

REVIEW OF THE NEW WORKERS' COMPENSATION LAW
Senate Bills Nos. 1 & 130

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¹ This contains revisions to the March 31, 2005 Review.

Table of Contents

<u>Item</u>	<u>Section</u>	<u>Topic</u>	<u>Page</u>
1.....	286.020.....	Commissioner Confirmation.....	3
2.....	287.020.....	Definitions: Accident, Injury and Prevailing Factor	3
3.....	287.040.....	Statutory Employer/Truck Drivers	4
4.....	287.063.....	Occupational Diseases - Last Exposure.....	4
5.....	287.067.....	Occupational Diseases - Defined	5
6.....	287.110.....	Jurisdiction/Principally Localized	5
7.....	287.120.....	Safety Rules/Alcohol and Drugs/Recreational Activities.....	5
8.....	287.127.....	Posted Notice of Rights	6
9.....	287.128.....	Fraud Provisions.....	7
10.....	287.129.....	Health Care Provider Fraud	7
11.....	287.140.....	Medical/Mileage/Sick Leave/TTD	7
12.....	287.143.....	Vocational Evaluations.....	8
13.....	287.150.....	Employer Lien on 3 rd Party Recoveries.....	8
14.....	287.170.....	Unemployment Compensation/Post-Injury Termination	8
15.....	287.190.....	Permanent Disability Defined/Objective Medical Findings	8
16.....	287.197.....	Hearing Loss/One-Month Separation	8
17.....	287.203.....	Hardship Hearing Costs	8
18.....	287.215.....	Surveillance Not A “Statement”	9
19.....	287.253.....	Bonuses/Average Weekly Wage	9
20.....	287.380.....	Reports of Injury	9
21.....	287.390.....	Compromise Settlements/Offers Before Representation.....	9
22.....	287.420.....	Written Notice	9
23.....	287.510.....	Temporary Award Penalty Reduced.....	10
24.....	287.610.....	Administrative Law Judges.....	10
25.....	287.615.....	Chief Legal Counsel	10
26.....	287.616.....	Legal Advisors	11
27.....	287.710.....	Insurer Tax Issues.....	11
28.....	287.715.....	Second Injury Fund Surcharge Cap.....	11
29.....	287.800.....	Law Interpretation - Strictly Construed.....	11
30.....	287.801.....	Judicial Powers.....	11
31.....	287.804.....	Religious Exception.....	11
32.....	287.808.....	Burdens of Proof	11
33.....	287.865.....	Bankrupt Self-Insurers and Proofs of Claim.....	12
34.....	287.957.....	Experience Modification Factors	12
		Topic/Case/Key Word Index.....	13-14
		About the Author.....	15

Introduction

Senate Bill Nos. 1 & 130 represent arguably the most major revision of Missouri's Workers' Compensation Law in over a decade, repealing thirty-five sections – and enacting forty new sections – of the Law.² To facilitate understanding these changes, I have prepared this review that includes a directory of the revised sections and a Topic/Key Word index. It is my hope that this tool will be helpful in considering the new law's many changes.

Disclaimer: This is not a summary by the Department of Labor and Industrial Relations, the Division of Workers' Compensation, or the Kansas City workers' compensation office. This strictly is a summary I completed with invaluable input from Administrative Law Judge Rebecca Magruder and attorney Daniel Doyle whom I wish to acknowledge for their contributions. Note: While fonts and certain punctuation (such as boldface and bracketing) are significant in the Legislation, the fonts and punctuation contained in this review – including underlining, **bolding**, and *italics* – are not intended to reflect statutory changes but were added to improve clarity.

Review

1. 286.020 – **Commissioner Confirmation:** Adds requirement that any appointee to the Labor and Industrial Relations Commission be confirmed by the Senate within 30 days after the Senate convenes during a regular legislative session. If the appointee is not confirmed, the appointee cannot be reappointed to the Commission. Eliminates indefinitely serving “acting commissioners”. (please note that this provision is in Chapter 286, not 287)

2. 287.020 – **Definitions**
 - **Accident:** “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.**” (Note: the **boldfaced** words are new.) Deleted is the former wording that an accident be “unforeseen” and happen “with or without human fault”. 287.020.2

 - **Injury:** Formerly for an injury to be compensable the employment had to be “a substantial factor in causing the injury”. Now, to be compensable, the accident must be “the prevailing factor in causing the injury.” 287.020.3(2)(a)
 - Prevailing Factor Defined:** “The prevailing factor’ is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” 287.020.3(1)

 - **Idiopathic Injuries:** “An injury resulting directly or indirectly from idiopathic causes is not compensable”. 287.020.3(3)

² The law has an August 28, 2005 effective date except for the repeal of §§287.615, 287.616 and 287.812, which is effective on January 1, 2006.

■ **Heart Attacks:** The new language is: “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;” 287.020.3(4)

■ **Going To And Coming From Cases:** The new statute states that 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 not compensable. 287.020.5.

■ **Parking Lot Cases:** The new law states “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.” 287.020.5.

■ The statute also declares “the intent of the legislature to reject and abrogate 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 v. Columbia Health Care and Rehabilitation, 80 S.W.3d 524 (Mo.App. W.D. 2002); Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo.banc 1999); and Drewes v. TWA, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.” 287.020.10

3. 287.040, 287.041, 287.043 – **Statutory Employers**

■ **Landlord-Tenant:** Deletes section 2, which applied to fraudulent landlord and tenant relationships that were created for the purpose of avoiding liability. 287.040

■ **Statutory Employer/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. A typical case that this provision would apply to is Wilson v C. C. Southern, 140 S.W.3d 115, (Mo. App. W.D. 2004). 287.040.4, 287.041 and 287.043.

4. 287.063 – **Occupational Diseases, Last Exposure**

■ **Last Exposure:** Changes which employer is liable in an occupational disease case. Formerly, the employer who last exposed the employee to the hazard prior to the claim being filed was liable. Now, the last employer who exposed the employee to the hazard, *prior to evidence of disability*, is liable. 287.063.2

■ **Statute of Limitations:** Adds that 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”. 287.063.3

5. 287.067 – **Occupational Diseases Defined**

■ **Prevailing Factor:** Occupational diseases and injuries due to repetitive motion “are compensable only if the occupational exposure was the prevailing factor” in developing the disease. 287.067.2

Definition: “prevailing factor” is “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” 287.067.2

■ **Repetitive Motion:** adds subsection 3 recognizing injuries due to repetitive motion.

■ **Aging:** “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.” 287.067.2

■ **Firefighters and Police Officers:** Old subsection 5 (which now is new subsection 6) now specifies that – only with regard to certain conditions including respiratory and cardiovascular diseases – the law applies to “paid fire fighters” and “paid police officers of a paid police department certified under chapter 590”. The apparent intent is to eliminate coverage for volunteer firefighters and volunteer police for these limited conditions. 287.063.6

■ **Three Month Rule:** Old subsection 7 (now 8) – the three month rule regarding repetitive motion injuries – is limited to going back to the “immediate prior employer” if work at that immediate prior employer was the prevailing factor in causing the injury. This specifically deletes the former “a substantial contributing factor” language. So now, if within three months of the employee’s new employment, the employee develops carpal tunnel syndrome the current employer will have to prove that the employment with the immediate prior employer was the prevailing factor in causing the injury to shift liability to the prior employer. However, the change to 287.063 which places liability on the employer who last exposed the employee to the occupational hazard, “*prior to evidence of disability*”, should settle most of these controversies.

6. 287.110 – **Jurisdiction/Principally Localized:** if the injury occurs outside Missouri, jurisdiction still may be had here if the employee’s employment was principally localized in Missouri “within thirteen calendar weeks of the injury or diagnosis of the occupational disease.” (the language in quotes is what is new). This limits the time period courts can consider in finding Missouri jurisdiction. In the past, an employee who worked in Missouri for two years and then went to work in another state for the last six months could argue that his employment over the entire two and a half year period was principally localized in Missouri. That option now is gone. 287.110.2

7. 287.120 – **Safety Rules and Penalties, Alcohol and Drugs, Recreational Activities**

■ **Safety Violation Penalty:** An employee’s failure to use safety devices “shall” reduce benefits by “at least 25% but not more than 50%”. Also, the employee’s failure to use

safety devices no longer has to be willful. Finally, employers now only need to make a “reasonable effort” – instead of a “diligent effort” – to ensure that their employees use provided safety devices. 287.120.5.

■ **Alcohol and Drug Use** – When an injury is sustained in conjunction with the use of alcohol or non-prescribed controlled drugs the compensation “shall” be reduced by 50% instead of the former 15% reduction. 287.120.6(1)

■ **Actual Knowledge/Diligent Effort Deleted:** Deletes the former requirement that an employee had to have “actual knowledge” of the employer’s no alcohol/drug-free workplace policy in order for the former 15% benefit reduction to apply. Now, not only does the law not require actual knowledge of such policies, but the former requirement that employers had to make a “diligent effort to inform the employee of the requirement to obey any reasonable rule or policy” simply was deleted and not replaced with any new standard. 287.120.6(1)

■ **Proximate Cause-Forfeiture:** The law remains that if “the use of alcohol or non-prescribed controlled drugs in violation of the employer’s rule or policy is the proximate cause of the injury” benefits shall be forfeited. However, the new law eliminates the former requirement that forfeiture applied only if the rules were posted and publicized. In addition, the new law deletes the former law’s provision that forfeiture did not apply if the employer had actual knowledge of the employee’s alcohol/drug use that went undisciplined or authorized such use. (Deleted 287.120.6(2)(a) and (b).)

■ **Legal Intoxication:** New subsection 3 provides that if the employee’s blood alcohol content is more than the legal limit, a rebuttable presumption is created that the employee’s intoxication was the proximate cause of the injury resulting in a forfeiture of all benefits. Also, adds that 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-injury testing. 287.120.6(3).

■ **Recreational Activities:** the former law specifically excluded from coverage only injuries that resulted from participation in a *voluntary* recreational activity that “the employer may have promoted, sponsored or supported”. The new law deletes the word “voluntary”, apparently intending to exclude more injuries from coverage that result from recreational activities. However, an injury resulting from a recreational activity still 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” the employer had actual knowledge of while participating in a recreational activity that the employer also was aware of. 287.120.7

8. 287.127 – **Posted Notice of Rights:** Requires the addition of the following language to the mandatory placards that employers must post: “Employees who fail to notify their

employer within 30 days may jeopardize their ability to receive compensation, and any other benefits under this chapter.” 287.127.1(2)

9. 287.128(10) – **Fraud Provisions**

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

■ **Fraud and Non-Compliance Investigation:** 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.” 287.128.3 (8)

■ **Invalid Certificate of Insurance:** 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 requirement) Also, a penalty of either \$10,000 or double the fraud’s value (whichever is greater) applies. 287.128.5.

■ **Failure to Insure Penalty:** “Any employer who knowingly fails to ensure 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). 287.128.7

■ **Disclosure of Documents:** 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. 287.128.9

■ **Fraud Statute of Limitations** for these crimes is three years “after discovery of the offense by an aggrieved party.” Thus, conceivably, if a party committed a fraud in 2005 that was not discovered until 2012, the statute of limitations would not expire until 2015. 287.128.11

10. 287.129 – **Health Care Provider Fraud:** Increases the penalty for certain crimes by health care providers to a D Felony if there was a previous conviction.

11. 287.140 – **Medical**

■ **Mileage:** Clarifies that an employee will receive mileage reimbursement only when traveling outside the employee’s principle place of employment – not outside the employee’s place of injury or residence as under the former statute. 287.140.1

■ **TTD:** Deletes language that allowed TTD for time missed from work while receiving physical therapy or undergoing an employer-requested PPD evaluation. 287.140.1

- **Sick Leave (In Lieu of TTD):** Adds new subsection 14 empowering employers to “allow or require” injured employees to use their “paid leave, personal leave, or medical or sick leave” when they miss work to receive medical treatment, physical therapy, or medical evaluations. 287.140.14
- 12. 287.143 – **Vocational Evaluations:** Requires employees to submit to a vocational rehabilitation assessment requested by the employer or insurer.
- 13. 287.150 – **Employer Lien on 3rd Party Recoveries:** adds language giving employers a subrogation lien on any third party recovery in addition to the old language which said that the employer would receive a credit for sums paid or payable to the extent of the settlement or recovery in death cases. 287.150.2
- 14. 287.170 – **Unemployment Compensation/Post-Injury Termination:** Disqualifies an employee from receiving TTD (1) during any time the employee is receiving unemployment benefits, or (2) if terminated for *post* injury misconduct. 287.170.3 and 4
- 15. 287.190 – **Permanent Partial Disability**
 - **Permanent Disability Defined:** tightens the definition by mandating that “disability shall be demonstrated and certified by a physician. Medical opinions addressing 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.” 287.190.6(2)
 - **Objective Medical Findings** are defined as “those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.” 287.190.6(2)
 - **Preexisting Disability Credit:** Adds new subsection that reduces any compensation award for all disability due to a preexisting disease or condition that contributed to the overall rating. Does not specifically address preexisting asymptomatic conditions. 287.190.6(3)
- 16. 287.197 – **Occupational Hearing Loss**
 - **Hearing Loss:** Brings the hearing loss standards up to date and provides that future standard changes will be adopted by the division by rule. *See, Thatcher v TWA*, 69 S.W. 3d 533 (Mo.App.WD 2002). 287.197.2
 - **One-Month Separation:** Reduces the time an employee has to be separated from noisy work from six months to one month before the employee can file a claim for hearing loss. 287.197.7
- 17. 287.203 – **Hardship Hearing Costs:** The former statute read that in hearings to restore TTD benefits that had been provided but subsequently terminated, the “Reasonable cost of

recovery *shall* be awarded to the prevailing party”. While occasionally an employer would prevail and recover its costs, typically it was claimants who were prevailing – not because of any bias – but because, by design, this is a type of hearing that only a claimant could request. The new statute employs the much softer language already found in 287.560 that provides that costs “may” be assessed at the fact finder’s discretion if the proceedings have been brought, prosecuted or defended without reasonable grounds – again, something the Statute already contained. This greatly mitigates the threat of costs being assessed against an insurer for improperly terminating TTD.

18. 287.215 – **Surveillance Not A “Statement”**: Videotapes, motion pictures, and a “visual reproduction of an image” no longer are “statements” (reversing the Supreme Court’s ruling in Fisher v. Waste Management, 58 SW3d 523 (Mo. 2001)). Thus, surveillance videos now do not have to be disclosed prior to a trial pursuant to a request under §287.215, as was the former rule. The new law also extends the time – from 15 to 30 days – allowed to provide statements that still are covered under this section.
19. 287.253 – **Bonuses**: of up to 3% of an employee’s yearly salary shall not be used in calculating average weekly wages. [New Section]
20. 287.380 – **Reports of Injury**: Employers now have 30 days – instead of 10 – after knowledge of an injury to file a Report of Injury with the Division. The law remains that if the Report of Injury is not filed within 30 days, a 3-year statute of limitations applies. The law also still requires that “employers shall report injuries to their insurance carrier, or third-party administrators” within five days of the injury or within five days of when the employee reported it, whichever is later. 287.380.1
21. 287.390 – **Compromise Settlements**
 - **Settlements Shall be Approved**: Adds requirement that an ALJ shall approve a settlement: (1) as long as it is not the result of undue influence or fraud, **and** (2) the employee fully understands his rights, **and** (3) voluntarily accepts the terms. 287.390.1
 - **Offers Before Representation**: Adds new subsection 5 that provides **IF** (1) an unrepresented employee is made an offer of settlement in writing, (2) that is filed with the division, (3) which the employee does not accept when unrepresented, **THEN** where additional proceedings occur “with regard to the employee’s claim”, the employee is entitled to 100% of the amount initially offered. The new subsection adds that “legal counsel representing the employee . . . shall receive reasonable fees”. This appears to codify the current practice already followed at the division. 287.390.5
22. 287.420 – **Written Notice**: States that 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. Occupational disease and repetitive trauma cases have to give written notice within 30 days of diagnosis of the condition or prove the employer was not prejudiced. The good cause exception for not giving timely notice has been deleted.

23. 287.510 – **Temporary Award Penalty Reduced:** Failure to comply with a temporary order may result in the doubling only of the amount “of compensation ordered and unpaid.” This provision modifies prior law, which had been interpreted to allow the entire final award to be doubled.

24. 287.610 – **Administrative Law Judges**

■ **Additional Judges:** the current statute authorizes 30 judges; the new statute increases that number to 40 judges. Currently, only 26 ALJ positions are funded and filled. Therefore, while 14 new ALJs could be appointed, how many positions the Legislature makes appropriations for will determine the number appointed. This section also requires the division’s director to publish and maintain on the division’s web site the appointment dates or initial dates of service for all ALJs. 287.610.1

■ **ALJ Review Committee:** The law creates a new six-member (with only five having a vote) “administrative law judge review committee” (“the committee”). The governor appoints two members: the division director – who chairs the committee – and one non-voting member, who must come from the commission on retirement, removal, and discipline of judges. The other four committee members include one person appointed by each of the following: Senate president pro tem, senate minority leader, speaker of the house, and house minority leader. Each position is for two years and is unpaid, except for the division director who serves for the duration of his/her tenure as division director. 287.610.9(2)

■ **Performance Audits:** The division director, as a member of the committee, must establish “written performance audit standards” by October 1, 2005. The director “in conjunction with the committee” shall complete a “performance audit” of all ALJs by August 28, 2006 (287.610.2) and every two years thereafter. [287.610.9(1)]. The committee votes within 30 days of each performance audit giving each ALJ either a vote of “confidence” or “no confidence”. (287.610.5). The committee reports the audit and vote results to the governor “no later than the first week of each legislative session immediately following” each audit. [287.610.9(1)]. Any ALJ who receives two or more no confidence votes “may have their appointment immediately withdrawn”. 287.610.9(1)

■ **Retention Votes:** in addition to the performance audits and confidence votes every 2 years, ALJs also are subject to a “retention vote” – presumably by the committee – every 12 years. Any ALJ who has received two or more no confidence votes “shall not receive a vote of retention.” 287.610.3

- The 13 ALJs with the most years of service have a retention vote on August 28, 2008;
- The next 13 ALJs have their retention vote on August 28, 2012;
- Any other ALJs have their retention vote on August 28, 2016.

25. 287.615 – **Chief Legal Counsel:** creates this new position in lieu of the former “chief legal advisor” position and eliminates references to legal advisors. The chief legal counsel must be “located at the division office in Jefferson City” [also see §287.812(5)]

26. 287.616 – **Legal Advisors:** this entire section which created the legal advisor position is repealed, effective January 1, 2006 upon which date the Division no longer will have legal advisors.
27. 287.710 – **Insurer Tax Issues:** changes manner in which insurers/self-insurers calculate and pay taxes.
28. 287.715 – **Second Injury Fund Surcharge Cap:** Employers pay a percentage of their workers’ compensation premium (surcharge) to subsidize the benefits and expenses of the state’s Second Injury Fund (the Fund). The new law limits the surcharge percentage “not to exceed three percent” beginning January 1, 2006. A March 30, 2005 actuarial study reflected that the Fund required a 3.5% surcharge in 2005, a 4.5% surcharge in 2006 and a 5.0% surcharge in 2007. 287.715.2
29. 287.800 – **Law Interpretation**
 - **Strictly Construed:** Deletes the mandate that the workers’ compensation law “shall be liberally construed” and supplants it with the requirement that it shall be construed strictly – by ALJs, legal advisors, the Commission, the division, and “any reviewing” court. 287.800.1
 - **Weigh impartially:** ALJs, legal advisors, the Commission, and the division “shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.” 287.800.2 (Note: this section still refers to legal advisors because most of the new law is effective on August 28, 2005, but legal advisors are not eliminated until January 1, 2006.)
30. 287.801 – **Judicial Powers:** Effective January 1, 2006, only ALJs, the Commission, and appellate courts are empowered to review workers’ compensation claims. [New Section]
31. 287.804 – **Religious Exception:** An employee may file an application to be excepted from workers’ compensation coverage if both the “employee and employer are members of a recognized religious sect or division, as defined in 26 U.S.C. 1402(g)” and are conscientiously opposed to accepting public or private insurance benefits. Exception may be prospective only. [New Section]
32. 287.808 – **Burdens of Proof** [New Section]
 - **Affirmative Defenses:** must be proved by the employer
 - **Entitlement to Compensation:** must be proved by the employee.
 - **Facts:** must establish that they are “more likely to be true than not true.”

33. 287.865 – **Bankrupt Self-Insurers and Proofs of Claim:** requires the division to give claimants who also are employee's of bankrupt self-insurers written notice that they must file a proof of claim with the bankruptcy court.
34. 287.957 – **Experience Modification Factors:** Prohibits experience modification adjustments if an employer's total medical costs are less than \$1,000 (increased from \$500).

INDEX

<u>Topic/Case/Key Word</u>	<u>Page</u>
Accident	3
Actual Knowledge	6
Additional Judges	10
Administrative Law Judges.....	10
Affirmative Defenses.....	11
Aging	5
Alcohol and Drug Use	6
ALJ Review Committee.....	10
Bankrupt.....	12
<u>Bennett v. Columbia Health Care and Rehabilitation</u>	4
Bonuses	9
Burdens of Proof	11
Certificate of Insurance.....	7
Chief Legal Counsel	10
Commission Confirmation.....	3
Compromise Settlements	9
Costs	8
Diligent Effort	6
Disclosure of Documents.....	7
<u>Drewes v. TWA</u>	4
Employer Lien on 3 rd Party Recoveries.....	8
Entitlement to Compensation.....	11
Experience Modification Factors	12
Failure to Insure Penalty	7
Firefighters	5
<u>Fisher v. Waste Management</u>	9
Forfeiture.....	6
Fraud and Non-Compliance Investigation	7
Fraud Statute of Limitations	7
Going To And Coming From Cases	4
Hardship Hearing	8
Health Care Provider Fraud	7
Hearing Loss	8
Heart Attacks.....	4
Idiopathic Injuries.....	3
Injury.....	3
Insurance Fraud	7
Insurer Tax Issues	11
Judicial Powers.....	11
Jurisdiction	5
<u>Kasl v. Bristol Care, Inc.</u>	4
Landlord-Tenant	4

INDEX (continued)

<u>Topic/Case/Key Word</u>	<u>Page</u>
Last Exposure.....	4
Law Interpretation	11
Legal Advisors	11
Legal Intoxication.....	6
Medical	7
Mileage	7
Objective Medical Findings	8
Occupational Diseases	5
Offers Before Representation.....	9
One-Month Separation.....	8
Parking Lot Cases.....	4
Performance Audits	10
Permanent Disability Defined	8
Police Officers.....	5
Posted Notice of Rights	6
Post-Injury Termination.....	8
Preexisting Disability Credit	8
Prevailing Factor	3
Principally Localized	5
Proofs of Claim	12
Proximate Cause.....	6
Recreational Activities.....	6
Religious Exception.....	11
Repetitive Motion.....	5
Reports of Injury	9
Retention Votes	10
Safety Violation Penalty	5
Second Injury Fund Surcharge Cap.....	11
Settlements Shall be Approved	9
Sick Leave (In Lieu of TTD)	8
Statement.....	9
Statutory Employer.....	4
Strictly Construed.....	11
Surveillance.....	9
Temporary Award Penalty Reduced.....	10
Three Month Rule.....	5
Truck Drivers	4
TTD	7
Unemployment Compensation.....	8
Vocational Evaluations	8
Weigh impartially	11
Written Notice	9

About the Author



Carl Mueller was selected as one of Missouri's 26 workers' compensation administrative law judges in December 1991. He formerly served as an attorney and legislative assistant in Governor John Ashcroft's administration and later practiced law in Kansas City. Judge Mueller has continued his legal education at the University of Nevada's National Judicial College in Reno where he has completed an Administrative Law and Adjudication Skills Certificate and is a candidate for a master's degree in judicial studies. Judge Mueller offices in Kansas City and presides over cases there and in both Lexington and Sedalia.

Raised in Moberly, Judge Mueller earned his undergraduate degrees in biology and political science at Truman State University in Kirksville where he served as president of its national alumni association. He earned JD and MBA degrees at Southern Methodist University in Dallas, Texas and is licensed to practice law in Missouri and Texas.

Judge Mueller and his wife, Jill, have two sons and reside in Lee's Summit. He serves on, and has chaired, the school board of the Lee's Summit Community Christian School, an independent Christian school with over 550 students. Judge Mueller, an Eagle Scout, is a leader in his son's Boy Scout troop, enjoys snow skiing and is an active member of the Lee's Summit Community Church.