Presented by Ellen Morgan

and Danny Schmitz

Kurbursky v. Independent In-Home Servicess., LLC

648 S.W.3d 894 (Mo. Ct. App. 2022)

§ 287.250.3

If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits ***shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee***, but such computation shall not be based on less than thirty hours per week.

Kurbursky v. Independent In-Home Servicess., LLC

648 S.W.3d 894 (Mo. Ct. App. 2022)

Final Hearing – 10/18/19

- Employee testified she worked between 20-25 hours per week for the employer
- Employee testified she was a part-time Employee
- Employee testified she earned $7.65/hour
- Employee testified there were about three other employees performing the same job in a full-time capacity

LIRC – 04/07/21

"If the Missouri legislature simply wanted us to calculate part-time employees at a rate of a full-time worker at 40 hours, then the legislature could have directed us to do so. However, the current wording of the statute does not state that, and the current approach taken by the Commission makes the most sense based on the statute as it is currently written. Based on that, we use a 30 hour work week, since, under §287.250, it represents the closest to the actual amount of hours worked by employee per week that is allowed under that statute."

Kurbursky v. Independent In-Home Servicess., LLC

648 S.W.3d 894 (Mo. Ct. App. 2022)

Court of Appeals – Southern District

Reversed and remanded for the Commission to make factual findings on “the average weekly wage of a full-time or regular employee engaged by [E]mployer to perform work of the same or similar nature” and the number of hours required by Employer to classify an employee as a “full-time or regular employee” and to then calculate its award based upon those findings. § 287.250.3

Remand Hearing – 09/29/22

- Parties stipulated that a full-time worker worked 40 hours per week
- Parties stipulated that Employee was paid at an hourly rate of $7.65
- Parties stipulated that Employee’s AWW was $306.00, with a PPD rate of $204.00

Lamy v. Stahl Speciality Co.

649 S.W.3d 330 (Mo. Ct. App. 2022)

Employee alleged a repetitive trauma injury to his "left upper extremity"

- Date of occupational disease – 08/26/16
- Left shoulder surgery with Dr. McNamara on 10/11/16
- 02/13/17 – Dr. McNamara indicates Employee still has carpal tunnel syndrome in the left wrist that might require future attention
- 03/13/17 – Dr. McNamara releases Employee without restrictions
- 04/10/17 – MMI

11/09/17 – Dr. Stuckmeyer IME

- Employee requires additional treatment for his left shoulder
- In the absence of additional treatment, Employee has 35% PPD of the left shoulder
- Employee also requires additional treatment for his work-related left carpal tunnel syndrome

Lamy v. Stahl Speciality Co.

649 S.W.3d 330 (Mo. Ct. App. 2022)

05/02/18 – Employee settles his Claim for 12.5% PPD of the left shoulder

06/26/18 – Employee files a new Claim for Compensation for the repetitive trauma injury to the left wrist

- Date of occupational disease – 02/13/17

08/19/19 – Dr. McNamara authors a report opining that Employee's current left hand complaints were related to the repetitive work injury that had been the subject of the August 2016 claim

Lamy v. Stahl Speciality Co.

649 S.W.3d 330 (Mo. Ct. App. 2022)

Final Hearing – 05/04/21

- Employer argues Employee's request for medical benefits and compensation for the left wrist is barred by the prior settlement of the 08/26/16 injury

ALJ concludes the prevailing factor for Employee's left carpal tunnel syndrome was the same as the prevailing factor for his left shoulder injury: the repetitive work activities that gave rise to the August 2016 claim

Employee voluntarily elected to settle his August 2016 claim with the knowledge that both Dr. McNamara and Dr. Stuckmeyer had diagnosed him with left carpal tunnel syndrome that might require future surgery, and with the knowledge that the compromise settlement settled "all issues between the parties."

LIRC affirms

On appeal, Employee argued the compromise settlement only bound the parties with respect to the left shoulder injury

Lamy v. Stahl Speciality Co.

649 S.W.3d 330 (Mo. Ct. App. 2022)

Court clarified Employee was challenging whether the LIRC's uncontested factual findings support a legal conclusion that the compromise settlement foreclosed the LIRC's jurisdiction to consider the February 2017 claim for injury to his left wrist

- Employee contended that the compromise settlement was limited in its scope to settlement of his left shoulder injury claim

Dr. McNamara's 08/19/19 letter underscores that Employee knew he had a repetitive trauma injury to his left wrist (a portion of his left upper extremity) when he saw Dr. McNamara back in August 2016, and before he entered into the compromise settlement

- Nevertheless, Employee settled all issues with Employer involving his August 2016 claim for repetitive injury to the left upper extremity

LIRC did not improperly rely on *Miller v. U.S. Airways Group, Inc.*, 316 S.W.3d 462 (Mo. App. W.D. 2010), which dismissed successive claims for bilateral carpal tunnel syndrome as a result of repetitive trauma

LIRC did not commit legal error when it concluded that the compromise settlement exhausted its jurisdiction to entertain Employee's February 2017 claim

Brooks v. Laurie

660 S.W.3d 394 (Mo. Ct. App. 2022), reh'g and/or transfer denied (12/20/22), transfer denied (03/07/23)

§ 287.040.1

- Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

Brooks (Employee) was a superintendent for Little Dixie Construction

- Commercial construction company

Brooks was cutting down trees at Big Buck Resort on 08/31/15

- A hunting resort near Cairo, MO where members are allotted a piece of property to hunt

Laurie (defendant) was a shareholder/member of Big Buck Resort

- Laurie co-owned Crown Center Farms, a horse breeding operation in Columbia, MO

Laurie was cutting a tree that fell on Brooks

Little Dixie Construction regularly performed services for Crown Center Farms and Laurie

Brooks v. Laurie

660 S.W.3d 394 (Mo. Ct. App. 2022), reh'g and/or transfer denied (12/20/22), transfer denied (03/07/23)

Brooks filed Petition for Damages naming Laurie, Crown Center Farms, and Big Buck Resort as defendants

Laurie and Crown Center Farms asserted the affirmative defense that Brooks may be deemed a statutory employee of Crown Center Farms, Laurie, or Big Buck Resort so as to be barred from recovery against these defendants

- Argued Brooks' exclusive remedy was workers' compensation

11/13/20 – Trial Court entered an order concluding that Crown Center Farms was a statutory employer of Brooks so as to trigger the exclusive remedy provisions of The Workers' Compensation Law

- Also concluded that Laurie was an employee of Crown Center Farms, and thus shielded from liability under the Workers'' Compensation Law

Brooks v. Laurie

660 S.W.3d 394 (Mo. Ct. App. 2022), reh'g and/or transfer denied (12/20/22), transfer denied (03/07/23)

Statutory Employment

- A person or entity is a statutory employer of the statutory employee if:
- (1) the work is performed under a contract;
- (2) the injury occurs on or about the premises of the purported statutory employer; and
- (3) the work is an operation of the usual business of the statutory employer.

Brooks argued there were genuine issues of material fact regarding whether Brooks was injured while doing work in the usual course of Crown Center Farms' business

Bass v. National Super Markets, Inc., 911 S.W.2d 617 (Mo. banc 1995)

- Those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement

Brooks v. Laurie

660 S.W.3d 394 (Mo. Ct. App. 2022), reh'g and/or transfer denied (12/20/22), transfer denied (03/07/23)

Laurie and Crown Center Farms argued Crown Center Farms was created to maintain the Lauries' various property interests, thus the scope of Crown Center Farms' "**usual business**" extended to "whatever Mr. Laurie needed to have done to his properties"

Court of Appeals noted it remains disputed whether the cutting down and clearing of trees was an activity that was routinely done by Crown Center Farms on a regular and frequent schedule

- The summary judgment record fails to establish with any precision how frequently or regularly trees were cut down at Big Buck by Crown Center Farms' employees

No indication from the summary judgment record that Crown Center Farms would have been required to **hire permanent employees** to cut down trees at Big Buck in the absence of an agreement between Crown Center Farms and Little Dixie Construction

The trial court erred in granting summary judgment to Crown Center Farms

Dahman v. City of Clinton

Inj. No. 17-090567 (September 30, 2022)

Employee began working as a police officer for the City of Clinton in January 2011

On 08/06/17, Employee heard a radio report from his friend and fellow officer Gary Michael that shots had been fired and an officer was down

Employee responded and found Officer Michael on the ground and alive

Employee testified:

- It was dark outside
- This was the first officer shooting in which he had been involved
- The suspect's whereabouts were unknown
- The suspect's rifle had pierced Officer Michael's protective gear
- He felt he was a "sitting duck"
- He later learned that Officer Michael had passed away

Dahman v. City of Clinton

Inj. No. 17-090567 (September 30, 2022)

Dr. William Logan, to whom Employee was referred by the City of Clinton, opined that the 08/06/17 event did rise to the level of extraordinary and unusual mental stress for several reasons including:

- As compared to an officer's death in a large department, the Clinton Police Department was a small organization where the officers were well known to each other, worked as a team, and had personal relationships both inside and outside of work.
- This is the first officer death in the department.
- In the 08/06/17 event, Employee was exposed to potentially lethal fire from the suspect.
- PTSD can also occur on learning that a traumatic event occurred to a close friend such as the relationship Employee had with Officer Michael.

Dr. Dale Halfaker, who evaluated Employee at the request of his attorney, similarly believed the event of 08/06/17, and the stress that it caused was both extraordinary and unusual. In support of this conclusion, Dr. Halfaker noted:

- Employee was in the dark
- Employee was lit up standing by the car knowing that the person had a rifle
- Employee knew that the suspect had already killed one police officer so why would he have second thoughts about perhaps killing another

City of Clinton also had Employee evaluated by Dr. Sheba Khalid, who agreed that the stress was both extraordinary and unusual

Dahman v. City of Clinton

Inj. No. 17-090567 (September 30, 2022)

The ALJ concluded, and the LIRC confirmed, that Employee showed by objective standards that his work-related stress was both extraordinary and unusual and meets the requirements of § 287.120.8

Despite the contention of the City of Clinton that police officers' shootings are not extraordinary, the particular facts of Employee's experiences, including but not limited to:

- responding to the scene of Officer Michael's shooting which was a friend of Employee,
- knowing that the suspect was still at large,
- knowing that the suspect had a long rifle,
- knowing that the protective vest would not help if the suspect decided to shot again, and
- feeling like a sitting duck in the dark

All support the conclusion that the work-related stress was both extraordinary and unusual

Harper v. Springfield Rehab & Health Care Ctr./NHC Health

No. SD 37268, 2023 WL 1776279 (Mo. Ct. App. Feb. 6, 2023), reh'g and/or transfer denied (Feb. 24, 2023)

Westlaw says this case has been ordered transferred to the Supreme Court

On 06/22/18 (Friday), Employee was working the night shift as a nurse for Employer

Around midnight, Employee was helping a tech give medications

The tech left the medication cart in the hallway, where it presented a hazard for patients

Employee strained to move the medication cart and felt a pull in her back

Employee continued working, but had difficulty walking

Employee reported the injury to the Employer the following Monday

Harper v. Springfield Rehab & Health Care Ctr./NHC Health

No. SD 37268, 2023 WL 1776279 (Mo. Ct. App. Feb. 6, 2023), reh'g and/or transfer denied (Feb. 24, 2023)

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At the Final Hearing, Employer argued Employee's incident on 06/22/18 did not meet the statutory definition of accident under § 287.020.2:

> *The word "accident" as used in this chapter shall mean 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. An injury is not compensable because work was a triggering or precipitating factor.*

The ALJ and LIRC both concluded Employee sustained a compensable injury arising out of and in the course of her employment, and awarded benefits.

Harper v. Springfield Rehab & Health Care Ctr./NHC Health

No. SD 37268, 2023 WL 1776279 (Mo. Ct. App. Feb. 6, 2023), reh'g and/or transfer denied (Feb. 24, 2023)

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On appeal, Employer argued Employee's accident did not meet the statutory definition of an "accident" because Employee's unusual strain did not produce "at the time objective symptoms of an injury."

The Court noted:

- One of the uses of "at" as a preposition is use "as a function word to indicate presence or occurrence in, on, or near."
- One of the meanings of (1) the noun "symptom" is "something that indicates the existence of something else," and (2) the adjective "objective" when used in combination with "symptom" is "perceptible to persons other than the affected individual
- § 287.020.3(5) in relevant part defines "injury" to "mean violence to the physical structure of the body."

Harper v. Springfield Rehab & Health Care Ctr./NHC Health

No. SD 37268, 2023 WL 1776279 (Mo. Ct. App. Feb. 6, 2023), reh'g and/or transfer denied (Feb. 24, 2023)
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Combining these meanings, the statutory phrase an unusual strain “producing at the time objective symptoms of an injury” should be interpreted in the circumstances of this case to mean an unusual strain producing at (*i.e.*, near) the time objective symptoms (*i.e.*, indications perceptible by persons other than Claimant of the existence) of an injury (*i.e.*, violence to the physical structure of Claimant's body).

Employee had difficulty walking later in the same shift during which she suffered the unusual strain

Employee’s difficulty walking would have been perceptible to persons other than Employee, indicated the existence of violence to the physical structure of Employee’s body, and was produced near the time of the unusual strain

Second Injury Fund Cases

March v. Treasurer of State, 649 S.W.3d 293 (Mo. 2022)

Adams v. Treasurer of State, 662 S.W.3d 8 (Mo. Ct. App. 2022)

Swafford v. Treasurer of Missouri, 659 S.W.3d 580 (Mo. 2023)

March v. Treasurer of State,

649 S.W.3d 293 (Mo. 2022)

Primary Injury:
- Inoperable bilateral carpal tunnel syndrome

Preexisting Disabilities:
- Morbid obesity
- Thyroid issues
- Hypothyroidism
- Hypertension
- Transient ischemic attack
- Atrial fibrillation
- Asthma
- 2 left rotator cuff tears
- Left leg laceration - required treatment for stasis ulcers, affected his ability to stand, and created blood flow issues
- Bilateral lower extremity condition diagnosed in 2005 with edema and pain radiating down both legs into his ankles

March v. Treasurer of State,

649 S.W.3d 293 (Mo. 2022)

Final Hearing

- The vocational testimony supported a finding that a progression of Employee’s bilateral lower condition rendered him unable to compete in the open labor market.
- Employee’s lower extremity condition (which preexisting the work injury) was actively being treated and significantly deteriorated after the work-related accident.
- There was no aggravation or acceleration of the work-related accident to combine to lead Employee to be PTD.

LIRC

- Disavowed ALJ’s findings regarding progression of his bilateral lower extremity condition that rendered him unable to compete in the open labor market.
- Still were not persuaded that the *combination* of Employee's preexisting injuries and the primary injury resulted in PTD
- Equally likely that Employee’s preexisting injuries (without the addition of the primary injury) resulted in PTD

March v. Treasurer of State,

649 S.W.3d 293 (Mo. 2022)

Court of Appeals – Western District

- LIRC's causation opinion is not supported by any expert medical opinion and is nothing more than the LIRC's person opinion
- LIRC's Final Award on the issue of causation is not supported by sufficient competent evidence to warrant the making of the Final Award and it must be reversed

Supreme Court

- Burden of production vs. burden of persuasion
- § 287.808 contains no language mandating the Fund present evidence, impeachment or otherwise, unless the Fund wishes to assert an affirmative defense
- Employee failed to carry his burden of persuasion in demonstrating he was entitled to PTD benefits
- LIRC could conclude the evidence was equivocal about the issue of whether it was more likely true than not that his preexisting disabilities and primary injuries combined to render him permanently and totally disabled such that the Fund was liable for PTD benefits

Adams v. Treasurer of State

662 S.W.3d 8 (Mo. Ct. App. 2022), reh'g and/or transfer denied (Nov. 22, 2022), transfer denied (Apr. 4, 2023)

Employee had three relevant work-related injuries:

- 1984 – left hand – settled for 32.5% PPD of the left hand (56.875 weeks)
- 2001 – back, bilateral knees – settled for 15% PPD BAW referable to the bilateral knees and low back (60 weeks)
    - Employee's doctor rated Employee at 35% PPD of the right leg, 35% PPD of the left leg, 7.5% PPD BAW (back)
    - Employer's doctor rated Employee at 5% PPD of the right leg, 3% PPD of the left leg, 2% PPD BAW (back)
- 2015 (primary injury) – right hand, right shoulder

Adams v. Treasurer of State

662 S.W.3d 8 (Mo. Ct. App. 2022), reh'g and/or transfer denied (Nov. 22, 2022), transfer denied (Apr. 4, 2023)

ALJ found Employee was permanently and totally disabled as a result of the 2015 work injury in combination with the prior 1984 and 2001 injuries

Fund appealed, arguing the 2001 injury resulted in disabilities to two specific body parts, the knees and the back, which are separate disabilities that do not separately meet the 50-week threshold

- LIRC agreed and reversed
- LIRC found SIF had no liability
    - "We find, as a factual matter, that preexisting disability relating to employee's [2001] work injury did not result in PPD of at least fifty weeks to either employee's back or bilateral knees."

On appeal to the Western District, the issue was whether the disabilities to Employee's back and bilateral knees which resulted from the 2001 Injury are statutorily required to be considered in combination as a body as a whole in order to satisfy the fifty-week PPD minimum of section 287.220.3(2)(a)a, such to be considered a qualifying preexisting disability

Adams v. Treasurer of State

662 S.W.3d 8 (Mo. Ct. App. 2022), reh'g and/or transfer denied (Nov. 22, 2022), transfer denied (Apr. 4, 2023)

In *Parker*, the Supreme Court expressly addressed the legislative change to limit the Fund's liability by <u>excluding</u> non-qualifying preexisting disabilities from consideration in determining PTD

In *Klecka*, the Supreme Court reiterated that non-qualifying preexisting disabilities cannot be considered in determining whether a claimant satisfies the second condition of section 287.220.3

Court of Appeals acknowledged it is bound by the LIRC’s factual determinations that the 2001 Injury resulted in two clearly differentiable disabilities and neither disability resulted in PPD of at least 50-weeks

“The Compromise Settlement simply agrees to an approximated and cumulative disability rating for purposes of settlement without separately rating the individual disabilities themselves, a function necessary to determine whether either qualifies as a preexisting disability as defined by § 287.220.3(2).”

<u>The Commission has discretion in how it addresses cumulative disabilities</u>.

Swafford v. Treasurer of Missouri

659 S.W.3d 580 (Mo. 2023)

Primary Injury:

- October 2017 – slipped while getting out of a truck and was left hanging by his right arm

Preexisting Disabilities:

- Ankylosing spondylitis ("AS")
  - a congenital condition causing his spine and rib bones to fuse together over time and resulting in "constant pain," difficulty breathing, curved posture, and a limited range of motion.
- Various cardiac conditions
  - Required multiple procedures, including hypertrophic cardiomyopathy, mitral valve regurgitation, and atrial fibrillation.
- Right-shoulder pain since 2012, which was associated with his repetitive single-handed cranking of jacks used to adjust the height of semi-trailers.
  - In 2016, he was diagnosed with bursitis in his right shoulder, which required steroid injections every 3-4 months.

Swafford v. Treasurer of Missouri

659 S.W.3d 580 (Mo. 2023)

Employee settled his primary claim with the Employer and proceeded against the Fund for PTD benefits

Dr. Erich Lingenfelter and Dr. Brent Koprivica both testified about the synergistic effect between Employee's primary injury and his preexisting disabilities

ALJ and LIRC denied Employee's claim for PTD against the Fund

- Employee failed to show his preexisting disabilities "directly and significantly aggravated or accelerated" his primary injury pursuant to § 287.220.3(2)(a)a(iii)

Swafford v. Treasurer of Missouri

659 S.W.3d 580 (Mo. 2023)

Employee appealed, arguing his preexisting qualifying disability directly or significantly aggravated or accelerated his primary workplace injury

Court of Appeals emphasized that the LIRC did not disregard, ignore, or reject Employee's medical opinions from Dr. Lingenfelter or Dr. Koprivica

- The LIRC simply determined that the evidence was insufficient to prove his claim under 287.220.3(2)(a)a(iii)

While Employee's experts established that Employee's preexisting disabilities had some worsening effect on his primary injury, the LIRC did not err in concluding those reports were insufficient to show that worsening effect rose to the level of significant and direct aggravation or acceleration

Swafford v. Treasurer of Missouri

659 S.W.3d 580 (Mo. 2023)

Webster's Third New International Dictionary defines “aggravate” as “to burden” and “to add weight to” and “accelerate” as “to hasten the ordinary progress or the development of” and “increase the rate or amount of.”

As such, the “aggravate or accelerate” requirement can be interpreted to mean the preexisting disabilities must exacerbate the primary injury in some way.

But that alone is not enough; the preexisting disabilities must directly and significantly exacerbate the primary injury.

“Significant” is defined as “deserving to be considered” and “direct” is defined as “characterized by or giving evidence of a close especially logical, casual, or consequential relationship.”

Hence, the impact of the preexisting disabilities on the primary injury must be more than incidental; they must clearly exacerbate the primary injury in a meaningful way.

The requirement that a qualifying preexisting disability combine with or, in Dr. Lingenfelter's terms, “contribute” to an employee’s PTD is distinct from whether it “directly and significantly aggravates or accelerates” the employee's primary injury.