERS' COMPENSATION
LEGISLATIVE CHANGES

(Effective Date August 28, 2005)

Presented by

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PRESENT LAW:	NEW STATUTE:
Brackets [] represent current law that has been deleted in SB 1.	Underscore highlights important changes contained in SB1. Effective Date 8/28/05
Commissioner Confirmation	<p>Commissioner Confirmation 286.020</p> <p>Adds requirement that any appointee to the Labor & Industrial Relations Commission be confirmed by the Senate within 30 days after Senate convenes during regular legislative session. If appointee is not confirmed, appointee cannot be reappointed to the LIRC. (This new section eliminates appointee indefinitely serving as "acting commissioners".)</p>
<p>Accident 287.020</p> <p>287.020.2 An accident shall mean an unexpected [or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault]</p> <p>"an injury is compensable if it is clearly work related. An injury is clearly work related if work is a <u>substantial factor</u> in the cause of the resulting medical condition or disability.</p> <p>287.020.3(1) [Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable except where the deterioration or degeneration follows as an incident of employment.]</p> <p>287.020.3 (2) (b) [It can be seen to have followed as a natural incident of the work and</p>	<p>Accident 287.020</p> <p>287.020.2 An accident shall mean an unexpected "<u>traumatic event or unusual strain identifiable by time and place of occurrence</u>" and producing at the time objective symptoms of an injury "<u>caused by a specific event during a single work shift.</u>"</p> <p>287.020.3(1) "An injury by accident is compensable only if the accident was the <u>prevailing factor</u> in causing both the resulting medical condition and disability. The prevailing factor is defined to be the <u>primary factor</u>, in relation to any other factor, causing both the resulting medical condition and disability."</p>

Notes:

<p>(c) It can be fairly traced to the employment as a proximate cause.]</p>	
<p>Idiopathic Events</p> <p>Abels and Alexander – Case law indicates that the idiopathic event is not compensable but the injury resulting from the idiopathic event may be compensable.</p>	<p>Idiopathic Events</p> <p>287.020.3 (3) “an injury resulting directly or indirectly from idiopathic causes is <u>not compensable.</u>”</p>
<p>Cardiovascular</p>	<p>Cardiovascular</p> <p>287.020.3(4)</p> <p>“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”</p>
<p>Going to and Coming From</p> <p>Wells – Present case law extends premises liability for employers.</p>	<p>Going to and Coming From</p> <p>287.020.5</p> <p>“Injuries sustained in <u>company-owned or subsidized automobiles</u> in accidents that occur while traveling from the employee’s home to the employer’s principal place of business or from the employer’s principal place of business to the employee’s home are not compensable. The “<u>extension of premises</u>” doctrine is <u>abrogated</u> 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 accented routes used by the employee to get to and from their place of employment.</p>

<p>287.020</p> <p>Bennett – Present case law expanding compensability of normal daily activity.</p> <p>Kasl and Drewes – Present case law expands compensability of arising out of and in the course of employment.</p>	<p>Case Law Overturned: Bennett, Kasl, Drewes 287.020 (10)</p> <p>287.020 (10) Abrogates three earlier case law interpretations on the meaning of or definition of “accident”, “occupational disease”, “arising out of” and “in the course of” the “employment” to include, but not be limited to, holdings in Bennett, Kasl and Drewes and all cases citing, interpreting, applying, or following those cases.</p>
	<p>Statutory Employers 287.040, 287.041, 287.043</p> <p>Deletes section 287.040.2 from current law, which applied to fraudulent landlord and tenant relationships that were created for the purpose of avoiding liability.</p> <p>Truck Drivers. Clarifies the recurring issue regarding independent contractors and owner/operator truck drivers. Drivers will NOT be deemed to be statutory employees for trucking companies if they are driving for someone else who has leased the truck.</p>
<p>Notice/Last Exposure Rule. 287.063</p> <p>Present law, the employer who last exposed the employee to the hazard prior to the claim being filed is liable.</p>	<p>Notice/Last Exposure Rule; Statute of Limitations 287.063</p> <p>287.063.2. The employer liable for this compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease [for which claim is made] <u>prior to evidence of disability</u>, regardless of the length of time such last exposure, subject to the notice provision of section 287.420.”</p>

Notes:

<p>Bryant - Present case law indicates employee has notice when "aware of medical causation by a doctor." No real defense of notice under present case law.</p>	<p>NOTE: under this new subsection 2, the Notice provision now applies not only to accident but also to occupational disease, including occupational disease by repetitive motion.</p> <p>287.063.3 Statute of Limitations. 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 "<u>related to such exposure.</u>"</p>
<p>Occupational Disease 287.067</p> <p>287.067.2. An injury by occupational disease is compensable only if it is clearly work-related and meets the requirement of an injury under Section 287.020 (i.e. work is <u>a substantial factor</u> in the cause of the resulting medical condition or disability.</p>	<p>Occupational Disease 287.067</p> <p>287.067.2. "An <u>injury</u> by occupational disease is compensable only if the occupational exposure was the <u>prevailing factor</u> in causing both the resulting medical condition and disability.</p> <p>287.067.3 "An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational <u>exposure was the prevailing factor in causing both the resulting medical condition and disability.</u> The prevailing factor is defined to be the primary factor in the relation to any other factor, causing both the resulting medical condition and disability. <u>Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.</u>"</p>

Notes.

<p>Firefighters/Police Officers 287.067.6</p> <p>Current law does not reference police officers.</p> <p>Current law covers volunteer firefighters:</p>	<p>Firefighters/Police Officers 287.067.6</p> <p>Disease of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart or cardiovascular system, including carcinoma, may be recognized as occupational diseases for the purposes of this chapter and are defined to be disability due to exposure to smoke, gases, carcinogens, inadequate oxygen, <u>of paid firefighters of a paid fire department or paid police offices of a paid police department certified under chapter 590, RSMo, if a direct causal relationship is established, or psychological stress of firefighters of a paid fire department if a direct causal relationship is established.</u></p>
<p>Last Exposure Rule 287.067.7</p>	<p>Last Exposure Rule 287.067.8.</p> <p>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 the period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with [a] <u>the immediate prior employer was the [substantial contributing] prevailing factor [to] in causing the injury,</u> the prior employer shall be liable for such occupational disease.</p> <p>This section in combination with changes in 287.063 which places liability on the employer who last exposed the employee to the occupational hazard, "<u>prior to evidence of disability</u>", should settle most controversies.</p>

Notes:

<p>Jurisdiction 287.110</p> <p>Current law: An employee who worked in MO for 2 years and then went to work in another state for the last 6 months could argue that his employment over the entire 2 ½ year period was principally localized in Missouri.</p>	<p>Jurisdiction 287.110</p> <p>If the injury occurs outside Missouri, jurisdiction still may be had in Missouri if the employee's employment was principally localized in Missouri "<u>within thirteen calendar weeks of the injury or diagnosis of the occupational disease.</u>"</p>
<p>Safety 287.120</p> <p>287.120.5 15% Reduction in benefits for Safety violation.</p> <p>[Employer makes a <u>diligent</u> effort]</p> <p>Injury caused by employee's [willful] failure to use safety device.</p> <p>[Employer must post rule in a conspicuous place]</p>	<p>Safety 287.120</p> <p>287.120.5 At least 25% but not more than 50% reduction in benefits; if the employee has actual knowledge of the rule.</p> <p>"Employer makes <u>reasonable</u> effort to cause his or her employees to use safety device or devices"</p>

Notes:

<p>Alcohol/Drug 287.020.6</p> <p>15% reduction</p> <p>287.020.6 (1) [Alcohol/drug policy posted in a conspicuous place....and employee had actual knowledge of the rule/policy]</p>	<p>Alcohol//Drug 287.020.6</p> <p>50% Reduction</p> <p>287.020 6 (3) “The voluntary use of alcohol to the percentage of blood alcohol sufficient under Missouri law to constitute legal intoxication shall give rise to a rebuttable presumption that the voluntary use of alcohol under such circumstances was the proximate cause of the injury. A preponderance of the evidence standard shall apply to rebut such presumption. An employee’s refusal to take a test for alcohol or a non-prescribed controlled substance, as defined by Section 195.010, RSMo, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a non-prescribed controlled substance by the claimant or if the employer’s policy clearly authorizes post-injury testing.”</p>
<p>Recreation 287.120.7</p> <p>Employee’s participation in a [voluntary] recreation activity.</p>	<p>Recreation 287.120.7</p> <p>Deletion of “voluntary” will exclude injuries from all recreational activities, whether ‘voluntary’ or required.</p>

Notes:

Fraud
287.128

Current law, fraud is a Misdemeanor.

Fraud
287.128

NEW LANGUAGE:

287.128.2

Insurance Fraud: Makes it a Class D Felony for an insurance company or self-insurer to “knowingly and intentionally refuse to comply with known and legally indisputable compensation obligations with intent to defraud.”

Also, in 287.128.4: a penalty of either \$10,000 or double the fraud’s value (whichever is greater) applies.

287.128.3 (8)

Fraud and Non-Compliance: Makes it a Class A misdemeanor to “Knowingly make or cause to be made a false or fraudulent material statement to an investigator of the division in the course of the investigation of fraud or noncompliance.”

287.128.5

Invalid Certificates: Makes it a class D felony “for any person, company, or other entity to prepare or provide an invalid certificate of insurance as proof of workers’ compensation insurance.” (no intent required) Also, a penalty of either \$10,000 or double the fraud’s value (whichever is greater) applies.

287.128.7

Failure to Insure Penalty. “Any employer who knowingly fails to insure his liability” shall be guilty of a class A misdemeanor and liable for a penalty “up to three times the annual premium” (instead of double), or a \$50,000 fine (instead of \$25,000).

	<p>287.128.9 <u>Disclosure of Documents:</u> All reports, records, tapes and photographs that are submitted to the fraud/noncompliance unit of the attorney general's office are confidential and not to be disclosed except to law enforcement authorities.</p> <p>287.128.11 <u>Fraud Statute of Limitations:</u> Shall start within 3 years after the discovery of the offense by the aggrieved party or by the attorney general or prosecuting attorney having jurisdiction.</p> <p>Health Care Provider Fraud 287.129 Increases the penalty for certain crimes to a class D Felony if there was a previous conviction.</p>
<p>Medical Examination 287.140</p> <p>Mileage reimbursement outside of local or metropolitan area from the place of [injury or the place of his residence]</p> <p>New law deletes employer's obligation to pay proportional weekly compensation benefit for lost wages for medical examination or physical rehabilitation.</p>	<p>Medical Examination 287.140</p> <p>287.140.1 "When an employee is required to submit to medical examinations or necessary medical treatment at a place <u>outside of the local or metropolitan area from the employee's principal place of employment</u>, the employer or its insurer shall advance or reimburse the employee for all reasonable and necessary expenses."</p> <p>287.140.14 "The employer may allow or require an employee to use any of the employee's <u>accumulated paid leave, personal leave, or medical or sick leave to tend to medical treatment, physical rehabilitation, or medical evaluations during work time.</u>" The intent of this subsection is to specifically supercede and abrogate any case law that contradicts express language of this section.</p>

Notes:

<p>Vocational Rehabilitation 287.143</p> <p>Under current law employers do not have the right to a vocational rehabilitation evaluation.</p>	<p>Vocational Rehabilitation 287.143</p> <p>“An employee shall submit to appropriate vocational testing and vocational rehabilitation assessment scheduled by an employer or its insurer.”</p>
<p>Employer Subrogation Interest on 3rd Party Death Recoveries 287.150</p> <p>Current law: Employer receives a credit for sums paid or payable to the extent of the settlement or recovery in death cases.</p>	<p>Employer Subrogation Interest on 3rd Party Death Recoveries 287.150</p> <p>“<u>Subrogation lien</u>” on death cases, in addition to current law.</p>
<p>Unemployment/TTD 287.170</p> <p>287.170.3 Dollar for dollar credit for TTD/unemployment benefits</p>	<p>Unemployment/TTD 287.170</p> <p>287.170.3. “An employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation”.</p> <p>287.170.4 Employee termination from post-injury employment caused by his or her misconduct forfeits temporary total and temporary partial benefits.</p> <p>“Post injury misconduct shall not include absence from the work place due to an injury unless the employee is capable of working with restrictions, as certified by a physician.”</p>

Notes:

<p>PPD 287.190</p>	<p>PPD 287.190</p> <p>287.190.6(2) <u>“Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing the compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedure;</u></p> <p><u>(3) Any award of compensation shall be reduced by an amount proportional to the permanent partial disability determined to be a pre-existing disease or condition or attributed to the natural process of aging sufficient to cause or prolong the disability or need of treatment.”</u></p>
<p>Hearing Loss 287.197</p>	<p>Hearing Loss 287.197</p> <p>Hearing loss - ANSI Standards</p> <p>Threshold for PPD hearing loss is from 15 to 26 decibels, from 82 to 92 decibels for permanent total disability.</p> <p>Reduces the time an employee has to be separated from noisy work <u>from 6 months to 1 month</u> before the employee can file a claim for hearing loss.</p>

Notes:

<p>Hardship Hearing Costs 287.203</p> <p>[Reasonable cost of recovery shall be awarded to the prevailing party]</p>	<p>Hardship Hearing Costs 287.203</p> <p>Reasonable cost of recovery <u>may</u> be awarded to the prevailing party</p>
<p>Statements 287.215</p> <p>Served within 15 days, Videotapes are statements, per <i>Fisher v Waste Management</i>.</p>	<p>Statements 287.215</p> <p>Served within 30 days</p> <p>“The term statement as used in this section shall not include a videotape, motion picture, or visual reproduction of an image of an employee”, reversing case law. <u>Surveillance videos now do not have to be disclosed prior to trial.</u></p>
<p>Bonus</p>	<p>Bonus 287.253</p> <p>“A monetary <u>bonus</u>, paid by an employer to an employee, of <u>up to three percent</u> of the employee’s yearly compensation from such employer shall <u>not have the effect of increasing the compensation amount used in calculating the employee’s compensation or wages</u> for purposes of any workers’ compensation claim governed by this chapter.”</p>
<p>Reports of Injury 287.380</p> <p>Employer has 10 days to notify the Division.</p>	<p>Reports of Injury 287.380</p> <p>Employer has 30 days <u>after knowledge of the injury</u> to notify the Division. (If not reported within 30 days, a 3-year statute of limitations applies.)</p>

Notes:

Compromise Settlements
287.390

Compromise Settlements
287.390

287.390.1.

“An administrative law judge, or the commission, shall approve a settlement as valid and enforceable as long as the settlement is not the result of undue influence or fraud, the employee fully understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement.”

287.390.5.

“In any claim under this chapter where an offer of settlement is made in writing and filed with the Division by the employer, an employee is entitled to one hundred percent of the amount offered, provided such employee is not represented by counsel at the time of the offer is tendered. Where such offer of settlement is not accepted and where additional proceedings occur with regard to the employee’s claim, the employee is entitled to one hundred percent of the amount initially offered. Legal counsel representing the employee shall receive reasonable fees for services rendered.”

287.390.6.

“As used in this chapter, ‘amount in dispute’ means the dollar amount in excess of the dollar amount offered or paid by the employer. An offer of settlement shall not be construed as an admission of liability.”

<p>Written Notice 287.420</p> <p>Present law requires the employee to give notice within 30 days after the accident [unless the division or commission finds there is a good cause shown for failure to give the notice or that] the employer was not prejudiced by failure to receive the notice.</p>	<p>Written Notice 287.420</p> <p>Notice has to 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.</p> <p>“No proceedings for compensation for any <u>occupational disease or repetitive trauma</u> under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been <u>given to the employer no later than thirty days after the diagnosis of the condition</u> unless the employee can prove the employer was not prejudiced by failure to receive the notice.”</p>
<p>Temporary Award Penalty 287.510</p> <p>Doubling of <u>entire</u> award is allowed.</p>	<p>Temporary Award Penalty 287.510</p> <p>“In any case a temporary or partial award of compensation may be made, and the same may be modified from time to time to meet the needs of the case, and the same may be kept open until a final award can be made, and if the same be not complied with, the amount <u>equal to the value of compensation ordered and unpaid</u> may be doubled in the final award, if the final award shall be in accordance with the temporary or partial award.”</p>

<p>Administrative Law Judges 287.610</p> <p>30 ALJs allowed</p>	<p>Administrative Law Judges 287.610</p> <p>287.610.1 Increases the number of ALJs allowed to 40.</p> <p>287.610.2 ALJ Review Committee is extensively rewritten. The Committee shall establish <u>written performance audit standards</u> by October 1, 2005.</p> <p>287.610.3 Each ALJ shall be reviewed by August 28, 2006 and every two years thereafter. Every ALJ is subjected to a retention vote every 12 years.</p>
<p>Legal Advisors 287.616</p>	<p>Legal Advisors 287.616</p> <p>This entire section which created the legal advisor position is repealed 1/1/06.</p>
<p>Insurer Tax Issue 287.710</p>	<p>Insurer Tax Issue 287.710</p> <p>Tax due by insurers/self-insurers "shall be based upon the <u>application of the current calendar year's tax rate to the premium</u> for the immediately preceding taxable year ending 12/31."</p>

Notes:

<p>Second Injury Tax 287.715</p>	<p>Second Injury Tax 287.715</p> <p>Clarifies that the SIF will be capped at 3% of the policyholders or self-insureds workers' compensation net premiums.</p> <p>Director of the Div. of W.C. shall calculate the SIF surcharge by October 31 for the following year. If not complied with, "any increase in the surcharge shall not be effective for any calendar quarter beginning less than 60 days from the date the director makes such determination."</p>
<p>Interpretation of the Statute 287.800</p> <p>Liberal construed</p>	<p>Interpretation of the Statute 287.800</p> <p>287.800.1 "Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the Division of Workers' Compensation, and any reviewing courts shall construe the provisions of this chapter <u>strictly.</u>"</p> <p>287.800.2 "Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation <u>shall weigh the evidence impartially</u> without giving the benefit of the doubt to any party <u>when weighing evidence and resolving factual conflicts.</u>"</p>
	<p>Religious Exception 287.804</p> <p>Written for Amish who may opt-out of the W.C. system.</p>

Notes:

	<p>Burden of Proof 287.808</p> <p><u>“The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.”</u></p>
<p>Bankrupt Self-Insurers and Proof of Claim 287.865</p>	<p>Bankrupt Self-Insurers and Proof of Claim 287.865</p> <p>Requires the Division to give written notice to claimants who also are employees of bankrupt self-insurers that they must file a proof of claim with the bankruptcy court.</p>
<p>Experience Modification Factor 287.957</p> <p>Current law allows employers to pay total medical cost not exceeding \$500 and no lost time.</p>	<p>Experience Modification Factor 287.957</p> <p>Employers may pay total medical cost not to exceed <u>\$1,000 and lost time is not more than the first 3 days of disability</u>. Those medical costs shall not be including in calculation of the experience modification factor. Employer utilizing this provision must maintain reporting requirements by the Division. (All reports of injury should still be sent to the TPA or insurance company as the Division requires electronic reporting.)</p>

Notes: