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PROVING THE PLAINTIFF'S CLAIM

MAX M. LIBRACH*

INTRODUCTION

When the author was approached for the purpose of writing this article, it was with the understanding that he was a practitioner in the field of workmen's compensation law. It was understood and seemed to be the desire that this article should have practical and useful application and be designed for the purpose of enabling the readers, who, it is hoped, will be principally practicing attorneys, to obtain the necessary information and to form a habit pattern useful to them in the processing, handling, prosecuting and proving of plaintiff's or claimant's claims in workmen's compensation matters. The author is not a professor but a practicing attorney. Therefore, this article has been planned and is written with a view to practicalities rather than from an academic viewpoint.

A second preface to this article should be that discussion in this article is directed, primarily because of the limitation of space, to matters relative to proving a plaintiff's or claimant's claim arising out of accidental injuries; there will be little or no discussion of this subject matter as it might pertain to occupational diseases, also compensable under the Workmen's Compensation Act.

It is the author's experience that the average practitioner who holds himself out to the public as an attorney-at-law, unless he specifically discourages it, will in a matter of a year probably be approached by one or more persons who have claims for injuries suffered in the course of employment. When this occurs the very first prerequisite for knowing how to prove a plaintiff's claim has occurred. In no way is it said in jest that the first step involved in proving the plaintiff's claim is to have a plaintiff. This article has no value in a vacuum but will only have meaning in the concrete situation, a case to be prosecuted. If the reader keeps this in mind, possibly when such a claimant comes into his office he will be in a position to follow the steps set forth in this article and thereby obtain the maximum recovery for his client.

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I. FIRST INTERVIEW WITH CLIENT

As a first step the lawyer must begin with the items to be determined by him at his initial interview with his client. Simply stated they are what he has to know in order to fill out Form 21 of the Division of Workmen's Compensation, known as "Claim for Compensation," plus such other facts as may make up a cause of action.

A. *Employer*

Question No. 3 on the form is the name and address of the employer. First it is of some value to ascertain whether the employer is a "major employer" or a "minor employer." The act¹ defines a "major employer" as one who has more than 10 employees regularly employed, and a "minor employer" as one who has 10 or less regularly employed. This is an important distinction, for a major employer is specifically subject to the provisions of the act and is presumed to be under the act unless he specifically rejects the act. If he is under the act, then he shall be liable, irrespective of negligence, to furnish compensation under the provisions of the law for personal injury or death to the employee by accident arising out of and in the course of his employment and shall, of course, be released from all other liability which may arise from said accident either to the employee, claimant, or any other person. A minor employer on the other hand is specifically not subject to the act² except when the minor employer has been determined to be engaged in an occupation hazardous to employees.

An interesting sidelight in the determination of who is a major employer is that the computation of the number of employees is not limited to the specific business where the client worked, but also includes employees of a separate business operated by the same employer without regard to whether the business is in Missouri or elsewhere. In *Harmon v. Rainey*,³ defendant was determined to be a major employer where he employed 9 or 10 employees in a feed and grain business and 5 employees at a service station separately operated.⁴

It also is of importance to determine whether the employer is a major or minor employer when viewed with regard to what happens if there has been a rejection of the act by the employer or employee. A major employer who has rejected the act loses his right to the defense of the fellow-

1. § 287.050, RSMo 1959.

2. § 287.090(5), RSMo 1959.

3. 306 S.W.2d 469 (Mo. 1957).

4. See also *Blew v. Conner*, 328 S.W.2d 626 (Mo. 1959).

servant doctrine, assumption of risk, and contributory negligence.⁵ This is also true of any minor employer who has been determined to be engaged in an occupation hazardous to employees and who, like a major employer, is conclusively presumed to have accepted the act unless he specifically rejects it.⁶ However, a minor employer who has not been determined to have been engaged in an occupation hazardous to employees may bring himself under the act by electing to accept it, retaining the right to withdraw his election by filing with the Commission a notice to that effect.⁷ If he should so do and it becomes effective under the act, then he does not lose the common law defenses heretofore mentioned.

Of interest in this connection is the legal requirement that every employer electing to accept the provision of the act, whether by reason of being presumed to have accepted it as a major employer, as a minor employer in a hazardous occupation, or as a minor employer who elected to accept the act, shall insure his entire liability therefor under the act with some insurance carrier authorized to insure such liability in this state, except that an employer may carry the whole or any part of such liability without insurance on satisfying the Commission of his ability to do so.⁸ A failure to have such insurance or to have satisfied the Commission of one's ability to be a self-insurer can subject an employer under the act to one of two very serious and damaging effects with respect to his rights.

The first of these is that the injured employee or his dependents may recover from the employer as though he had rejected the act. In *Daniels v. Luechtefeld*⁹ the court held that where a major employer never insured his liability under the act or satisfied the Commission of his ability to carry such liability without any insurance, his injured employee was entitled to sue the employer for damages at common law and neither assumption of risk nor contributory negligence was a defense to that action. It must be noted that this case specifically speaks of a *major employer* being to penalized; it will be recalled that a rejection of the act once accepted by a minor employer apparently does not subject him to the loss of these defenses. No case could be found holding that a minor employer is also penalized this way. However, in the view of this writer, there

5. § 287.080(1), RSMo 1959.

6. § 287.070(1), RSMo 1959.

7. § 287.090(2), RSMo 1959.

8. § 287.280, RSMo 1959.

9. 155 S.W.2d 307 (St. L. Ct. App. 1941).

is a decided conflict between the purposes of the section requiring the carrying of insurance and the preservation of the defenses of a minor employer who has withdrawn his acceptance of the act. It is felt that a minor employer might be penalized in the same way as a major employer in a common law action while not insured, for to hold otherwise would render the act¹⁰ meaningless with regard to minor employers and make the purported purpose to require responsibility on the part of such minor employer illusory.

The other alternative that can be suffered by an employer who fails to carry insurance is that the compensation payments are commuted and become immediately due and payable in a lump sum and may not be paid out over the normal period of the compensable time.¹¹ If the injury is serious and the award in weeks is sizeable this may create financial problems for an employer in that it would require him to pay out a substantial amount of money as to which he is not protected by insurance.

Control as to which of these two remedies will be brought to bear against the employer is in the hands of the injured employee-claimant.¹² As was said by the Supreme Court of Missouri in *Neff v. Baiotto Coal Co.*,¹³ an injured employee's acceptance of hospital and medical benefits and monthly compensation, known by him to have been paid by the employer under the workmen's compensation law, for one year, constitutes an election to recover compensation under such law so as to preclude his maintenance of an inconsistent action to recover damages from the employer for personal injuries under a common law remedy. Therefore, the lawyer is warned that the choice of which remedy to pursue may well be an irrevocable choice.

B. *Name of Employee*

In ascertaining this, it is advisable to determine whether a client is a compensable "employee" or is an independent contractor, one who is not compensated under the act. The leading case in Missouri and apparently the fountainhead of all other cases is *Maltz v. Jackoway-Katz Cap Co.*,¹⁴ where the court in the course of its opinion states that the factors to be taken into consideration in determining whether one is an independent contractor or an employee are:

10. With reference to § 287.280, RSMo 1959.

11. *Ibid.*

12. *Ibid.*

13. 361 Mo. 304, 234 S.W.2d 578 (Mo. 1950).

14. 336 Mo. 1000, 82 S.W.2d 909 (Mo. 1935).

The existence of a contract for the performance by a person of a certain piece of work at a fixed price; independent nature of his business or occupation; his employment of assistants with the right to supervise their work; his obligation to furnish necessary tools, supplies, and materials; his right to control the progress of the work, except as to final results; the time for which he is employed; the method of payment, whether by time or by the job; and perhaps others.¹⁵

The court in this case and in subsequent cases considers most of these factors, but the one that seems to be the touchstone of this entire matter is the right to control. The court does not go into the question of whether the alleged employer did exercise his right to control but whether he had a right to assert or exercise control.¹⁶

It is obvious why the foregoing determination must be made. In any claim by a plaintiff, an absolute essential is the existence of a party to whom a duty is owed by the defendant. The duty under the act is owed by an employer only to an employee and not to a person who may be classified as an independent contractor.

C. *Wages*

The employee's wages are the basis for the amount of compensation, and they are computed on the basis of the annual earnings for a year prior to the injury. If the employee has been continuously employed by the same employer for the year prior to his injury, his average annual earnings are taken as a basis.¹⁷ If he has not been so employed, it is necessary to refer to the annual earnings which persons of the same class in the same employment and in the same location have earned during such one year period.¹⁸ In addition to computing the annual earnings or wages on the basis of what actually has been paid to the employee there should be included the reasonable value of board, room, housing, lodging and fuel that may be received from the employer as part of the employee's remuneration and which can be estimated in money and the value of gratuities or tips customarily received by consent of the employer in the usual course of business from persons other than the employer.¹⁹ It has been held that veteran's benefits paid to

15. *Id.* at 1012, 82 S.W.2d at 916.

16. See *Fisher v. Hennessey*, 329 S.W.2d 225 (K.C. Ct. App. 1959); *Hackler v. Swisher Mower & Mach. Co.*, 284 S.W.2d 55 (K.C. Ct. App. 1955).

17. § 287.250(1), RSMo 1959.

18. § 287.250(3), RSMo 1959.

19. § 287.250(7), RSMo 1959.

a World War II veteran for on-the-job training under the G.I. Bill of Rights are gratuities under this section and are to be added to other wages paid by the employer in computing the annual earnings.²⁰

D. *Date of Accident*

The date of the accident is fundamentally important because under the act there are limitations on when claims may be filed and there are certain notice requirements. It is strongly urged that the claimant give the exact date of his accident. More will be mentioned on this subject later in this article.

E. *Description of Accident*

It is important to know all the facts relating to the injury on which the claim is founded. It is expressly stated that if both the employer and the employee have elected to accept the provisions of the act, the employer shall be liable irrespective of negligence to furnish compensation under the provisions of the act for personal injury or death of the employee *by accident arising out of and in the course of employment*.²¹ This means that what occurred must be an accident, which by definition is:

. . . an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury.²²

The fact of an injury does not presuppose that an accident has occurred. The accidental event referred to in the definition is not the result that is wrought by the event but the cause which led to the person's being hurt, injured or killed. Pain that has come upon an employee in working hours without any unexpected or unforeseen event happening suddenly and violently would not constitute a compensable accident.²³

The accident must arise out of and in the course of employment. It is not within the scope of this article to set forth a comprehensive list of circumstances showing specifically how an accident arose out of and in the course of employment within the meaning of the act. Every case involving the question of an injury to the employee from an accident arising out of

20. *Dixon v. Postlewait Glass Co.*, 238 S.W.2d 93 (K.C. Ct. App. 1951).

21. § 287.120(1), RSMo 1959.

22. § 287.020(2), RSMo 1959.

23. *Aldridge v. American Car & Foundry Co.*, 132 S.W.2d 1023 (St. L. Ct. App. 1939).

and in the course of his employment must be decided upon its own facts and circumstances and not by reference to some formula.²⁴

F. *Medical Attention*

In connection with the injury to his client, the attorney should ascertain immediately what, if any, medical attention has been received by the client and when he received it. This is essential from both the humanitarian standpoint, the knowledge that the client has been treated for what could be a serious injury, and from the more practical legal standpoint of knowing what, if any, medical history has been developed already and whether it will be necessary to obtain further medical evidence or whether it will be possible to rely upon the employer's medical reports.

The claimant should furnish the name and address of all doctors to whom he has gone and the person who directed him to the doctor, whether the employer, an insurance adjuster or someone else. Perhaps he chose the doctor himself with permission of the employer. Once having ascertained this information the lawyer would do well to reflect as to the evidentiary value of the doctor, i.e., whether he will be a good witness. Will he give medical opinions and disability ratings that are sound and acceptable? Unless a lawyer practices workmen's compensation or personal injury law with a certain amount of regularity, the answer to this question may not be at his disposal. However, as competitive as the legal profession might be, fellow practitioners who are more knowledgeable in these subjects will supply this information if properly approached. Knowledge of this may make or break the case. It determines what medical evidence might be needed. It goes without saying that the lawyer should also be interested in what medical treatment has been given. The foregoing information and determinations are preliminary to medical considerations that will come. The medical problems which will be encountered in connection with the complete litigation of your claim will be discussed more fully later on.

G. *Temporary Disability*

The next salient point to be determined is the plaintiff's ability to work at the time of this interview. Is he still off of the job; is he being furnished with temporary total disability, and has he been furnished to date with temporary total disability for the time he was unable to work? The act provides:

24. See *Dehoney v. B-W Brake Co.*, 271 S.W.2d 565 (Mo. 1954); *Goetz v. J. D. Carson Co.*, 357 Mo. 125, 206 S.W.2d 530 (1947); *McFarland v. St. Louis Car Co.*, 262 S.W.2d 344 (St. L. Ct. App. 1953).

For temporary total disability the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability, but not less than sixteen dollars nor more than forty-five dollars per week, with full wages if the average earnings amount to less than sixteen dollars a week.²⁵

This provision is applicable only for total disability, which means the inability to return to *any employment* of whatever nature and is not merely limited to inability to return to the job as it was at the time of the accident.²⁶ No compensation is payable for the first three days or less of disability unless the disability shall last longer than four weeks.²⁷

It is necessary to know if the client has been paid any such amounts and at what rate. Such payments as have been made for temporary total disability may affect the amount of the final award or settlement.

The fact that your client has been paid and the time when he was paid for total disability and the fact that he has been furnished medical care as required by the statute will bear on the possible issues of "Limitations" or "Notice" which can be raised by the employer's answer to the claim to be filed. Because of this, it is very important to know about these matters at the time of this interview.

Incidentally, compensation is paid for temporary partial disability.²⁸ The claimant may not be able to go back to the work he did at the time of the accident but, for reasons of his own, he may wish to go back to work on a job which is less difficult than the one he was performing when he was injured.

H. *Present Complaints*

This category is almost self-explanatory. It really means that subject to the breadth of the attorney's own medical acumen he should find out what is medically wrong with his client. If his client had been injured but has completely recovered and suffers from no present complaints and symptoms that could give rise to permanent partial disability, then he will be able to recover only temporary total disability compensation if he has not already received that. From a practical standpoint, the attorney might well be wasting his time. If all the attorney can obtain for the client is temporary total disability and medical attention, it is strongly urged that he does not devote the time to the case that will be required when he has

25. § 287.170, RSMo 1959.

26. § 287.020(8), RSMo 1959.

27. § 287.160(1), RSMo 1959.

28. § 287.180, RSMo 1959.

a claim for permanent partial or total disability, or a death claim. The attorney cannot justify the expenses that may be incurred for the client and he certainly cannot justify the time consumption from his practice.

The attorney should determine whether there are any subjective or objective signs or symptoms of a permanent injury. Of course, the average practitioner who does not have a substantial practice in either personal injury or workmen's compensation law will not have a large store of medical-legal knowledge at his fingertips. If he is in doubt and there appear to be symptoms or complaints that are worth further investigation, it is strongly urged that he obtain a medical examination of the person. But by no means is the foregoing a suggestion to throw any case out of the office because all that may be involved is temporary total disability and medical payments. It is only recommended that the attorney devote such energy to those cases as they may justify.

II. PRETRIAL PROCEDURE AND CONSIDERATION

Whether the client has returned to work, or is still off the job and receiving total temporary disability compensation, if it appears that he is partially disabled it is time to begin the second stage of the proceedings.

A. *File the Claim*

This would appear on the surface to be obvious. Having obtained the information necessary to fill out Form 21, "Claim for Compensation," it should be filled out and mailed with two copies to the Division of Workmen's Compensation in Jefferson City, Missouri.

One of the major reasons for the prompt filing of claims is that there is a limitation on the maintenance of a proceeding for compensation under the act. Claimants are limited in filing a claim to one year after the injury or death or in case any payments have been made on account of the injury or death to within one year from the last payment, whichever date is later.²⁹ If a claim is not filed within this period the claimant is left without a remedy under the act.

B. *Additional Medical Information*

It was stated earlier that it is a good idea to ascertain what medical attention the client has received and from whom. If the attorney ascertains from the devices at his disposal that the claimant is going to or is being

29. § 287.430, RSMo 1959.

treated by a doctor who generally treats patients at the request of insurance carriers, and limits his practice to industrial medicine, then it might be advisable to send him to a doctor of his choice so that he will be in a position to know all the medical factors involved and to obtain an independent medical opinion of the permanent partial disability. Once again it should be mentioned that the expense incurred is not recoverable in the claim unless the employer has failed to furnish medical attention and it must be warranted by the nature of the injury and the possibility of a good disposition of the case. It would be unfair to the lawyer and his client to incur expenses in a case in which the best that could be obtained would not justify inordinately large expenditures for medical and other evidence.

One of the best ways to determine the need for medical evidence is to obtain the medical records of the client relative to any medical attention that has been given to him by any hospital or any person on behalf of his employer. The act provides in part as follows:

Every hospital or other person furnishing the employee with medical aid shall permit its record to be copied by and shall furnish full information to the commission, the employer, the employee or his dependents and any other party to any proceedings for compensation under this chapter, and certified copies of such records shall be admissible in evidence in any such proceedings.³⁰

The Commission furnishes to anyone a form known as Form 53, "Authorization to Inspect and/or Copy Medical Records." When this is directed to a particular party and authorized by the Division of Workmen's Compensation, the person who has possession of the medical records must permit the specifically named person on behalf of the specifically named party in the action, or the Commission, as is set out in the foregoing statute, to inspect and copy any of the medical records they may have in their possession. It is generally understood that any party who is authorized to inspect and copy medical records under the foregoing statute may delegate that power to an agent of his choosing.

Also the act provides that the employee shall receive and the employer shall provide medical, surgical and hospital treatment as reasonably may be required for the first 90 days after the injury or disability to cure or relieve the effects of the injury and thereafter any additional treatment as the Commission by special order may determine to be necessary.³¹ As

30. § 287.140(6), RSMo 1959.

31. § 287.140(1), RSMo 1959.

stated above, the attorney may want to send the employee to a physician, surgeon or other medical authority, but this is at the client's expense. There are certain circumstances where this may be at the expense of the employer, primarily where the employer with the notice of injury refuses and neglects to provide the necessary medical aid, in which event the employee may secure his own necessary medical aid and have the reasonable cost thereof assessed against the employer as part of the award or settlement.³²

C. Issues Raised By Answer

On the receipt of claim Form 21 by the Division of Workmen's Compensation, the Division forthwith forwards a copy of the same to the employer and insurer of record and within fifteen days from the date of the Division's acknowledgment of claim, the employer or his insurer files, also in triplicate, an answer to the claim on Form 22, appropriately known as "Answer to Claim for Compensation."

Assume that an answer has been filed. Generally most insurers and employers will file a general denial, which sets the case at issue ready for either a pretrial conference or a full hearing on the issues involved. But on some occasions special issues are raised in the answer; the most usual issues raised, the equivalent of affirmative defenses, are: (1) limitations; (2) notice; and (3) the nature and extent of disability.

Because each of the above is primarily a major problem involved in proving the case, it is in order at this time to discuss these issues separately.

1. Limitations

The act provides:

No proceedings for compensation under this chapter shall be maintained unless a claim therefor be filed with the commission within one year after the injury or death, or in case payments have been made on account of the injury or death, within one year from the date of the last payment. The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the one year period provided in this section. . . .³³

It has been held that medical treatment furnished to an injured employee at the instance of an employer constitutes "payment" on account

32. *Slider v. Brown Shoe Co.*, 308 S.W.2d 306 (Spr. Ct. App. 1957); *Hammett v. Nooter Corp.*, 264 S.W.2d 915 (St. L. Ct. App. 1954).

33. § 287.430, RSMo 1959.

of injury within the meaning of this section,³⁴ and therefore the statute is tolled until the date of the last treatment.³⁵ There is one recent case which puts a minor but significant limitation on the effect of medical care as a device to toll the statute. In *Igoe v. Slaton Block Co.*³⁶ the court held that under the foregoing statutory provision where medical treatment was not furnished by the employer and apparently was not necessary for more than one year after the employee was allegedly injured in a fall off a retaining wall, such authorized treatment as was given by the employer and insurer after one year expired did not revive the employee's cause of action. He was not entitled to an additional year in which to file his claim after the authorized medical aid was furnished but instead his cause of action was extinguished a year from the date of the original injury.

In view of the language of the statute and the interpretations placed on it by the courts, it is apparent why the attorney must find out the true date of the accident, the last date of compensation payments, the last date on which authorized medical care was furnished by the employer or insurer and whatever other evidence he will need to meet this issue.

2. Notice

The act provides:

No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, shall have been given to the employer as soon as practicable after the happening thereof but not later than 30 days after the accident, unless the commission shall find that there was good cause for failure to give such notice, or that the employer was not prejudiced by failure to receive such notice. No defect or inaccuracy in such notice shall invalidate the same unless the commission shall find that the employer was in fact misled and prejudiced thereby.³⁷

This provision, while not litigated in the courts to as great an extent as one might believe, nevertheless has been the subject of many heated arguments between practitioners of workmen's compensation law with regard to matters relating to the burden of proof. This section is applicable to claims whether arising from accidental injury, death, or by reason of an

34. *Buecker v. Roberts*, 200 S.W.2d 529 (St. L. Ct. App. 1947).

35. *Thomas v. Baker-Lockwood Mfg. Co.*, 236 Mo. App. 1248, 163 S.W.2d 117 (K.C. Ct. App. 1942).

36. 329 S.W.2d 39 (K.C. Ct. App. 1959).

37. § 287.420, RSMo 1959.

occupational disease for which compensation is payable under the act. Accident resulting in a disabling injury, of course, dates from the occurrence. Where there is a death claim, it has been held that the 30 day period begins upon the death of the employee and the widow, or whatever dependent may make a claim, need not give notice until after the employee's death.³⁸ The notice requirement relative to an employee's disability from occupational disease dates from the time when the employee is incapacitated for work, regardless of the time of the first exposure to the occupational disease.³⁹

It is clear that in Missouri the giving of the notice herein described is not an unconditional prerequisite to recovery by a claimant. As was said in the case of *Brown v. Douglas Candy Co.*:⁴⁰

. . . The purpose of the statute is designed to give the employer timely opportunity to investigate the facts pertaining to whether an accident occurred, and if so, to give the employee medical attention in order to minimize the disability. However, if the employer had actual notice or knowledge of the accident, then he could not be prejudiced by failure to receive written notice; or if there is an affirmative showing of "good cause" for failure to give the notice, then the claimant will not be denied relief.⁴¹

The court in *Brown v. Douglas Candy Co.* further stated that an affirmative showing of good cause can be made if the injury does not appear until more than 30 days after the accident. This is on the theory that the accident was apparently trivial or the condition produced by the accident was a latent one and not reasonably discoverable. In the *Brown* case the court held that the claimant failed to make an affirmative showing of good cause because she suffered pain and injury immediately upon her falling and slipping in the course of her employment. It is clear that the court took the position that if the claimant contends that he had "good cause" for his failure to give written notice, the burden of proof lies upon the claimant and unless affirmative evidence showing such good cause is adduced, the claimant has not met this requisite burden.

However, a more complex situation arises when the excuse for the failure to give written notice is that the employer was not prejudiced by

38. *Beatty v. Chandeysson Elec. Co.*, 238 Mo. App. 868, 190 S.W.2d 648 (St. L. Ct. App. 1945).

39. *King v. St. Louis Steel Casting Co.*, 353 Mo. 400, 182 S.W.2d 560 (1944).

40. 277 S.W.2d 657 (K.C. Ct. App. 1955).

41. *Id.* at 662.

the failure to receive such notice. There appears to be a difference of opinion between the Kansas City Court of Appeals and the St. Louis Court of Appeals as to which party has the burden of proof of showing that the failure to give such notice did not prejudice the employer. However, it appears that this difference is more a matter of semantics than it is a matter of fact.

The St. Louis Court of Appeals has stated:

If the claimant proves the giving of timely and adequate written notice, the question as to his compliance with section 38 (*now section 287.420*) is at an end. Failing in this, the burden is undoubtedly upon him in the first instance to show that the employer was not prejudiced by failure to have received such written notice. The Oklahoma courts in particular, in construing a statute of that state much like our own, have announced a rule which strikes us as being eminently sound, which is that when the employee makes proof of actual notice, he makes a prima-facie showing of want of prejudice to his employer, whereupon the burden shifts to the latter to prove that in spite of such actual notice, he has still been prejudiced by the failure to have received a written notice.⁴² (Emphasis supplied.)

The Kansas City Court of Appeals has held:

... [T]he burden of proving that notice of the *accident* was given as required by Section 287.420, or a legal excuse for not giving such notice, rests on the claimant; and we also hold that there is no substantial evidence to support the finding of the commission that the appellants were not prejudiced thereby.⁴³

Attention is called to the fact that in the case before the Kansas City Court of Appeals no evidence was offered either by the claimant or the employer to show that the employer was prejudiced by the failure to receive notice and further there was evidence that oral knowledge of the accident was not brought to the employer's attention until more than three months after the accident occurred, whereas in the case before the St. Louis Court of Appeals there was evidence that the employer had actual knowledge within two weeks after the accident.

It would appear, therefore, that the cases are consistent and stand for the proposition that the claimant has the burden of proving he gave actual

42. *Schrabauer v. Schneider Engraving Prod., Inc.*, 224 Mo. App. 304, 316, 25 S.W.2d 529, 534 (St. L. Ct. App. 1930).

43. *Brown v. Douglas Candy Co.*, *supra* note 40, at 664.

notice, or if he fails to show or cannot show this then he must show that he had good cause for not having given written notice; the burden of proving this "good cause" never leaves him. Likewise, he has the burden of proof at all times of showing that there was no prejudice to the employer resulting from the lack of written notice. But he has made a prima facie showing when he proves that the employer had actual notice or knowledge within the thirty day period and the burden of overcoming the prima facie case shifts to the employer to show that despite his actual knowledge he was nevertheless prejudiced because he did not get the written notice.

Thus if the defense of lack of notice is raised the lawyer must be prepared to show that written notice was given or to sustain the burden of proof with regard to the statutory excuses, namely "good cause" and "lack of prejudice." Good cause, of course, is proved as is set forth in the *Brown*⁴⁴ case, i.e., that the accident was apparently trivial or the condition was a latent one and not easily discoverable. The only proof that is of any value in overcoming the burden with regard to lack of prejudice is that the employer actually had notice, though not in written form, within the thirty day period.

3. Nature and Extent of Disability

The last of the issues that might arise in the prosecution of a workmen's compensation claim is the proof of the nature and extent of disability. To the employer and his insurer the injuries, if any, are at best trivial and minor in nature and minimal in extent; while to the claimant, of course, the injuries are critical, major and highly compensable.

The problem of the proof of this matter is the problem of eliciting convincing medical testimony and evidence. This means the medical testimony that is to be given and adduced before a referee for and on behalf of each of the parties. All of this leads to a most unique application of discovery procedure, particularly with regard to medical testimony.

The act provides as follows:

The testimony of any physician who treated or examined the injured employee shall be admissible in evidence in any proceedings for compensation under this chapter, but only if the medical report of such physician has been made available to all parties as in this section provided. Immediately upon receipt of notice from the division or commission setting a date for hearing of a case in which the nature and extent of an employee's disability is to be

44. *Id.*

determined, the parties or their attorneys shall arrange, without charge or costs, each to the other, for an exchange of all medical reports, including those made both by treating and examining physician or physicians, to the end that the parties may be commonly informed of all medical findings and opinions. Such exchange of medical reports shall be made at least *seven days* before the date set for the hearing and failure of any party to comply may be grounds for asking for and receiving a continuance, upon proper showing, by the party to whom the medical report or reports were not furnished. If any party fails or refuses to furnish the opposing party with the medical report or reports of the treating or examining physician or physicians, as in this section provided, upon the objection of the party who was not provided with the medical report or reports, such physician or physicians shall not be permitted to testify at that hearing.⁴⁵ (Emphasis supplied.)

Particular attention is directed to the fact that these reports must be delivered at least seven days before the hearing or else the testimony of such doctor is excluded from the hearing when held or the hearing may be continued. There is some question as to whether the seven day rule applies with regard to cases which may be continued for a short period by the referee in which the time was less than seven days from the setting date but seven days have elapsed at the time the hearing is actually held. If, knowing this, the other party makes no objection to the continuance, it would appear that he has waived the seven day rule.

To meet the challenge of the employer's claim as to the nature and extent of the disability of your claimant, the attorney may need every shred of sound medical testimony he can get and present. He would be remiss in his duty to his client and himself to allow any portion of the quoted section to be overlooked, particularly the seven-day rule. Briefly stated, his maxim should be: "Get those reports to your opponent in plenty of time."

Incidentally, if any medical witnesses are to be presented on behalf of claimant, unless the doctor is familiar with workmen's compensation practice it may be necessary to educate him in making up his medical report because it is not similar to the standard medical report used in personal injury matters. It is described in the act as a report made on any printed form authorized by the Division of Commission or any "complete medical report."⁴⁶

45. § 287.210(3), RSMo 1959.

46. § 287.210(5), RSMo 1959.

In the event the doctor does not use one of the forms provided by the Division of Workmen's Compensation, then he must furnish what has been before referred to as a complete medical report, which is defined as:

the report of a physician giving the patient's history, complaints, details of the findings of any and all laboratory, X-ray and all other technical examinations; diagnosis, prognosis, nature of disability, if any, and *an estimate of the percentage of permanent partial disability, if any.*⁴⁷ (Emphasis supplied.)

This definition requires what is referred to by the Commission as a "rating," which is an estimate of the percentage of the permanent partial disability of the claimant, and a medical report is incomplete, even though exchanged in proper time, unless the doctor makes on a form what in effect is a rating or does it by means of a complete medical report as above defined.

Here again the seven-day rule is most important because if the extent and nature of disability is an issue the attorney will need the valuable testimony of medical witnesses. Failure of an attorney to follow this rule and to permit the claimant's case to be continued to a setting sometime in the future and thus further delay the claimant's obtaining the recompense he deserves or to permit him to go on trial without all of the medical testimony he requires, borders on negligence.

CONCLUSION

All of the foregoing matters constitute major, significant and important considerations for a person handling workmen's compensation matters. There are, of course, other matters which, because of the limitations of this article, cannot be discussed. What is said above, if utilized with sufficient personal dedication and a moderate amount of independent research, will enable an attorney to prosecute successfully plaintiff's or claimant's claims in workmen's compensation matters.

Of course, there is no substitute for the attorney's own digging, preparing, and handling of his claim. As axiomatic as it is, every case is individual on its facts and what may be precisely the right procedure or precisely the exact law under one set of circumstances may be different in the very next case that comes across the desk. All the foregoing will do is furnish guideposts along the way and, it is hoped, make it easier to find the way through the mazes of what might be the unfamiliar field of workmen's compensation law.

47. *Ibid.*

Having satisfied himself that his client sustained an accident arising out of and in the course of his employment, that the employer and employee are under the act and subject to its provisions, that the filing of the claim is within the time prescribed by law, that the employer received proper and timely notice, and that the claimant is entitled to compensation benefits by reason of the foregoing, and having utilized and taken into consideration what is said in this article in the preparation for trial, the attorney is now ready to present his claim before a referee.