

A. BASIC REQUIREMENTS UNDER THE LAW - PARTIAL & TOTAL DISABILITY

1. Permanent Partial Disability

Permanent partial disability is defined by section 287.190 as a disability that is permanent in nature and partial in degree. § 287.190.6, Mo. Rev. Stat. (1998). Thus, by being partial in nature, the employee is able to return to some type of work with the disability, as opposed to permanent total disability where the employee can no longer work in the open labor market.

a. Breakdown of Disability and Amounts to be Paid

The key question is how the level of disability is determined, and what factors a court will consider in making a decision. However, to adequately understand how a court renders its determination regarding the nature and extent of disability, it is important to first look at how disability has been broken down under the statute and what amounts are payable.

If an employee sustains compensable permanent partial disability, the employer should pay the employee compensation in addition to any payments for temporary total disability or temporary partial disability. The amount payable for permanent partial disability is computed at the weekly rate of compensation in effect on the date of the accident. Determining the weekly compensation rate depends on a number of factors including the maximum and minimum compensation rates provided by law, whether the employee worked for the same employer for the year prior to the injury, whether the employee was a part-time worker, and whether the employee was under the age of 21.

Once the average weekly wage has been determined, the permanent partial compensation rate can be calculated. As with temporary total disability, the permanent partial disability rate is generally 2/3 of the average weekly wage subject to certain maximums and minimums set forth by Missouri law. §287.190.5, Mo. Rev. Stat. (1998).

Permanent partial disability is paid for a proportionate loss of use of one or more of the members listed in the “schedule of losses” in subsection 1 of section 287.190 of the Missouri Workers’ Compensation Statute. This schedule includes items such as arms, hands, legs, feet, toes, deafness in one or both ears, and loss of sight. §287.190.1, Mo. Rev. Stat. (1998). If an employee suffers a 100% loss of use of any of the 29 things listed in the list of scheduled losses, the number of weeks of compensation allowed by the schedule for such a disability will be increased by 10%. §287.190.2, Mo. Rev. Stat. (1998). (See Division of Workers’ Compensation Chart No. 1 - Permanent Partial Disability Schedule and Division Graph of Maximum Rates at the end of this section for more information.)

Anything not listed in the schedule of losses is considered an unscheduled loss. Unscheduled losses include things such as injuries to the head, neck, back, as well as cardiovascular problems. A psychological injury or a work-related depression will also be classified as an unscheduled loss. Parker v. Mueller Pipeline, Inc., 807 S.W.2d 518 (1991). Interestingly, tinnitus, which is ringing in the ears, has been found to be loss to the body as a whole rather than a specific loss of hearing. Poehlein v. Trans Work Airlines, 891 S.W.2d 505 (Mo. Ct. App. 1994).

Subsection 3 of section 287.190 states “[f]or permanent injuries other than those specified in the schedule of losses, the compensation shall be paid for such periods as are proportionate to the relation which the other injury bears to the injuries above specified, but no period shall exceed 400 weeks, at the rates fixed in subsection 1. The other injuries shall include permanent injuries causing a loss of earning power.” § 287.190.3, Mo. Rev. Stat. (1998). Also, if an employee has multiple scheduled injuries, these injuries may be combined and compensated as an unscheduled loss. This is discussed further later in this section.

Section 287.190 also provides for compensation for an employee who is seriously and permanently disfigured about the head, neck, hands or arms. Subsection 4 indicates that the Division or Commission may allow an additional sum of compensation for disfigurement as it may deem just, but noted that the sum should not exceed 40 weeks of compensation. This subsection specifically indicates that an Administrative Law Judge (ALJ) may use a photograph of the disfigurement in making his or her determination of compensation. §287.190.4, Mo. Rev. Stat. (1998). The rate of compensation for disfigurement is not specifically indicated in the statute, but since this subsection is in the general section of permanent partial disability, it is customary for the rate to be the same rate used in determining a permanent partial disability award.

b. Determining the Percentage of Disability

An assignment of residual disability in a workers’ compensation case is within the expertise of the Labor and Industrial Relations Commission. Cook v. Sunnen Products,

Corp., 937 S.W.2d 221, 226 (Mo. Ct. App. 1996). First, it is important to note that a finding regarding permanent partial disability will not be rendered until the claimant is a maximum medical improvement, meaning that the employee's condition has stabilized. Only then can the level of permanent disability be determined. Determining a disability percentage is largely a question of fact, and the ALJ relies on medical evidence, the testimony of the claimant, and his or her own determinations as to credibility when making a decision. As with the other elements of a claim, the claimant does not have to establish permanent partial disability on the basis of absolute certainty, but only by a "reasonable probability." Cook, 937 S.W.2d at 223. "Reasonable probability" means probability founded on reason and experience which inclines a person to believe it, but may leave some room for doubt. Id.

The Labor and Industrial Relations Commission and the Division of Workers' Compensation are charged with the responsibility of passing on the credibility of witnesses, and the Commission's acceptance or rejection of part or all of the witnesses' testimony can not be disturbed on review, unless its acceptance or rejection is against the overwhelming weight of the evidence. Hunsberger v. Poole Truck Lines, 886 S.W.2d 656 (Mo. Ct. App. 1994). Thus, an appellate court will defer to the Commission on issues concerning the weight to be given to conflicting testimony. As for the weight to be given to a particular expert opinion, the Commission has sole discretion to make a determination. Rana v. Landstar TLC, 46 S.W.3d 614, 620 (Mo. Ct. App. 2001). This means the ALJ's judgment calls regarding who is believable are paramount in decision making. If there is a

close call to be made with regard to credibility, the ALJ will many times side with the claimant in order to give a liberal construction of the statute.

Evidence presented largely consists of the claimant's testimony regarding how the injury occurred and how it has affected his or her life. It also consists of the claimant's medical records, which document the history given to the medical provider including the facts surrounding injury and the progression of complaints, and which also document objective findings from tests and physical examinations. Evidence regarding disability will include testimony from physicians as to the percentage of impairment that the claimant has suffered. The Commission is not bound by exact percentages of disability estimated by medical experts and is free to deviate from those percentages, especially when there is additional testimony as to the claimant's reduced ability to function. Jost v. Big Boys Steel Erections, Inc., 946 S.W.2d 777, 779 (Mo. Ct. App. 1997). This means that the Commission can consider all of the evidence in arriving at a percentage rating for a claimant's permanent partial disability because the degree of a claimant's disability is not solely a medical question. Lytle v. T-Mac, Inc., 931 S.W.2d 496, 501 (Mo. Ct. App. 1996).

Furthermore, it should be noted that recovery may be had for permanent partial disability, notwithstanding the fact that the injured employee suffered no loss of time from work and no immediate loss of earning power, if it appears there is an injury that caused a partial loss of bodily function and an impairment of the efficiency of the person in the ordinary pursuits of life. Gordon v. Chevrolet-Shell Division of General Motors Corp.,

269 S.W.2d 163 (Mo. Ct. App. 1954). For example, the Missouri Court of Appeals has found that an employee's return to full work did not render an award of 400 weeks for permanent partial disability excessive, where the employee was impaired in ordinary pursuits of his life due to many injuries. Sapienza v. Deaconess Hosp., 738 S.W.2d 149 (Mo. Ct. App. 1987).

c. Scheduled v. Unscheduled Losses & Multiple Injuries

The weeks totaling what each scheduled loss is worth has been determined by the Missouri state legislature. As mentioned above, physicians will testify to the percentage loss of use and then ALJ, as the trier of fact, will decide what is appropriate. Often this decision may go beyond the facts of the case and will be influenced by precedent and custom. For example, a compensable torn rotator cuff which has been surgically repaired can yield a percentage disability around 25-35% loss of use of the arm at the shoulder. An ALJ will most likely have that percentage in mind and then go higher or lower based on facts that are presented. There are similar customary awards for each type of injury that is treated in a certain way, such as with physical therapy, injections, surgery, etc.

Loss of hearing and loss of sight are listed among scheduled injuries. §287.190, Mo. Rev. Stat. (1998). Both of these losses have specific rules set forth for the determination of loss. See 8 CSR 50-5.020 and 8 CSR 50-5.060. Awards for all scheduled and unscheduled injuries are based on disability prior to artificial correction. For example, the Missouri Court of Appeals has held that an award for an injury to an eye is properly

based on an actual loss of vision, and not on a loss of vision when corrected by corrective lenses. Graf v. National Steel Products Co., 38 S.W.2d 518 (Mo. Ct. App. 1931).

Sometimes two or more injuries to a smaller portion of a larger part may require a rating to the larger part rather than individually to the smaller injured portions. For example, when a claimant suffered crushing injuries to two fingers, and subsequent treatment left the fingers in a fixed, contracted position with atrophy in the fingers and loss of strength and impairment of grasp in the hand, the Commission was to determine percentage disability which the injury caused to the hand, rather than base an award on a scheduled loss of use of the fingers. Lowery v. ACF Industries, Inc., 428 S.W.2d 7, 11 (Mo. Ct. App. 1968).

There seem to be two ways to deal with multiple injuries. The first way is to combine the injuries, scheduled or unscheduled, to determine the disability to the whole person. The other way is to recognize that by having multiple injuries the claimant has an increased disability of a certain percentage. This percentage is determined and then added to the final award.

The first way to handle multiple injuries is to treat them as an unscheduled loss and award a loss to the person as a whole. For example, if a claimant suffered an elbow strain, a fractured ankle, and a concussion as a result of a compensable fall, the Division may award a loss of use of the body as a whole, taking into account all the injuries, rather than awarding separate percentages for loss of use of the arm, leg and body as a whole. The following two cases help illustrate this concept. In Haggard v. Snyder Const. Co., 479

S.W.2d 142 (Mo. Ct. App. 1972)., the Court found that where the claimant's permanent injury was not confined to his arm, but also affected his shoulder and neck, the injury was not specifically a scheduled loss. It was an injury for which compensation was to be fixed according to the proportionate relation which the injury bore to the loss of the normal function of the body as a whole. Id. In Teel v. F. Burkart Mfg. Co., 281 S.W.2d 259 (Mo. Ct. App. 1954), the Court held that the when the claimant suffered multiple injuries as a result of a fall, the Commission could properly find disability to be 35% loss of use of the man as a whole, as opposed to a determination with regard to rating specific disabilities set out in the statute.

Although not specifically provided for in the statute, case law has set out another way to deal with multiple injuries. The court may award a "multiplicity factor" if an employee has sustained an injury to two or more parts of his or her body. That employee may be entitled to additional compensation above the sum owed for each of his or her individual disabilities if there is evidence that the combination of those disabilities exceeds the sum owed for the disabilities individually.

The Court in Eagle v. City of St. James awarded the claimant a 10% additional award for multiplicity of injuries where the claimant was found to have sustained 75% loss of use of his shoulder, 10% loss of use of a knee and 5% loss of use of the body as a whole. 669 S.W.2d 36, 41 (Mo. Ct. App. 1984). The claimant's total award was for 210 weeks, and the 10% multiplicity factor was calculated according to that figure and equaled an additional 21 weeks. Id. When the employer challenged this decision by arguing that no

authority for this was granted in the statute, the Eagle court responded that the section providing for permanent injuries, other than those specified in the schedule of losses, did not prohibit a special or additional allowance for cumulative disabilities resulting from a multiplicity of injuries. Id. at 42.

In Struma v. General Installation Co. of Missouri-Illinois, the employer appealed a Commission award allowing a multiplicity factor award for multiple injuries to the same part of the body. 739 S.W.2d 586, 587 (Mo. Ct. App. 1987). In that case, the Commission awarded the claimant 15% loss of use of the body for disability to his low back, 15% for disability to his neck, and 10% for multiplicity of injuries. The Court upheld the Commission decision based on the Eagle decision and the discretion the Commission is allowed when making decisions regarding the percentage of disability to be awarded. Id. at 588. The multiplicity factor is also commonly referred to as a load factor.

Finally, it should be noted that a claimant can receive compensation for both scheduled and unscheduled losses. However, the total period of compensation should not exceed 400 weeks. Schwartz v. Shamrock Dairy Queen, 23 S.W.3d 768 (Mo. Ct. App. 2000). In the Schwartz case, the claimant was a paraplegic who continued to work and sought compensation for permanent partial disability. A physician rated his disabilities as 100% loss of use of each leg (which in itself equals over 400 weeks), 60% loss of use of the body as a whole for neurogenic bladder, 20% loss of use of the body as a whole for sexual dysfunction, 15% loss of use of the body as a whole for psychological injuries, etc. Schwartz, 23 S.W.3d at 770. These ratings totaled over 1000 weeks of compensation, and

the Court held that according to the statute, recovery was limited to 400 weeks of compensation. Id. at 774.

d. Preexisting Disability

When a claimant has a preexisting disability that bears upon a claim for permanent partial disability, the claimant must offer expert testimony as to the extent of preexisting disability in order to determine what percentage of permanent partial disability is attributable to the work-related disability. Miller v. Wefelmeyer, 890 S.W.2d 372, 376 (Mo. Ct. App. 1994). A failure to offer expert testimony regarding percentage of disability derived from compensable injury bars a claimant from recovering permanent partial disability benefits. Id. However, if the claimant has a preexisting condition that is not disabling, that condition does not bar recovery of compensation if a work-related injury causes that preexisting condition to escalate to the level of a disability. Id.

Also, when a claimant has made claims for two separate work-related injuries that were sustained while employed by the same company, he or she is still required to provide expert medical testimony regarding the extent of preexisting injury to recover permanent partial disability benefits for the second work-related injury. Goleman v. MCI Transporters, 844 S.W.2d 463, 465-66 (Mo. Ct. App. 1992). The Missouri Court of Appeals has noted that a claimant is required to do this because often two separate claims are pending for each injury. Id.

The case of Reeves v. Midwestern Mortg. Co. further examined this rule. In that case, the claimant testified that prior to the work-related accident, she had been in good physical and mental health. Reeves, 929 S.W.2d 293, 295 (Mo. Ct. App. 1996). However, the psychiatrist retained by the employer stated that it was his opinion that the claimant had a preexisting psychiatric disorder unrelated to the accident, and he rated her as having 10% preexisting disability. Id. The Court held that the claimant was not required to present expert testimony regarding the extent of a pre-existing injury in order to recover permanent partial disability benefits because she denied that she had any pre-existing disability and was seeking a permanent total disability award rather than a permanent partial disability award. Id. at 296.

2. Permanent Total Disability

According to the Missouri Workers' Compensation Statute, the term "total disability" means an employee is unable to return to "any employment" and not merely unable to return to "the employment in which the employee was engaged in at the time of the accident." § 287.020.7, Mo. Rev. Stat. (1998).

An inability to return to "any employment" has been interpreted to mean that after considering the manner that duties are customarily performed by the average person engaged in such employment, the employee is no longer able to perform the usual duties of employment. Reves v. Kindell's Mercantile Co., Inc., 793 S.W.2d 917, 920 (Mo. App. Ct. 1990). Courts have found that a claimant who is "only able to work very limited hours at rudimentary tasks" is totally and permanently disabled. Grgic v. P & G Const., 904

S.W.2d at 466 (citing *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo. Ct. App. 1990)). Thus, an employee does not have to be completely inactive or inert to be considered permanently and totally disabled. *Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274 (Mo. Ct. App. 1994). Rather, the question is whether any employer in the usual course of business would reasonably be expected to employ the claimant in his or her physical condition. *Reves*, 793 S.W.2d at 920.

The legal test for permanent total disability is “whether, given the claimant’s situation and condition, he is competent to compete in the open labor market . . . The central question is whether in an ordinary course of business, an employer would reasonably be expected to hire the claimant in his present physical condition reasonably expecting him to perform the work for which he is hired. . .” *Grgic v. P & G Const.*, 904 S.W.2d 464, 466 (Mo. Ct. App. 1995) (citing *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781 (Mo. Banc 1983)).

Subsection 2 of section 287.200 indicates that all claims for permanent total disability should be determined in accordance with the facts. § 287.200.2, Mo. Rev. Stat. (1998). Case law indicates that an award of the Labor and Industrial Relations Commission should be based upon substantial and competent evidence. *Frenzel v. Stark Printing Co.*, 804 S.W.2d 774 (Mo. Ct. App. 1990). Therefore, the claimant has the burden of proving that he or she is permanently and totally disabled through the presentation of substantial and competent evidence. The Missouri Court of Appeals has held that the Labor and Industrial Relations Commission is not dependent solely on medical evidence from expert

witnesses when making its finding. Story v. The Southern Roofing Co., 875 S.W.2d 228, 230 (Mo. Ct. App.1994). The testimony of lay witnesses, including the claimant, can constitute substantial evidence of nature, cause and extent of disability, especially when supported by medical evidence. Id. The Labor and Industrial Relations Commission and the Division of Workers' Compensation may also consider such factors such as education, academic record and work history, as well as vocational experts' testimony and written evaluations regarding a claimant's ability to compete for employment in the open labor market. Id. at 233.

Interestingly, it appears that a claimant's age can be properly considered when the Labor and Industrial Relations Committee and the Division of Workers' Compensation find that a claimant is totally disabled. Reves, 793 S.W.2d at 921. In Reves v. Kindell's Mercantile Co., Inc., the Missouri Court of Appeals commented that "[t]he the court will look at the employee's age and the work in which he has experience and will ask: Given the employee's age, could he be considered for another type of job? Given his physical (or mental) condition, could anyone be expected to employ this person?" 793 S.W.2d 917, 921 (Mo. App. Ct. 1990) (citing Kenter, Missouri Workers' Compensation (1989), subsection 7:7). Also in Reves, the court held that retirement is not the equivalent of a return to normal work, and thus, concluded that the claimant's permanent total disability benefits would not be suspended after her 65th birthday even though she would receive Social Security retirement benefits, and even though there were allegations that the claimant intended to voluntarily retire on her 65th birthday.

Once a claimant receives an award for permanent and total disability, compensation should be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under subsection 1 of section 287.200 on the date of injury, which is usually sixty-six and two-thirds of the claimant's average weekly wage, subject to the maximum and minimum rates in regard to the state average weekly wage.

This award is reviewable under section 287.200.2 of the Missouri Workers' Compensation Statute, which states:

"when an injured employee receives an award for permanent, total disability but by the use of glasses, prosthetic appliances, or physical rehabilitation to the employee is restored to his regular work or its equivalent, the life payment mentioned in subsection 1 of this section shall be suspended during the time in which the employee is restored to his regular work or its equivalent. The employer and the division shall keep the file open and the case during the lifetime of any injured employee who has received an award of permanent total disability. In any case where the life payment is suspended under this subsection, the commission may at reasonable times review the case and either the employee or the employer may request an informal conference with the Commission relative to the resumption of the employee's weekly life payment in the case."

§ 287.200.2, Mo. Rev. Stat. (1998).

It appears that a party could petition for a review of an award under the above-cited section or section 287.470, which is the more general review section, which states:

Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the commission may at any time upon a rehearing after due notice to the parties interested review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall immediately send to the parties and the employer's insurer a copy of the award. No such review shall affect such award as regards any money's paid.

§ 287.470, Mo. Rev. Stat. (1998).

Bunker v. Rural Electric Cooperative is the Missouri Court of Appeals' recent interpretation these two sections of the Missouri Workers' Compensation Act in a permanent total disability fact setting. Bunker v. Rural Elec. Co-Op., 46 S.W.3d 641 (Mo. Ct. App. 2001) . In that case, the claimant's injuries resulted in the amputation of his left arm and right leg, and he was awarded permanent total disability. Bunker, 46 S.W.3d at 642. The claimant eventually began wearing an arm prosthesis for cosmetic reasons, but due to the level of amputation of his leg, he could not wear a leg prosthesis and was bound to a wheelchair. Id. He also began volunteering at a nonprofit organization and taking college courses. Eventually he earned his bachelor's degree in accounting and was hired as a Revenue agent for the City of Kansas City. Id. at 643.

Following these events, the employer suspended disability payments and filed a motion to terminate total disability benefits pursuant to section 287.470, because the claimant was no longer permanently and totally disabled and was employed in the open labor market. The employer alternatively sought a suspension of benefits under section 287.220.2. Id. at 643

The Court addressed the section 287.470 argument first and held that the Commission did not err when it interpreted that section to mean that there has to be a change in *physical* condition. The Court cited precedent reflecting that section 287.470 was only applicable in situations where the claimant's original physical condition, the one the award was predicated upon, had materially changed. Bunker, 46 S.W.3d at 645 (reviewing legislative history and citing Kramer v. Labor & Indus. Relations Comm'n, 799 S.W.2d 142, 145 (Mo. Ct. App. 1990)). It examined the case of Vandaveer v. Reinhart & Donovan Construction Co., and noted that similarly, the claimant in that case began working and was regularly hired as other employees. Id. at 646 (discussing Vandaveer, 370 S.W.2d 156 (Mo. Ct. App. 1963)). The Court pointed out that the Vandaveer court had stated that the claimant was not permanently totally disabled as defined in the statute, but then commented that that fact did not seem to be dispositive because the Vandaveer court went on to examine whether there had been a substantial change in the claimant's physical condition. Id. The Court in Bunker then quoted language from Vandaveer and concluded that "[i]t is evident that the court found the significant changes in the physical

condition of the Employee to be a determining factor in whether there was a ‘change in condition’ under the statute.” Id.

Thus, the Court held the employer was not entitled to a review of the award based upon the fact that the claimant had obtained an education and was now employed because original condition had not changed from the time the Commission made its decision.

Bunker, 46 S.W.3d at 647.

The Court then went on to address a suspension of benefits pursuant to section 287.200.2. It noted that the employer had conceded that the use of a prosthetic arm was only cosmetic and had not restored the claimant to regular employment, and then held that a wheelchair could not be considered a “prosthetic appliance” and was not the equivalent of the use of a “prosthetic appliance” within the definition of the workers’ compensation statute requiring suspension of permanent total disability benefits during the time that the claimant is restored to his regular work through the use of a “prosthetic appliance”.

Bunker, 46 S.W.3d 649. The court commented that the word “prosthesis” should be given its plain and ordinary meaning as “an artificial device to replace a missing part of the body.” Id. at 647.

Therefore, a party can petition for review of an award for permanent total disability if there has been a material change in physical condition of the employee since the time of the award and/or if a prosthetic device has restored the claimant to his or her regular work or equivalent. It does not appear that the term “physical rehabilitation” from section 287.200.2 has been tested yet as a basis for review in any Court of Appeals cases.

B. THE ROLE OF PHYSICIANS

The role of physicians in establishing permanent disability is fairly apparent in light of the discussion above. With regard to permanent partial disability, physician testimony is needed to clarify what the injury is, what treatment was and is appropriate, whether the claimant is at maximum medical improvement, what level of disability the claimant suffers, whether the disability is permanent, whether the claimant has physical limitations, and whether treatment will be required in the future. Often there will be more than one medical opinion before an ALJ, and he or she will have to decide which opinion will receive more weight.

Although not specifically required by statute, physicians will typically render an opinion regarding the disability percentage a claimant has suffered as the result of an injury. This opinion and rating should be based upon a thorough review of the medical records and usually a physical examination of the claimant. A rating based on the American Medical Association's guidelines for impairment is not recognized as dispositive

in Missouri. As mentioned above, these medical opinions are persuasive, but an ALJ is not bound by an expert's opinion as to percentage and may assign a disability rating lower or higher than expressed in a medical opinion. Jost v. Big Boys Steel Erections, Inc., 946 S.W.2d 777, 779 (Mo. Ct. App. 1997).

With regard to permanent total disability, it appears that a physician can testify to whether an employee is totally disabled, and may be considered qualified to refute a vocational expert's testimony. Hamby v. Ray Webbe Corp., 877 S.W.2d 190, 193 (Mo. Ct. App. 1994). However, a cumulative review of case law seems to indicate that an employee making a claim for permanent total disability should have a vocational rehabilitation expert's opinion in evidence, especially if the employer or the second injury fund have both medical and vocational opinions supporting their defense.

Also, Missouri allows an award of future medical treatment, so physician testimony will be central to a claimant's case for future medical treatment. According to Mathia v. Contract Freighter, Inc., the claimant's right to future medical treatment will not be denied because it has not yet been prescribed as of the date of the hearing or because the claimant has achieved maximum medical improvement. 929 S.W.2d 271 (Mo. Ct. App. 1996). It is not necessary for a claimant seeking future medical benefits to produce conclusive evidence to support their claim. Id. at 278. A claimant can prove entitlement to an allowance of future medical treatment by showing that there is a "reasonable probability" that they will need future treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601 (Mo. Ct. App. 1997). "Reasonable probability", as discussed earlier, has to be founded on

reason and experience. Dean, 936 S.W.2d at 605. Again, this is a fact question, and if medical records and testimony from a physician and the claimant are found persuasive, it is within the authority of the Division to award future medical expenses.

C. VOCATIONAL REHABILITATION

Under the Missouri Workers' Compensation statute, vocational rehabilitation services are not mandatory. §287.143, Mo. Rev. Stat. (1998). Section 287.143 states that the sections that follow it, sections 287.144 to 287.149, "shall not be construed to require the employer to provide vocational rehabilitation to a severely injured employee."

Sections 287.144 through 287.149 merely set out guidelines regarding vocational rehabilitation once it is initiated. In summary, section 287.144 sets out the definitions of terms used in sections 287.144 to 287.149 and the requirements for being considered a "rehabilitation practitioner"; section 287.145 requires that rehabilitation providers obtain certification from the Division; section 287.146 sets out the duties of the director of the division of workers' compensation in regard to vocational rehabilitation; section 287.148 sets out requirements regarding instituting vocational rehabilitation in regard to plans, duration, and cost of rehabilitation; and section 287.149 deals with when benefits are to be paid or reduced. In regard to permanent disability, subsection 2 of section 287.149 states

that permanency of an employee's disability under the permanent partial and permanent total disability sections should not be determined or adjudicated while the employee is participating in rehabilitation services. §287.149, Mo. Rev. Stat. (1998).

Interestingly, subsection 3 of section 287.149 provides that “[r]efusal of the employee to accept rehabilitation services or submit to a vocational rehabilitation assessment as deemed necessary by the employer shall result in a fifty percent reduction in all disability payments to an employee, including temporary partial disability benefits paid pursuant to section 287.180, for each week of the period of refusal.” §287.149.3, Mo. Rev. Stat. (1998). This section has yet to be interpreted by the Missouri Court of Appeals, and it is unclear what context this section is to be interpreted in or what impact it has in light of the non-mandatory nature of vocational rehabilitation and the case of Lakeman v. Siedlik, which is discussed below.

Examining the status of vocational rehabilitation in other states is helpful in determining where it fits within Missouri Workers' Compensation Law. For example, some other states have wage differential provisions to address a loss of earning capacity situation. These provisions provide that an employer has to pay for any difference between the employee's pre-injury wage and their post-injury wage if there is a decrease in a worker's earning capacity as a result of an injury. See for example 820 ILCS 305/8(d)(1). Therefore, vocational rehabilitation is initiated to help determine what the wage differential will be and to assist the employee in finding a position with wages comparable to his or her

pre-injury wage. This reduces liability for the employer and can often be initiated by either party in appropriate situations.

In Missouri, there is no statutory provision regarding wage differentials. The claimant cannot compel the employer to offer vocational rehabilitation or initiate it on his or her own and then seek payment or reimbursement from the employer. Often vocational rehabilitation is not administered in an active attempt to help the employee to rejoin the labor market in as close to a pre-injury wage as possible, but simply rather to assess whether the employee is employable in the open labor market for the purposes of determining permanent total disability.

In the case of Lakeman v. Siedlik, the Missouri Court of Appeals opined that an Administrative Law Judge (ALJ) lacks authority to order a claimant to undergo a vocational rehabilitation evaluation at the request of either the Second Injury Fund or the employer. 872 S.W.2d 503 (Mo. Ct. App. 1994). In that case, the claimant was evaluated and obtained a report from a vocational expert of his choice, and the ALJ ordered the claimant to submit to an examination by a vocational rehabilitation expert selected by the Second Injury Fund and the employer. Lakeman, 872 S.W.2d at 505. The Court supported its decision that the ALJ lacked authority to order the claimant to attend such an examination by explaining that the workers' compensation statute only expressly grants certain parties the right to have a physician conduct a medical evaluation of the claimant, and does not grant any authority to compel an examination of the claimant by a non-medical evaluators. Id. at 506

Clearly, the employee may wish to hire a vocational rehabilitation specialist to evaluate his or her case and establish and testify to his or her employability in claim for permanent total disability. However, absent consent to an examination by the employee, an employer's vocational rehabilitation expert will be left to analyze the records of the case, and opine without examination of the claimant.

D. THE IMPACT OF REPRESENTATIONS AS TO DISABILITY BY WORKERS IN APPLICATIONS FOR SOCIAL SECURITY BENEFITS

The most important issues to be considered when a workers' compensation claimant has applied for and/or is receiving social security disability benefits have already been discussed in the section relating to offsets. However, in claims for permanent total disability, the claimant may attempt to enter in evidence information regarding his or her application and status with the Social Security Administration. While such evidence, including statements made as to disability, may be used for impeachment and other acceptable evidentiary purposes, the claimant's status as disabled with the Social Security Administration is not conclusive or persuasive in a workers' compensation proceeding. For example, just because the Social Security Administration has found an employee totally disabled and unable to work, does not mean that the same employee is permanently and totally disabled according to the standards set out by the Missouri Workers' Compensation Statute and interpreting case law.

The rationale for this is that the standards of proof required under each of these statutes is not the same. There is little case law available to illustrate this; however, the Labor and Industrial Relations Commission's opinion in Joy Collins v. Quaker Oats Co., Injury No.: 90-109486, noted in a footnote that the Commission would not consider any evidence regarding social security disability because they found it irrelevant to the case in light of the different standards of proof. 1997 WL 359137 (Mo.Lab.Ind.Rel.Com.).

E. ALTERNATIVE EMPLOYMENT OBLIGATIONS

If, after an employee is found permanently and partially disabled, he or she is unable to return their regular job following the injury, the employer has no obligation under the Workers' Compensation Statute to make accommodations for that employee. As mentioned above, an employer is not required to provide vocational rehabilitation to the worker in an attempt to help him or her to obtain a different job.

Of course a claimant's lack of return to his or her regular job because of physical disability is something very different from an employee discharged in retaliation for the filing of a workers' compensation claim. (Retaliatory discharge is beyond the scope of this topic and will not be discussed.) Also, it is important to note that although the employer is not required to make alternative employment arrangements under the Workers' Compensation Statute, under the Americans with Disabilities Act, the employer may have certain responsibilities to make accommodations for a disabled employee.