Proving the Defendant's Claim

John S. Marsalek

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation
John S. Marsalek, Proving the Defendant's Claim, 26 Mo. L. Rev. (1961)
Available at: https://scholarship.law.missouri.edu/mlr/vol26/iss3/5

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
PROVING THE DEFENDANT'S CLAIM

JOHN S. MARSALEK*

I. UNCONTESTED CASES

The great majority of claims arising out of industrial injuries are un
contested. In 1959, 81,230 reports of injury were filed with the Division of
Workmen’s Compensation, but only 6,014 formal claims for compensation
were filed.¹

Ordinarily, when an accident occurs the employer or insurer promptly
furnishes medical attention and commences the payment of compensation.
The extent and duration of disability is established by medical reports. The
amount of compensation is calculated in accordance with the terms of the
Workmen’s Compensation Law,² and bulletins and tables issued by the
Division.³ An informal conference before a representative of the Division
may be held where doubt exists as to the proper evaluation of the injury.
The rules of the Division set forth clearly and in detail the reports and
other papers required of the employer.⁴ Following this procedure, the rights
and obligations of the parties arising from industrial injuries are adjusted
through routine administrative action in all but a comparatively few cases.
As against 6,014 formal claims in 1959, there were 3,007 compromise settle-
ments approved and formal hearings were necessary in only 320 cases.⁵

In this area the only subject which requires special comment is the
filing of the report of injury. Except as noted below, the law requires every
employer in this state, knowing of an accident resulting in personal injury
to an employee, to notify the Division thereof within ten days, and within
thirty days to file a full and detailed report.⁶ Rule 1 of the Division pro-
vides that any injury which requires medical aid (other than first aid only)

*Attorney, St. Louis, Mo.; LL.B., Washington University, St. Louis, Mo.,
1911; Professor of Law, Washington University; Partner, Moser, Marsalek,
Carpenter, Cleary, Jaeckel & Hamilton, St. Louis, Mo.
2. C. 287, RSMo 1959.
3. RULES, REGULATIONS, BULLETINS & PROCEDURE, MISSOURI DIVISION OF
WORKMEN’S COMPENSATION 119-153 (April 1960) [hereinafter cited as RULES].
4. RULES at 98.
6. § 287.380, RSMo 1959.

(313)
shall be fully reported on Form 1, "Report of Injury," by the employer or insurer.\textsuperscript{7} The section exempting specified employments from coverage does not refer to the reporting section. The duty also applies to minor employers who have not elected to accept the law, and to occupational diseases even though the employer has not adopted the occupational disease section. It applies as well to exempt employments, such as employment by the state or its agencies, farm labor, domestic service, casual employees and employees engaged in home work.\textsuperscript{8} 

The only exceptions to the reporting provisions are injuries exclusively covered by federal law,\textsuperscript{9} such as the Federal Safety Appliances and Employers' Liability Acts,\textsuperscript{10} the Jones Act,\textsuperscript{11} the Longshoremen's and Harbor-workers' Compensation Act,\textsuperscript{12} and the Federal Employees Compensation Act.\textsuperscript{13} 

Violation of the reporting section is a misdemeanor.

II. CONTESTED CASES

Small in percentage but not inconsiderable in number are those cases in which a controversy arises with respect to the employer's liability for compensation or the nature and extent of the disability. In such cases the employee is entitled to the assistance of the Division in filing a formal claim.\textsuperscript{14} 

The claim must be in writing, and must be sufficient to advise the employer and the Division of the nature of the claim being made, but the civil code is not applicable to workmen's compensation proceedings, and it is not necessary that the claim set forth facts sufficient to show that claimant is entitled to relief. If the employer believes that the claim should be more specific a motion for a more definite statement is in order.\textsuperscript{15} The law contains no provisions for the filing of a responsive pleading by the

\textsuperscript{7} Rules at 98. See, however, the statement that the act does not contemplate that an employer report an accident unless it results in an injury of a compensable character in Wheeler v. Missouri Pac. R.R., 33 S.W.2d 179, 183 (K.C. Ct. App. 1930). 
\textsuperscript{8} § 287.090, RSMo 1959. 
\textsuperscript{9} § 287.110, RSMo 1959. 
\textsuperscript{11} 46 U.S.C. § 668 (1915). 
\textsuperscript{12} 33 U.S.C. § 901 (1938). 
\textsuperscript{14} Rules 99; §§ 287.400, 430, 450, RSMo 1959. 
employer or insurer, but this requirement is made in the rules adopted by the Division pursuant to rule making power conferred by the law. The answer must be filed within fifteen days after the Division's acknowledgment of the claim, unless an extension is obtained. If the answer is not timely filed, the statements in the claim are taken as admitted, but no default judgment or award is entered. Whether or not an answer is filed, the case is set for either a prehearing conference or for a hearing before a referee.

At the hearing (if the dispute was not resolved at a prehearing conference), the parties are expected to produce all their evidence. The burden of proof rests upon the claimant. The law and the rules of the Division provide that the hearing shall be conducted in a simple, informal and summary manner. This provision must be interpreted in the light of the constitutional requirement that the findings and decisions of administrative agencies, in cases where a hearing is required by law, must be supported by competent and substantial evidence upon the whole record. Pursuant to the latter requirement, the Division's rule on the subject provides that the rules of evidence which apply in civil cases in Missouri shall apply in compensation hearings. The courts have held that the erroneous admission of evidence will not result in a reversal if the award is sustained by other competent and substantial evidence, whereas the erroneous rejection of material evidence tendered by the unsuccessful party requires a remand. Nothing in the nature of a demurrer to the evidence or motion to dismiss will be entertained. The referee bases his findings and decision, or award, upon all the evidence adduced.

Within ten days from the date of the referee's award either party may apply to the Industrial Commission for a review. The review is upon the transcript of the testimony and proceedings before the referee; no additional evidence will be entertained unless a petition is filed, reciting new evidence that has been discovered, and showing why the evidence could

18. Rules at 15, 100; § 287.460, RSMo 1959.
22. Rules at 101; see Goetz v. J. D. Carson Co., 358 Mo. 125, 206 S.W.2d 330 (1947).
not reasonably have been discovered and produced before the referee.\textsuperscript{27} The application for review must state specifically in what respect the referee's award is not supported by substantial evidence.\textsuperscript{28} The opposing party may, within ten days after the application is filed, file an answer thereto and both parties are entitled to file typewritten briefs or memorandums of law in support of their contentions. Leave may be granted for oral argument before the Industrial Commission, provided application is made within thirty days from the filing date of the application for review.\textsuperscript{29}

The final award of the Industrial Commission is conclusive and binding, absent an appeal to the circuit court of the county in which the accident occurred. If the accident occurred without the state, the appeal lies to the circuit court of the county in which the contract of employment was made. Notice of appeal must be filed with the Industrial Commission within thirty days from the date of the final award.\textsuperscript{30} Appeal lies from the circuit court to the proper court of appeals, or to the supreme court where the amount in dispute or some other issue casts appellate jurisdiction on that court.\textsuperscript{31}

III. PRACTICAL SUGGESTIONS

The foregoing outline is intended as a general view of workmen's compensation rules and statutes with particular attention to procedural features important to the defense. It is not intended as a substitute for a careful study of the applicable rules and statutes bearing upon the case, and the constructions placed upon them by the courts. The protection of the client's interests in contested cases requires the same degree of effort in the investigation of the facts, legal research, and preparation as is required in other types of litigation. This is true as to substantive questions as well as to matters of procedure. Substantial amounts may be at stake.

Under the 1960 maximum rates allowed by the law, the total sum recoverable for death is $15,500.00, for permanent partial disability, $16,900.00, and for temporary total disability, $18,000.00. For permanent total disability the initial 300 weeks at $40.00 amounts to $12,000.00, fol-

\begin{itemize}
  \item \textsuperscript{27} Rules at 15.
  \item \textsuperscript{28} Rules at 16.
  \item \textsuperscript{29} Rules at 16.
  \item \textsuperscript{30} \S 287.401(1), RSMo 1959; Wors v. Tarleton, 234 Mo. App. 1173, 95 S.W.2d 1199 (St. L. Ct. App. 1936), \textit{cert. quashed sub nom. State ex rel. Wors v. Hostetter}, 343 Mo. 945, 124 S.W.2d 1072 (1938) (en banc).
  \item \textsuperscript{31} \S 287.490(2), RSMo 1959.
\end{itemize}
followed by a pension of $1,430.00 per year as long as the employee lives.32 Added to the above figures is the heavy cost of medical, surgical and hospital treatment.33 In cases where the employee is bedfast and requires medical treatment, hospitalization and nursing care over a prolonged period, the costs may run to a very high sum. For the last year for which figures are available, the total medical costs exceeded one-third of the total compensation paid to employees and dependents.34

While it is settled that substantive rights are to be enforced at the sacrifice of procedural formality35 the rule has its limitations. Thus it has been held that the employer must state in the answer all the defenses relied upon, and that defenses not so raised will not be considered.36 The failure of the employee to notify the employer of the injury as required by the law has been upheld as a defense under proper circumstances,37 but the defense is waived if the point is not raised before the Commission.38 Where a party offered evidence in rebuttal which was properly a part of his case in chief, it was held that the referee committed no error in rejecting it.39 Time limitations upon the filing of claims are mandatory.40 No doubt the same applies with respect to the time allowed for filing answers, applications for review by the Industrial Commission, and notices of appeal to the circuit court. Obviously, procedural requirements should be fully complied with, notwithstanding the decisions holding such requirements subordinate to substantive rights.

The facts may be shown by an investigation made before the reference of the file to counsel. A study of the file, with the following questions in mind, may suggest additional subjects for investigation:

Was the claimant an employee, actual or statutory, of the employer named in the claim?41

32. §§ 287.240(1)(2), .190, .170, RSMo 1959.
33. § 287.140, RSMo 1959.
36. The Division's Form 22, "Answer to Claim for Compensation," requires the employer to deny disputed statements in the claim, and also to state "any other facts tending to defeat the claim." Cf. Grauf v. City of Salem, 283 S.W.2d 14, 18 (Spr. Ct. App. 1955); Shout v. Gunite Concrete & Constr. Co., 229 Mo. App. 388, 41 S.W.2d 629 (K.C. Ct. App. 1931); Nabors v. United Realty Co., 298 S.W.2d 474, 480 (St. L. Ct. App. 1957).
41. §§ 287.020, .040, RSMo 1959.
Had the employee filed an election to reject the law or entered into a contract not to be governed by it?  

Was the occurrence giving rise to the claim an accident?  

Did the accident result in a personal injury?  

Did the accident arise out of and in the course of the employment?  

Was the employer a major employer under the law?  

Was the employment exempted from coverage, and, if so, had the employer made an election applying to the occupation in which claimant was engaged?  

Was the claim filed within the limitation period applicable to the particular claim?  

If an occupational disease is claimed, had the employer elected to accept the occupational disease section?  

Is either self-inflicted injury or violation of a safety rule involved?  

Was the employee in the joint service of more than one employer?  

Is a third party liable for the injury?  

If hernia is claimed, are the facts sufficient to prove definitely and to the satisfaction of the Commission the four essential elements specified in the law?  

Was the claimant suffering from a preexisting disability due to a condition or an injury?  

In death cases is the required relationship of the claimant or claimants to the deceased shown by marriage or birth records, or otherwise clearly established?  

The employer may have records which throw light upon the case. Police records of the occurrence should be examined, and in fatal accidents the coroner's record. If the necessary facts cannot be obtained by other

42. §§ 287.060, .040, .110, RSMo 1959.  
43. § 287.020, RSMo 1959.  
44. Ibid.  
45. §§ 287.020, .120, RSMo 1959.  
46. § 287.050, RSMo 1959.  
47. §§ 287.090, .110 RSMo 1959.  
48. § 287.090, RSMo 1959.  
49. §§ 287.430, .440, .063 (6), .020 (6), .197 (7), RSMo 1959.  
51. § 287.120 (3) (5), RSMo 1959.  
52. § 287.130, RSMo 1959.  
53. § 287.150, RSMo 1959.  
54. § 287.195, RSMo 1959.  
55. §§ 287.220, .250 (8), RSMo 1959.  
56. § 287.240, RSMo 1959.
means, it may be necessary to obtain them by depositions. In any serious case the deposition of claimant should be obtained if there is room for doubt or dispute regarding the facts bearing upon the employer's liability or the cause or extent of the disability claimed. Deposition process is available in like manner as in civil cases in the circuit court.

On almost all of the possible defenses suggested, a body of precedents has been built up during the years since the compensation law was enacted.

On many subjects which seem simple enough at first glance, complications and close distinctions will be found in the authorities. A sufficient example is the case law under the first of the above questions: was the claimant an actual or statutory employee of the party named as employer?

The statutory definition is broad. "The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election."57

An employer is defined as any person using the service of another for pay. The state and its political subdivisions and agencies are excepted, absent an election to accept the chapter by law or ordinance.58

The courts construe the term "employee" liberally, with the express purpose of extending the benefits of the law to the largest possible class of employees and restricting those excluded to the smallest possible class.59 The chief, but not exclusive test of the relationship is the right of the employer to direct and control the physical conduct of the employee, or the manner and means of performance. The questions who is an employer and who is an employee under compensation acts do not usually depend upon common law principles (although they may be considered), but depend instead upon the terms and definitions of such acts.60

Following the foregoing rules, a 16 year old boy who worked for his father not under a contract of employment but pursuant solely to the parent and child relationship, who was supported by his father at the family home, but received and expected no wages, was held entitled to compensation for an injury, because he was a workman, and performed a man's work, the court pointing out that the definition contained in the act was not limited to services rendered under a contract of hire, but included those rendered by appointment or election.61

57. § 287.020, RSMo 1959.
58. § 287.030, RSMo 1959.
60. Patton v. Patton, 308 S.W.2d 739 (Mo. 1958).
61. Pruitt v. Harker, 328 Mo. 1200, 43 S.W.2d 769 (1931).
In *Krupp v. Potashnick Truck Serv., Inc.*, an award in favor of the claimant was reversed under the following circumstances. Claimant applied in writing for employment as a truck driver. In order to learn the routes and other details of the job, he rode as a student driver with a regular driver on a number of trips, at his own expense for meals and incidentals, and without any understanding that he was to receive any pay until he qualified for the work. He was injured on one of these trips. The court held that he was not an employee at the time of his injury, stating that all preliminary steps and conditions must be performed so that the relationship of master and servant is fully completed in order to render the Workmen's Compensation Law applicable.

Under a millwright apprenticeship contract claimant worked for the employer during regular hours and attended a public vocational school at night for the purpose of qualifying as a journeyman. He was injured while operating a lathe at the school. The contract provided that the employer would provide training opportunities, but did not obligate it to furnish the classroom work referred to. The employer had no control over claimant's night school work and he received no pay therefor. The court, in *McQuerrey v. Smith St. John Mfg. Co.*, held that he was not an employee at the time of his injury and was not entitled to compensation.

One who applies for employment and signs a contract upon employer's premises with the understanding that the employment is to commence later is not thereby made an employee under the act, but in *Ott v. Consolidated Underwriters* where the employer detained the applicant for 20 minutes to give her some instructions relating to her duties, and she was injured while leaving the premises, it was held that she was in the service of the employer and was an employee within the meaning of the law at the time of her injury.

In *Garcia v. Vix Ice Cream Co.*, an ice cream vendor handled defendant's product. He obtained his supplies each morning in a refrigerated box belonging to defendant, peddled it at such places he chose, returned at night and paid defendant an agreed percentage of his receipts. The company exercised no control over his manner or hours of work. It was held that he was not an employee.

62. 135 S.W.2d 1084 (Spr. Ct. App. 1940).
63. 216 S.W.2d 534 (K.C. Ct. App. 1948).
64. 311 S.W.2d 52 (K.C. Ct. App. 1950).
65. 147 S.W.2d 141 (St. L. Ct. App. 1941).
The case of *Gibson v. St. Joseph Lead Co.*, 66 involved a mining company which sold the trees standing on its land under an arrangement whereby the vendee was to cut and sell them and pay the company an agreed rate per thousand feet out of the proceeds. A tree cutter employed by the vendee was injured by a falling tree. He sought compensation from the company on the theory that the agreement for the sale of the trees, being oral, was invalid because the standing trees were a part of the real estate, and consequently the alleged vendee was merely an employee or contractor for the company. The court held that the vendee was upon the land as a licensee and that the instant the tree which fell on claimant was severed it became personal property, the title to which passed to the vendee. A finding that claimant was an employee of the vendee, and that the relationship between the latter and the company was that of vendor and vendee, and not of master and servant, was permitted to stand.

A mine owner leased a mine to an organization of miners, on terms providing for the payment of royalty to the owner, supervision of the work by a person selected by the miners, and distribution of the net proceeds among them. The owner advanced the money for purchase of the mine equipment. It was held, in *Langley v. Imperial Coal Co.*, 67 that the owner was not the employer and was not liable for compensation on account of the fatal injury of one of the miners. A claim that the lease was a mere device for the purpose of avoiding compensation liability on the part of the lessor was rejected.

A contract between the owner of several farms and another termed the parties “owner” and “tenant” respectively, in the case of *Hogue v. Wurdack*. 68 It provided that it was founded upon an “agreement for employment to operate the farms”; that the owner was to furnish the farms and equipment, and the tenant all labor required for operation and maintenance; and that the tenant was to receive “as compensation for the above services” the use of the farm house and garden, the right to keep certain farm animals, and a percentage of the profits. The court said that notwithstanding the references to the parties as owner and tenant, the agreement was couched in conflicting terminology, and that it granted no estate in the premises. The court concluded that the Commission’s finding, that the so-called tenant was an employee of the owner, was justified.

---

66. 232 Mo. App. 234, 102 S.W.2d 152 (St. L. Ct. App. 1937).
68. 298 S.W.2d 492 (Spr. Ct. App. 1957).
In *Bernat v. Star-Chronicle Publishing Co.*, an 11 year old newsboy who sold and delivered papers for two competing publishers was held not to be an employee of either under the law. It was stipulated in writing that he was to deliver the papers promptly on arrival and charge rates fixed by the publishers, and that upon his failure to conduct the business to their entire satisfaction they had the right to discontinue supplying him with papers or appoint another dealer. The evidence showed that he was not carried on the payrolls as an employee, and that his compensation consisted of his profits from sale of the papers. He delegated his work to others at will, and was free to handle other publications. He conducted the business according to his own methods. It was held that the limited right of control retained by the publishers related to the result to be accomplished, and not the method of performance, and did not give rise to the relationship of employer and employee.

An employee of a contractor on a construction job who, contrary to the instructions of his employer, attempted to assist employees of the owner of the premises in work being done by the owner was a volunteer. It was held in *Lawrence v. Wm. Gebhardt, Jr. & Son*, that he was not an employee of the owner and was not entitled to compensation for an injury sustained while acting as such volunteer.

One may occupy the dual capacity of employee and independent contractor for his employer, and thus be under the protection of the compensation law part of the time, and at other times not within its protection. If the injured party is an independent contractor at the time of the accident, he is not an employee under the law, and is not entitled to recover unless the case falls within section 287.040, applying to the independent contractor relationship.

A member of a partnership is not an employee, and is not entitled to compensation benefits, but the rule is otherwise as to corporate officers and stockholders who render service for the corporation in the capacity of employees. However it was held in *Soars v. Soars-Lovelace, Inc.* that one

69. 84 S.W.2d 429 (St. L. Ct. App. 1935).
70. 311 S.W.2d 97 (St. L. Ct. App. 1958).
71. Coy v. Sears, Roebuck & Co., 253 S.W.2d 816, 819 (Mo. 1953).
72. Rutherford v. Tobin Quarries Inc., 336 Mo. 1171, 82 S.W.2d 918 (1935).
73. § 287.040, RSMo 1959.
74. Chambers v. Macon Wholesale Grocer Co., 334 Mo. 1215, 70 S.W.2d 884 (1934).
76. 346 Mo. 710, 142 S.W.2d 866 (1940).
who was the chief executive officer of a corporation, majority holder of its stock, and in actual control of its operations did not have the status of an employee, because he had no superior, and the element of control by the corporation was absent.

The fact that the insurer may have charged a premium based upon the amount paid a corporate officer as salary does not authorize the Commission, under the doctrine of estoppel, to make an award of compensation in his favor if he is not an employee within the terms of the law. 77

The fact that an employee secures employment by false representations does not render the contract void, but merely voidable at the option of the employer. He is not precluded from recovering compensation for an injury sustained while the contract remains in effect. 78 Where the alleged contract upon which claimant based his status as statutory employee was void because it was not in writing, it was held that proof of an essential element of the claim was lacking, and the claimant could not recover. 79

The foregoing review deals with the statutory definition of the word "employee" and the various circumstances under which a claimant may satisfy or fail to qualify under this single requirement of the law. No consideration has been given the closely related questions applying to casual employees, 80 landlords, contractors and subcontractors 81 employments not subject to the law, 82 exceptions to the application of the law, 83 and the borrowed servant doctrine. 84 On each of these subjects, as well as on many others which arise in contested cases, refinements exist similar to those pointed out above. The situation emphasizes the need to develop the facts fully and in detail at the hearing before the referee.

Where there is more than one theory of the facts or the law upon which the award could rest, the findings and rulings of law accompanying the award ordinarily disclose upon which theory the award is based, so that, in the event of an appeal, the court will have this required information before it. 85 If necessary, a written request for a special finding upon any

77. Ibid.
79. Grauf v. City of Salem, supra note 36.
80. § 287.020 (6), RSMo 1959; Cf. Nabors v. United Realty Co., supra note 36; Noland v. George Tutum Mercantile Co., 313 S.W.2d 633 (Mo. 1958).
81. § 287.040, RSMo 1959.
82. § 287.090, RSMo 1959.
83. § 287.110, RSMo 1959.
84. Patton v. Patton, supra note 60.
85. Smith v. General Motors Corp., 189 S.W.2d 259 (Mo. 1945); Michler v. Krey Packing Co., 253 S.W.2d 136, 142 (Mo. 1952) (en banc).
point in dispute may be filed. This should be done prior to the rendition of the award. It has been held that, where the method of calculation adopted by the Commission appeared by implication from its award, and its conclusion was supported by substantial evidence, it was too late on appeal to question the method followed by the Commission, in the absence of a request by either party for a specific finding regarding the matter.\textsuperscript{86} The Industrial Commission is the court of last resort so far as the findings of fact are concerned, unless the award is clearly contrary to the overwhelming weight of the evidence, and in determining the latter question the court adheres to the rule of deference to the administrative findings involving the credibility of the witnesses, and views the evidence and inferences in the light most favorable to the award.\textsuperscript{87} This being the case, the filing of a memorandum or brief with the referee and the Commission, covering the issues of law and fact both, is advisable in any case in which reasonable grounds for difference of opinion exists.

IV. Medical Problems

The cause, nature and extent of the alleged disability is the only question in dispute in many cases. Various aspects of the subject are included within the scope of other articles in this volume. The discussion here will be limited to a number of suggestions of special interest to the defense.

Injuries included in the schedule which is contained in the law\textsuperscript{88} which heal normally and without complications usually provide little ground for disagreement. The number of weeks of compensation due is fixed by the law. Where an accident causes a permanent injury not listed in the schedule, it becomes necessary to rate the loss in proportion to the relation the injury bears to those specified. In these cases the rating becomes a matter of opinion, and in some cases the opinions on the subject vary widely, depending upon the examiner's belief as to the extent of the impairment remaining after maximum recovery has been attained. Even where the character and extent of the loss of motion in an injured member can be determined with a fair degree of accuracy, the percentage of disability remains within the realm of opinion, depending somewhat on the nature of the injured em-

\textsuperscript{87} Ossery v. Burger-Baird Engraving Co., 256 S.W.2d 805, 808 (Mo. 1953); Seabaugh's Dependents v. Garver Lumber Mfg. Co., 355 Mo. 1153, 200 S.W.2d 55 (1947) (en banc).
\textsuperscript{88} § 287.190, RSMo 1959.
ployee's occupation and other subjective factors. Thus a "trick knee" may completely disable a truck driver from returning to his occupation, while the result would not be so serious to a bookkeeper. The question in all such cases is one of fact for the referee, or for the Commission on review. The opinions of medical experts as to the percentage of disability is not binding upon the trier of the facts. A finding and award which does not follow the opinion of any of the experts will be sustained by the courts if, considering the entire record, there is a reasonable view which supports it. Thus, in a case where the medical experts gave various estimates of the employee's disability running from 20 per cent to 50 per cent of impairment of his back, and the referee found that the disability was 30 per cent loss of function of the body as a whole, a finding by the Commission that the disability was 5 per cent of the body as a whole was sustained on appeal. 89

When a complication of injury and disease is alleged still more difficult questions are presented. It may be claimed that the accident brought on the disease, or aggravated or accelerated a diseased condition already present, or the disease claimed may be occupational in character. Ordinary diseases to which the general public is exposed are not compensable, 90 except where such diseases result from an accident 91 or follow as an incident of an occupational disease, that is, one which is peculiar and incident to the particular employment. 92 At present the law specifically mentions only silicosis, asbestosis, loss of hearing due to industrial noise, and radiation disability as occupational diseases but the statutory definition includes other forms as well. 93 In this connection, it has been held that tuberculosis, unless brought on by silicosis or some other occupational lung disease, is not an occupational disease, 94 and that conditions due to an allergy do not fall within the classification. 95

Diseases not caused or aggravated by accident, and not peculiar and incident to the particular occupation, form a third class, which is not covered by the Workmen's Compensation Law. To recover on account of such diseases, the employee is left to his rights at common law. 96

90. § 287.067, RSMo 1959.
92. § 287.067, RSMo 1959.
96. McDaniel v. Kerr, 364 Mo. 1, 258 S.W.2d 629 (1953) (en banc).
In all contested cases where disease is alleged as a complication of accidental injury, or as an occupational condition, the investigation should cover the employee's occupational and medical history, which may be obtained through the employee's voluntary statement or by deposition. The employer's records may contain reports or other information of value in determining whether there is any connection between the accident or employment and the disease alleged. Copies of the records of any hospitals where the employee may have been treated for a similar condition should be obtained and examined. An examination of the employee by a physician who specializes in the disease alleged should be obtained, and in preparation for a hearing, a study of the medical literature on the subject, and consultation with the defense medical witnesses is required, so that the medical questions may be properly developed both on direct and cross-examination. Any hypothetical questions to be submitted should be given careful consideration in advance of the hearing, and unless the subject is one with which counsel has had a lengthy experience, such questions should be prepared in writing. In this connection, it should be noted that the objection to such questions most frequently made, that the question does not include all material facts in evidence, is unsound. It is necessary that the facts hypothesized be shown by the evidence, but it is not absolutely essential that the question include all the material facts bearing on the issue. The questioner may frame his hypothetical question on his own theory of the case. He may elicit an opinion on any combination, or set of facts he may choose, if the question propounded fairly hypothesizes facts the evidence tends to prove and fairly presents the questioner's theory.\(^7\)

The use of medical texts in the cross-examination of adverse medical experts should be considered, but this course is attended with difficulties and is not ordinarily successful.\(^8\)

The burden rests upon the claimant to prove the causal relation between the accident and the disease alleged to have resulted therefrom, and where permanent injury is claimed, the permanency must be shown with reasonable certainty. While this does not mean that absolute certainty is required, evidence which amounts to no more than mere conjecture, or shows no more than mere likelihood or even probability, will not sustain a

\(^7\) Hunter v. St. Louis S.W. Ry., 315 S.W.2d 689 (Mo. 1958); Huffman v. Terminal R.R. Ass'n of St. Louis, 281 S.W.2d 863 (Mo. 1955).

\(^8\) 32 C.J.S. Evidence § 574 (1942); Cooper v. Atchison, T & S.F.R.R., 347 Mo. 555, 148 S.W.2d 773 (1941).
finding that a permanent injury exists. Such issues do not always require expert medical testimony in their support, but where the subject is one beyond common knowledge and experience, expert testimony may be indispensable.

The necessity above commented upon for a full and detailed development of the facts at the hearing, and the filing of briefs with the referee and the Commission clearly stating the litigant’s position and arguments, applies to the medical issues as well as to questions of liability. While on medical questions the finding of the Commission may in exceptional circumstances be reversed on appeal when not reasonably supported by the evidence, in the great majority of instances the effort to obtain relief on appeal runs afoul of the rule that where the right to compensation depends upon which of two conflicting medical or scientific theories should be accepted such issue is peculiarly one for the determination of the Industrial Commission. The authorities hold out little ground for hope that the findings of the Industrial Commission on medical questions will be reversed by the courts.

102. Vollmar v. Board of Jewish Educ., 287 S.W.2d 868 (Mo. 1956).