



SUPREME COURT OF MISSOURI

en banc

November 23, 2009

Effective July 1, 2010

IN RE: REVISIONS TO MAI-CIVIL

TABLE OF INSTRUCTIONS

- MAI 8.02 DAMAGES – F.E.L.A. – INJURY TO EMPLOYEE
 (Instruction – Revision)
 (Notes on Use – Revision)
- MAI 32.01 AFFIRMATIVE DEFENSE - GENERALLY
 (Committee Comment – Revision)

ORDER

1. Revisions of previously approved MAI-CIVIL Instructions, Notes on Use and Committee Comments as listed above, having been prepared by the Committee on Jury Instructions - Civil and reviewed by the Court, are hereby adopted and approved.

2. The Instructions, Notes on Use and Committee Comments revised as set forth in the specific exhibits attached hereto must be used on and after July 1, 2010, and may be used prior thereto; any such use shall not be presumed to be error.

3. It is further ordered that this order and the specific exhibits attached hereto shall be published in the South Western Reporter and the Journal of The Missouri Bar.

Day - to - Day

WILLIAM RAY PRICE, JR.
Chief Justice

8.02 [2010 Revision] Damages - F.E.L.A. - Injury to Employee

(Approved November 23, 2009; Effective July 1, 2010)

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future]¹ as a result of the occurrence² mentioned in the evidence. [In determining plaintiff's damages, you may include an amount to compensate plaintiff for the fear of cancer if you believe that such fear is genuine and serious.]³ Any award of future pecuniary damages must be included at present value. [Any award you make is not subject to income tax.]⁴ [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number _____, in determining plaintiff's total damages you must not include those damages that would not have occurred without such failure.]⁵ [If you find plaintiff contributorily negligent as submitted in Instruction Number _____, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff.]⁶

Notes on Use (2009 Revision)

(Approved November 23, 2009; Effective July 1, 2010)

1. This bracketed phrase may be added if supported by the evidence.
2. When the term "occurrence" must be modified, substitute some descriptive term that specifically describes the compensable event or conduct. For example, if the

plaintiff claims that he was injured in a fall that occurred at work but the defendant claims that the injury did not result from the fall but rather resulted from a non-compensable automobile accident, the instruction may be modified to read “as a result of the fall on (the date of the compensable event).”

3. Add this bracketed sentence where the evidence supports submission of compensability of plaintiff’s fear of the future risk of contracting cancer in accordance with *CSX Transportation, Inc. v. Hensley*, 556 U.S. ____, 129 S.Ct. 2139, 173 L.Ed.2d 1184 (2009).

4. If requested, this bracketed sentence must be given. See: *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

5. If failure to mitigate damages is submitted, the damages instruction must be modified by adding this bracketed sentence. See MAI 32.07(A) for the appropriate method of submission of failure to mitigate damages in an F.E.L.A. case. *Kauzlarich v. Atchison, Topeka, and Santa Fe Ry. Co.*, 910 S.W.2d 254 (Mo. banc 1995).

6. If contributory negligence is submitted, the damages instruction must be modified by adding this bracketed sentence. See MAI 32.07(B) for the appropriate contributory negligence instruction in an F.E.L.A. case.

32.01 Affirmative Defenses - Generally

Committee Comment (2009 New)

(Approved November 23, 2009; Effective July 1, 2010)

If a party has properly pleaded an affirmative defense pursuant to Rule 55.08, and if there is substantial evidence in support of the affirmative defense, even if there is also evidence of the contrary, then a party is entitled to an affirmative defense instruction. *Romeo v. Jones*, 144 S.W.3d 324 (Mo. App. 2004). The propriety of any affirmative defense is derived from either case law or statutory authority. See *Dustin Meyer v. Astrazeneca Pharmaceuticals, L.P.*, 224 S.W.3d 106 (Mo. App. 2007), and section 537.764, RSMo.