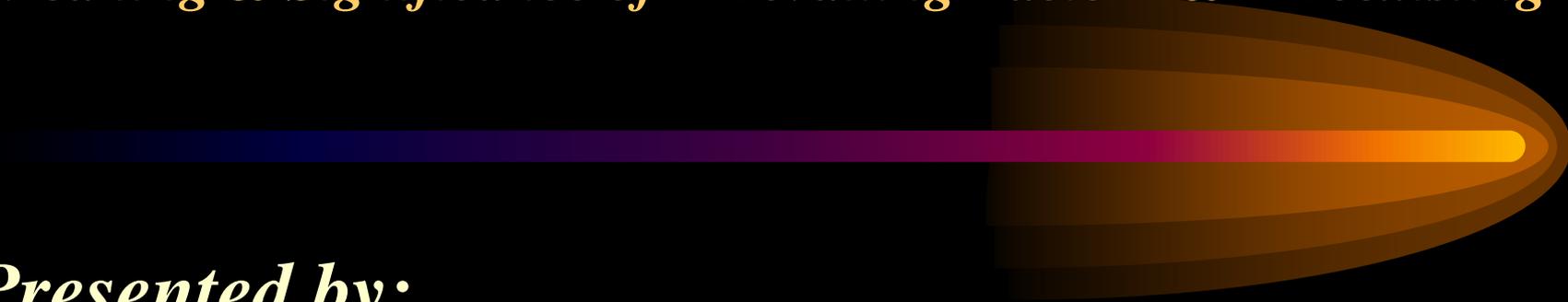


*A Case Study Analysis of Compensability – Evaluating the
Meaning & Significance of “Prevailing Factor” & “Preexisting”*



Presented by:

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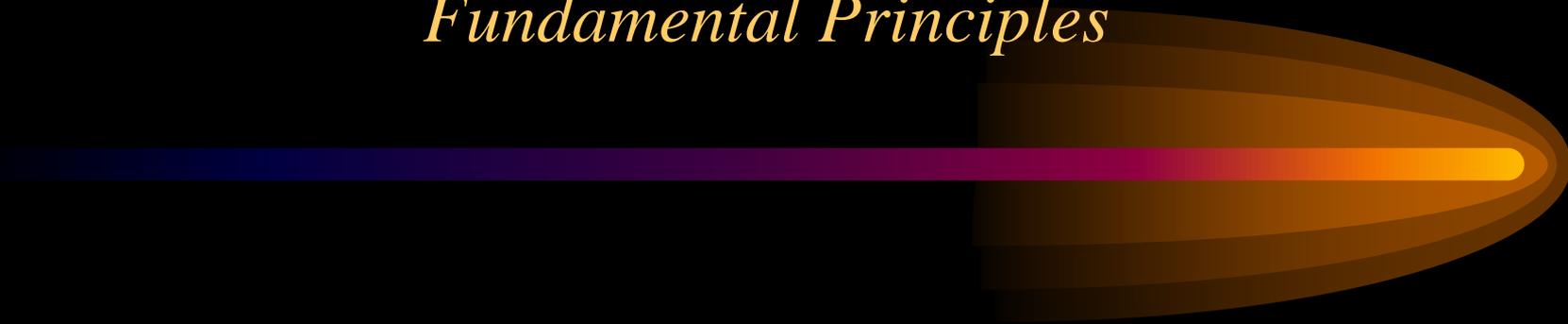
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WORKERS' COMPENSATION IN MISSOURI

Fundamental Principles



- Purpose of the Act -- to place upon industry the losses sustained by employees resulting from work related injuries
 - In consideration for this statutory liability, industry is relieved of tort liability for negligence, and is not subject to unlimited damages.
 - The benefits are to be provided voluntarily without requirement that the employee file a claim or secure the services of an attorney.

WORKERS' COMPENSATION IN MISSOURI

Fundamental Principles



- Generally, the negligence and/or fault of an employee are immaterial to a determination of whether the employee is entitled to benefits.
- In exchange for this benefit, the employee gives up his or her common law right to sue the employer (or pursue such other rights and remedies against the employer) not provided for by Chapter 287, RSMo, on account of such work-related injury or death. Section 287.120, RSMo. E.g., See, *James v. CPI Corp.*, 897 S.W.2d 92 (Mo. App. E.D. 1995)

WORKERS' COMPENSATION IN MISSOURI

Fundamental Principles



- There are exceptions to this general rule. (Section 287.120, RSMo.)
 - No compensation is allowed if the employee intentionally committed a self-inflicted injury.
 - Compensation and death benefits may be reduced if the employee's injury was caused by willful failure of the employee to use safety devices or violated a safety rule
 - Compensation and death benefits may be reduced if the employee's injury is sustained in conjunction with the use of alcohol or non-prescribed controlled drugs
 - The benefits available under workers' compensation may be forfeited if the use of alcohol or non-prescribed controlled drugs is the *proximate cause* of the employee's injury; provided however, the employer posted conspicuously according to statute the alcohol / drug rule.

WORKERS' COMPENSATION IN MISSOURI

Adjudication of a Case

What is a compensable injury?

Elements of Proof

- ❖ Jurisdiction
- ❖ Notice
- ❖ Timely Filing of Claim for Compensation
- ❖ Employment – Operating Under & Subject to W.C.
- ❖ Injury by Accident / Incident of Occupational Disease
- ❖ Arising Out of & In the Course of Employment
- ❖ Establishment of Average Weekly Wage (Comp. Rate)
- ❖ Establishment of Applicable Benefits (Medical Care, TTD/TPD Compensation, PPD/PTD Compensation, Disfigurement Compensation, Death Compensation)

Case Study Analysis - Issues for Adjudication



- Did the employee sustain a compensable work injury?
- If the employee sustained a compensable work injury, what is the nature and scope of the medical care he is entitled to receive? (What medical care, if any, does ER/IR owe to EE?)
- If the employee sustained a compensable work injury, what is the nature and extent of the disability (temporary and/or permanent) sustained by the employee? (What disability compensation (temporary and/or permanent), if any, does ER/IR owe to EE?)

Injury by Accident - Arising Out of & In the Course of Employment

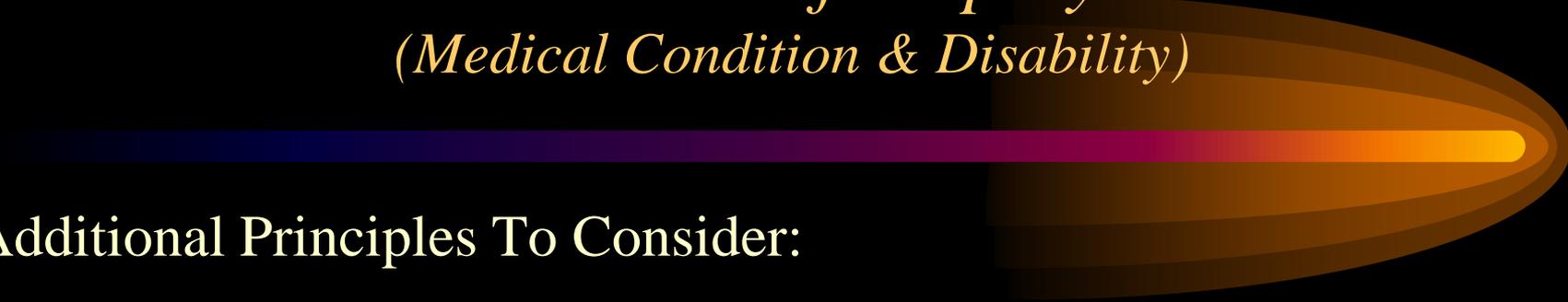
(Medical Condition & Disability)

Principles To Consider:

- A preexisting but not disabling condition does not bar recovery under The Missouri Workers' Compensation Law, if a work-related injury causes the condition to escalate to a level of disability. *Weinbauer v. Grey Eagle Distributors*, 661 S.W. 2d 652 (Mo. App., E.D. 1983)
- If the evidence establishes that an accident (occupational disease) caused a disability or aggravated a preexisting condition or infirmity of an employee, which produces a condition that would not have resulted in a normal, healthy individual, an award is authorized. *Fogelson v. Banquet Foods Corp.* 526 S.W.2d 886 (Mo. App., K.C.D. 1975)
- An aggravation of an existing infirmity caused by an accident or occupational exposure arising out of and in the course of employment is compensable under Chapter 287, RSMo, even if the particular accident (occupational injury) would not have produced such result in a normal and healthy individual. *Mashburn v. Chevrolet-Kansas City Division, General Motors Corp.*, 397 S.W.2d 23 (Mo. App., K.C.D. 1965).

Injury by Accident - Arising Out of & In the Course of Employment

(Medical Condition & Disability)



Additional Principles To Consider:

- Determining whether the accident (or O. D.) was the “prevailing factor” in the cause of the injury.
 - Consideration of the “egg shell” employee
 - Asymptomatic to symptomatic / worsening of medical condition
 - Consideration of the phrase “arising out of and in the course of employment” → requires two separate tests / findings

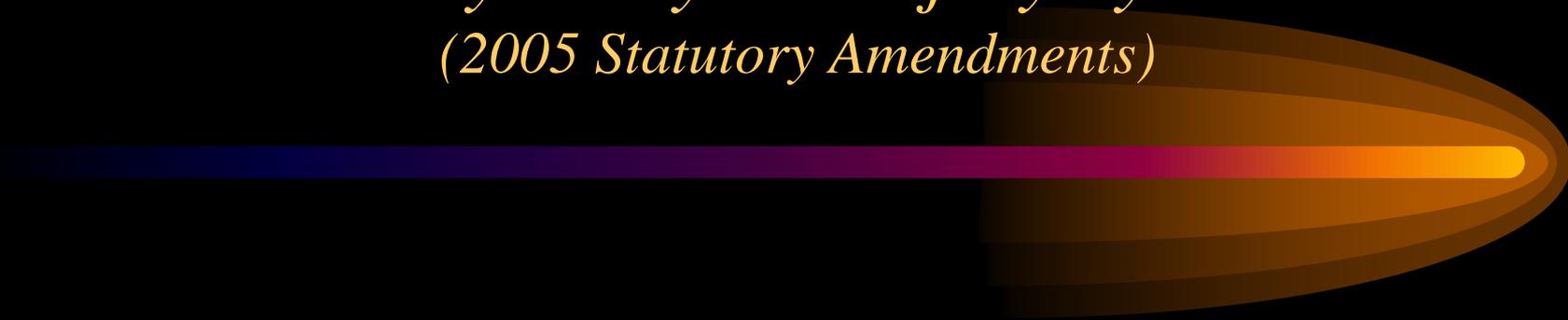
Case Study Analysis - Injury by Accident

(2005 Statutory Amendments)

- ❖ Section 287.020.2, RSMo states:
 - 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.

Case Study Analysis - Injury by Accident

(2005 Statutory Amendments)



❖ [Applicable Statute]

Section 287.020.3(1), RSMo states:

- In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course employment. An injury by accident is compensable only if the accident was *the prevailing factor* in causing both the resulting medical condition and disability. *The “prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.* [Emphasis added.]

Case Study Analysis - Injury by Accident

(2005 Statutory Amendments)

❖ [Applicable Statute]

Section 287.020.3(2), RSMo states:

- An injury shall be deemed to arise out of and in the course of the employment only if:
 - (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is *the prevailing factor* in causing the injury; and
 - (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

[Emphasis added.]

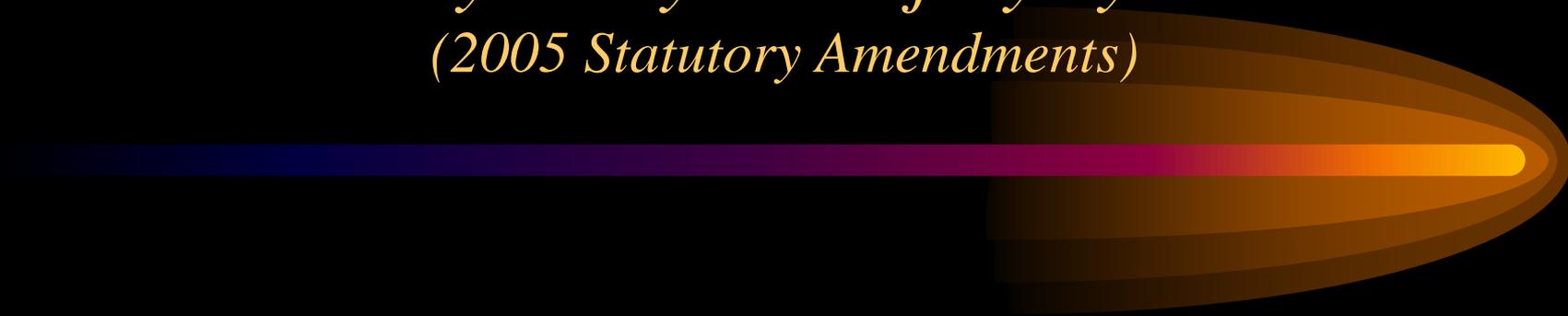
Case Study Analysis - Injury by Accident

(2005 Statutory Amendments)

- Three-step Process: The adjudication of this issue involves consideration of three questions:
 - What is the injury (medical condition & disability)?
 - Which factor among the factors is the prevailing (primary) factor in causing the injury?
 - Does the injury have as its origin a risk connected with the employment, and is the injury flowing from that source as a rational consequence? [If Accident (as opposed to O. D.) does the injury come from the hazard or risk unrelated to employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life?]

Case Study Analysis - Injury by Accident

(2005 Statutory Amendments)



REVIEW OF HYPOTHETICAL:

- Accident
- Medical Treatment
- Medical Opinion

Adjudication of First Issue

(Did EE sustain a compensable injury?)

Consideration of Hypothetical:

Step 1:

Question: What is the injury (medical condition & disability)?

Answer: ?

Comments & Analysis:

- The accident (event in hypothetical) involves Employee lifting the heavy trash bag filled with specific trash items from the work place and situated in a trash can, while reaching down to pick-up the trash bag to keep it from spilling and falling on to the ground. EE experienced immediate pain to her right shoulder and neck.
- ❑ Did EE sustain an injury to her right shoulder? If so, what is the nature of this injury?
- ❑ Did EE sustain an injury to her neck? If so, what is the nature of this injury?

Adjudication of First Issue

(Did EE sustain a compensable injury?)

Step 1 Discussion Continued:

Comments & Analysis:

- Evidence of a prior medical condition and disability relating to the right shoulder— what is the nature of EE’s medical condition and disability referable to the right shoulder prior to the work accident?
 - ❑ Evidence of receiving medical treatment for right shoulder prior to work accident?
 - ❑ Evidence of EE suffering disability referable to right shoulder prior to work accident?

- Evidence of a prior medical condition and disability relating to the neck— what is the nature of EE’s medical condition and disability referable to the neck prior to the work accident?
 - ❑ Evidence of receiving medical treatment for neck prior to work accident
 - ❑ Evidence of EE suffering disability referable to neck prior to work accident

Adjudication of First Issue

(Did EE sustain a compensable injury?)



Step 1 Discussion Continued:

Comments & Analysis:

- Do the facts indicate a change in the prior medical conditions following the occurrence of the work accident?
 - ❑ Consideration of the “egg shell” employee
 - ❑ Asymptomatic to symptomatic
 - ❑ Even if symptomatic, is there a change in pathology / medical condition - worsening of the medical condition

Adjudication of First Issue

(Did EE sustain a compensable injury?)

Consideration of Hypothetical:

Step 2:

Question: Which factor among the factors is the prevailing factor in causing this injury)?

Evaluation Process:

- ❑ Is it biologically and mechanically plausible that the lifting of the heavy trash bag while EE was engaged in her employment sufficient to cause the injury (medical condition and disability) to her right shoulder?
- ❑ Is it biologically and mechanically plausible that the lifting of the heavy trash bag while EE was engaged in her employment sufficient to cause the injury (medical condition and disability) to her neck?

Adjudication of First Issue

(Did EE sustain a compensable injury?)



Consideration of Hypothetical:

Step 3:

Question: Does the injury have as its origin a risk connected with the employment, and is the injury flowing from that source as a rational consequence?

Evaluation Process:

This risk source analysis involves identification of the *activity that caused the injury*, and then comparing that risk source or activity to normal non employment life. This is a specific and narrow inquiry.

Adjudication of First Issue

(Did EE sustain a compensable injury?)

Consideration of Hypothetical:

Step 3 (continued):

- ❖ The risk source is determined by identifying the specific conditions the employee faced.
- ❖ The risk presented in this case relates to the employee lifting the heavy trash bag from the trash can, while reaching down to pick-up the trash bag to keep it from spilling and falling on to the ground,. The risk here is not merely walking or merely lifting, but lifting and picking up this particular trash. In Missouri, we know the risk source as we find it by concluding the risk source from the specific conditions the employee faced.

Adjudication of First Issue

(Did EE sustain a compensable injury?)

Case Examples of This Risk Source Analysis:

- Setting forth the standard of when an injury happens because of employment and not merely during employment. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo banc 2012); *Miller v. Missouri Highway and Transportation Commission*, 287 S.W.3d 67 (Mo banc 2009).
- Cases where the employee has fallen due to a condition of employment increasing the risk of injury. *Dorris v. Stoddard County*, 436 S.W.3d 586 (Mo.App. S.D. 2014); *Young v. Boone Electric Cooperative*, 462 S.W.3d 783 (Mo.App. W.D. 2015); *Lincoln University v. Narens*, 2016 WL 1436275 (Mo.App. W.D. 2016); *Stricker v. Children's Mercy Hospital*, 304 S.W.3d 189 (Mo.App. W.D. 2010); *Pope v. Gateway to West Harley Davidson*, 404 S.W.3d 315 (Mo.App. E.D. 2013).

Adjudication of First Issue

(Did EE sustain a compensable injury?)

Case Examples of This Risk Source Analysis:

- An injury due to close awkward quarters in an office setting. *Randolph County v. Moore-Ransdell*, 446 S.W.3d 699 (Mo.App. W.D. 2014); *Wright v. Treasurer*, 2015 WL 6926992 (Mo.App. E.D. 2015).
- Specifying a cause of the injury is not necessarily required when the accident and risk source can be identified. *Gleason v. Treasurer*, 455 S.W.3d 494 (Mo.App. W.D. 2015). In *Gleason* the EE was working and fell off the top of a railcar 20 – 25 feet above the ground.
- Slips and falls on icy parking lots. *Missouri Department of Social Services v. Beem*, 478 S.W.3d 461 (Mo.App. W.D. 2016); *Scholastic, Inc., v. Viley*, 452 S.W.3d 680 (Mo. App. W.D. 2014); *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo.App. E.D. 2012). The risk relates to the specific icy condition causing the fall, and not elsewhere.

Adjudication of Second Issue

(What medical care does ER/IR owe to EE?)



- Legal Question: What medical treatment is reasonably required in order to cure and relieve the employee from the effects of the injury?
- This inquiry does ***NOT*** include consideration of the “prevailing factor” analysis. Rather, the test is governed by Section 287.140.1, RSMo.

Adjudication of Second Issue

(What medical care does ER/IR owe to EE?)

❖ [Applicable Statute]

Section 287.140, RSMo:

287.140. 1. In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, *as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury....*

[Emphasis added.]

Adjudication of Second Issue

(What medical care does ER/IR owe to EE?)

Implications → [Broad Application of Medical Care for Treatment of the Injury]

- The injury may be one of multiple factors, including a lesser factor, in causing need for EE's receipt of the medical treatment.
- The prescribed treatment need not cure EE's medical condition. The obligation includes treatment that will provide EE with relief from the effects of the injury.
- The prescribed or recommended treatment must be reasonable? [EE may easily satisfy his or her burden of proof in establishing the treatment is reasonable with evidence of medical opinion. Does ER/IR have a physician willing to state that the other physician is prescribing unreasonable medical treatment? Having a different medical opinion-wherein the physician states simply that he or she would not prescribe such treatment-is not proof of the treatment being prescribed by the other physician is unreasonable.]
- *See, Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo. App. W.D. 2011)

Adjudication of Third Issue

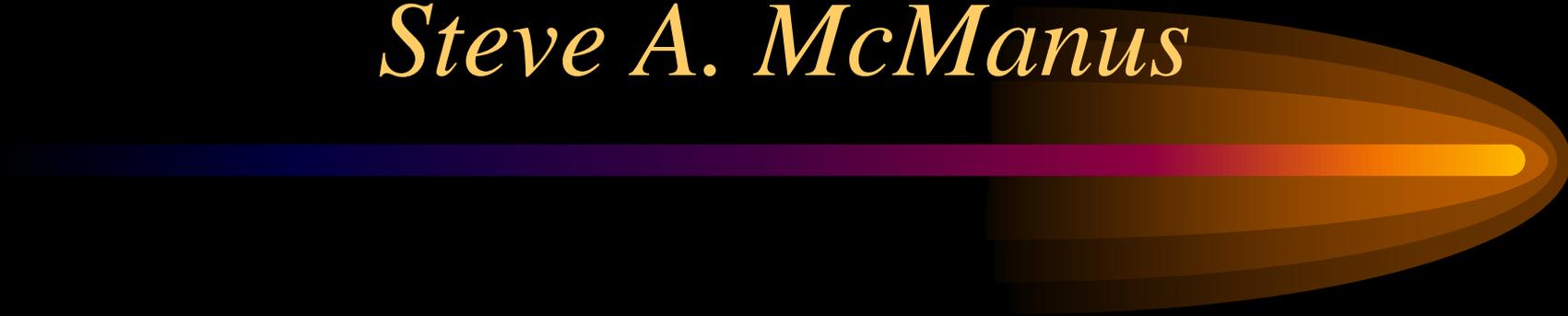


- If compensable, did the work injury to the right shoulder cause the EE to sustain any disability (temporary and/or permanent)?
 - ❖ If so, what is the nature and extent of this disability? What disability compensation, if any, does ER/IR owe to EE?

- If compensable, did the work injury to the neck cause the EE to sustain any disability (temporary and/or permanent)?
 - ❖ If so, what is the nature and extent of this disability? What disability compensation, if any, does ER/IR owe to EE?

- Consideration of prior permanent disability and apportioning of permanent disability attributable to the work injury and the prior disability.

Steve A. McManus



- The perspectives of legal counsel for the Employer/Insurer and consideration of practical problems faced beyond the Hypothetical Case Study.

Audience Questions & Final Thoughts



- Comments by Attorney McManus
- Comments by Judge Wilson

Thank you!

