

**REVIEW OF THE NEW  
WORKERS' COMPENSATION LAW**

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**MISSOURI - 2005**

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## Introduction

Senate Bill Nos. 1 & 130 passed by the 93<sup>rd</sup> General Assembly in Spring 2005 represent arguably the most major revision of Missouri's Workers' Compensation Law in over a decade, repealing thirty-five sections – and enacting forty new sections – of the Law. To facilitate understanding these changes, I have prepared this review that includes a directory of the revised sections and a topic and case index. It is my hope that this tool will be helpful in considering the new law's many changes.

Disclaimer: This is not a summary by the Department of Labor and Industrial Relations, the Division of Workers' Compensation, or the Kansas City workers' compensation office. This strictly is a summary I completed with invaluable input from Administrative Law Judge Rebecca Magruder and attorney Daniel Doyle whom I wish to acknowledge for their contributions. Note: While fonts and certain punctuation (such as boldface and bracketing) are significant in the Legislation, the fonts and punctuation contained in this review – including underlining, **bolding**, and *italics* – are not intended to reflect statutory changes but were added to improve clarity.

## Review

### 1. **286.020 – Commissioner Confirmation**

Adds requirement that any appointee to the Labor and Industrial Relations Commission be confirmed by the Senate within 30 days after the Senate convenes during a regular legislative session. If the appointee is not confirmed, the appointee cannot be reappointed to the Commission. Eliminates indefinitely serving “acting commissioners”. (Note: this provision is in Chapter 286, not 287)

### 2. **287.020 – Definitions**

■ **Accident:** “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.**” (Note: the boldfaced words are new.) Deleted is the former wording that an accident be “unforeseen” and happen “with or without human fault”. 287.020.2

■ **Injury:** Formerly for an injury to be compensable the employment had to be “a substantial factor in causing the injury”. Now, to be compensable, the accident must be “the prevailing factor in causing the injury.” 287.020.3(2)(a)

■ **Prevailing Factor Defined:** “The prevailing factor’ is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” 287.020.3(1)

■ **Idiopathic Injuries:** “An injury resulting directly or indirectly from idiopathic causes is not compensable”. 287.020.3(3)

■ **Heart Attacks:** The new language is: “A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is

an injury only if the accident is the prevailing factor in causing the resulting medical condition;" 287.020.3(4)

■ **Going To and From Work Cases:** The new statute states that injuries in company owned or subsidized "automobiles" that occur while traveling from the employee's home to the employer's place of business, or vice versa, are not compensable. As the new statute specifically reads "automobiles" strict construction could render this change inapplicable if the employee were traveling to and from work by means other than an automobile. In any event, this would not appear to eliminate coverage for cases in which an employee were a traveling salesperson or on a business trip. 287.020.5.

■ **Parking Lot Cases:** The new law states "the 'extension of premises' doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment." 287.020.5

■ **"Positional Risk" Cases:** The statute also nullifies the Supreme Court's decisions in *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. banc 1999) and *Drewes v. TWA*, 984 S.W.2d 512 (Mo. banc 1999), and the Court of Appeals' ruling in *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002). These are all so-called "positional risk" cases in which employees received workers' compensation benefits for unremarkable incidents only because they happened to occur at work.

For example, in *Kasl*, the employee's foot simply "fell asleep" causing her to fall and break her ankle. In *Drewes*, the employee fell while carrying her lunch tray in a break room near, but not owned or controlled by, the employer. In *Bennett*, the employee – who had a pre-existing knee injury – merely was walking when she felt her knee pop. Benefits were awarded in all three cases. Now, cases such as them are not compensable. 287.020.10

### 3. **287.040 – Truck Drivers (and 287.041, 287.043)**

Changes to §§287.040, 287.041 and 287.043 must be considered collectively to understand their impact. Together, they work to eliminate certain over-the-road truck drivers from being covered by the Law.

A typical arrangement for a trucking company is to hire a driver as an independent contractor. The contract between the driver and the trucking company expressly states that the driver is an independent contractor and *not* an employee and does not have to provide workers' compensation insurance for him. Further, if the driver does not own a rig the trucking company often will arrange for him to obtain one (typically from a company affiliated with it) through a lease-purchase agreement. The driver is the lessee of the truck and the company is the lessor.

Some recent appellate decisions disregarded independent contractor agreements between the drivers and the trucking companies and instead held that the drivers were employees. Thus, the trucking companies were ordered to pay workers' compensation benefits to the drivers.

The specific changes to each of these sections are as follows:

**287.040 –**

- *Deletes* section 2, which applied to fraudulent landlord and tenant relationships that were created for the purpose of avoiding liability. The old law in such fraudulent arrangements deemed the landlord or lessor to be the employer of the employees of the tenant or lessee.
- Adds new subsection 4 which states that 287.040 shall not apply to the relationship between a for-hire motor carrier and an owner and operator of a motor vehicle.

**287.041 –** This is a new section which states that:

- Notwithstanding the provisions of §287.030 (employer defined) and §287.040 (statutory employers) a for-hire motor carrier shall not be determined to be the employer of
  - A lessor defined by 49 C.F.R. §376.2 (f), or
  - A driver receiving remuneration from a lessor
- The term “for-hire motor carrier” shall not include an organization described in §501 (c) (3) of the Internal Revenue Code or any governmental entity.

**287.043 –**

Expressly abrogates and rejects two trucking cases, *Nunn v. C.C. Midwest*, 151 S.W.3d 388 (Mo. App. W.D. 2004) and *Owner Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc.*, 133 S.W.3d 162 (Mo. App. S.D. 2004). It should be noted that the workers' compensation administrative law judge in *Nunn* held that the driver was an independent contractor and denied benefits, but his decision was reversed by the Labor Commission and awarded benefits. The *New Prime* case originated in a circuit court.

**4. 287.063 – Occupational Diseases, Last Exposure**

- **Last Exposure:** Changes which employer is liable in an occupational disease case. Formerly, the employer who last exposed the employee to the hazard prior to the claim being filed was liable. Now, the last employer who exposed the employee to the hazard, *prior to evidence of disability*, is liable. 287.063.2

- **Statute of Limitations:** Adds that the statute of limitations in occupational disease cases shall not begin to run until it becomes reasonably discoverable and apparent that an injury has been sustained “related to such exposure”. 287.063.3

**5. 287.067 – Occupational Diseases Defined**

- **Prevailing Factor:** Occupational diseases and injuries due to repetitive motion “are compensable only if the occupational exposure was the prevailing factor” in developing the disease. 287.067.2

**Definition:** “prevailing factor” is “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” 287.067.2

- **Repetitive Motion:** adds subsection 3 recognizing injuries due to repetitive motion.
- **Aging:** “Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.” 287.067.2
- **Firefighters and Police Officers:** Old subsection 5 (which now is new subsection 6) now specifies that – only with regard to certain conditions including respiratory and cardiovascular diseases – the law applies to “paid fire fighters” and “paid police officers of a paid police department certified under chapter 590”. The apparent intent is to eliminate coverage for volunteer firefighters and volunteer police for these limited conditions. 287.063.6
- **Three Month Rule:** Old subsection 7 (now 8) – the three month rule regarding repetitive motion injuries – is limited to going back to the “immediate prior employer” if work at that immediate prior employer was the prevailing factor in causing the injury. This specifically deletes the former “a substantial contributing factor” language. So now, if within three months of the employee’s new employment, the employee develops carpal tunnel syndrome the current employer will have to prove that the employment with the immediate prior employer was the prevailing factor in causing the injury to shift liability to the prior employer. However, the change to 287.063 which places liability on the employer who last exposed the employee to the occupational hazard, “*prior to evidence of disability*”, should settle most of these controversies.

## 6. 287.110.1 – Drafting/Clerical Error

Lawmakers recently acknowledged that this provision was enacted with an error in drafting. See, “Workers' Comp Bill Has Glitch”, Columbia Daily Tribune, August 8, 2005.

Initial versions of the proposed legislation read (**boldfaced** wording is new proposed language):

“287.110. 1. This chapter shall apply to all cases within its provisions except those exclusively covered by any federal law **and those addressed in subsection 11 of section 287.120.**”

However, the final (Truly Agreed To and Finally Passed) version approved by the legislature and signed by the governor read:

“287.110. 1. This chapter shall apply to all cases within its provisions except those exclusively covered by any federal law **and those addressed in [subsection 11 of] section 287.120.**”

Note that the three bracketed words “subsection 11 of” were removed from the final version.

Subsection 11 of §287.120 was a new section that was eliminated from the final version; one could speculate that because subsection 11 was eliminated from the final version, the reference to it in §287.110 also was removed. However, leaving the remaining language of §287.110 (“**and those addressed in section 287.120**”) results in “This Chapter” (287) not applying to cases covered by §287.120.

Section 287.120 is the provision that:

- (1) Specifies that employers subject to this chapter must provide workers compensation benefits for the personal injury or death of employees that result from accidents (not occupational diseases) that arise out of and in the course of employment, and
- (2) Releases employers from civil liability.

Governor Blunt called the Legislature into Special Session, in part, so that it could correct this error. And, the Legislature succeeded by passing SB 4, which corrected this error by eliminating any reference in §287.110.1 to §287.120. Governor Blunt signed the bill on Thursday, September 15, 2005. However, because SB 4 did not pass with an emergency clause (which would have made it effective immediately), the correction will not go into effect for 90 days, or, until Wednesday, December 14, 2005.

There appear to be three possible results from the error:

1. It could eliminate the entire workers' compensation law from August 28 to December 13, 2005; or,
2. Simply being a typographical error, it did not have any substantive effect and the error can be ignored; or,
3. It could be determined that only the provisions in §287.120 regarding safety, alcohol use, mental stress and firefighters were revoked, with the rest of the workers' compensation law remaining intact.

The Missouri Department of Insurance issued Bulletin 05-06 (found at <http://www.insurance.mo.gov/laws/bulletin/05-06.htm>) adopting position number 2, above, concluding:

. . . the General Assembly did not intend to carve out an exception that eliminates the whole of the workers' compensation law. . . . This error in drafting does not obscure the clear legislative intent of the General Assembly. Insurance companies are advised that Senate Bills 1 & 130 became effective on August 28, 2005 and insurers will be held to the intended requirements of Missouri 's workers' compensation law.

The Division of Workers' Compensation also has taken the same position.

Thus, both the Department of Insurance and the Division of Workers' Compensation will hold all insurers and self-insurers subject to the Act to the intended requirements of Missouri's Workers' Compensation Law.

Therefore, it is recommended that employers, insurers, self-insurers and the Second Injury Fund continue “business as usual” and accept or defend workers’ compensation cases under the new law, effective August 28, 2005, as if the clerical error had not occurred. In addition, employees – and, as the case may be, their attorneys – similarly are advised to pursue treatment and benefits for workplace injuries through the workers’ compensation system.

However, a civil suit, no doubt, will test this error in court. A likely test case would involve otherwise obvious negligence by an employer. Suits testing the error could be filed up to five (5) years after December 14, 2005 for injuries that occur between August 28, 2005 and December 13, 2005.

#### 7. **287.110.2 – Jurisdiction/Principally Localized**

If the injury occurs outside Missouri, jurisdiction still may be had here if the employee’s employment was principally localized in Missouri “within thirteen calendar weeks of the injury or diagnosis of the occupational disease.” (the language in quotes is what is new). This limits the time period courts can consider in finding Missouri jurisdiction. In the past, an employee who worked in Missouri for two years and then went to work in another state for the last six months could argue that his employment over the entire two and a half year period was principally localized in Missouri. That option now is gone. 287.110.2

#### 8. **287.120.5 – Safety Violation Penalty**

The employee’s failure to use a safety device provided by the employer or “to obey any reasonable rule adopted by the employer for the safety of employees” shall reduce benefits by “at least 25% but not more than 50%”. Such failure no longer must be willful. And, employers now only need to make a “reasonable effort” – instead of a “diligent effort” – to cause their employees to use safety devices and to follow safety rules. 287.120.5.

#### 9. **287.120.6 – Alcohol and Drug Use Penalty**

If an employee: (1) fails to obey any rule or policy adopted by the employer “relating to a drug-free workplace or the use of alcohol or nonprescribed controlled drugs in the workplace”, and (2) an injury is sustained “*in conjunction with* the use of alcohol or non-prescribed controlled drugs” the compensation “shall” be reduced by 50% instead of the former 15% reduction. 287.120.6(1)

■ **Actual Knowledge/Diligent Effort Deleted:** Deletes the former requirement that an employee had to have “actual knowledge” of the employer’s no alcohol/drug-free workplace policy in order for the former 15% benefit reduction to apply. Now, not only does the law not require actual knowledge of such policies, but the former requirement that employers had to make a “diligent effort to inform the employee of the requirement to obey any reasonable rule or policy” simply was deleted and not replaced with any new standard. 287.120.6(1)

■ **Proximate Cause-Forfeiture:** The law remains that if “the use of alcohol or non-prescribed controlled drugs in violation of the employer’s rule or policy is the proximate cause of the injury” benefits shall be forfeited. However, the new law eliminates the

former requirement that forfeiture applied only if the rules were posted and publicized. In addition, the new law deletes the former law's provision that forfeiture did not apply if the employer had actual knowledge of the employee's alcohol/drug use that went undisciplined or authorized such use. (Deleted 287.120.6(2)(a) and (b).)

■ **Legal Intoxication:** New subsection 3 provides that if the employee's "blood alcohol" content is more than the legal limit, a rebuttable presumption is created that the employee's intoxication was the proximate cause of the injury resulting in a forfeiture of all benefits. Also, adds that an employee's refusal to take a drug or alcohol test at the employer's request results in benefit forfeiture if: (1) "the employer had sufficient cause to suspect" drug or alcohol use **OR** (2) the employer's policy authorizes such post-injury testing. 287.120.6(3)

■ **"Stacking" Penalties:** Nothing in the new law prohibits the "stacking" of penalties. Thus, if the employee's injury allowed BOTH the safety penalty and the drug/alcohol penalty, compensation arguably could be reduced by *at least* 50% and up to 100% – even if the use of drugs or alcohol alone was not the proximate cause of the injury.

#### 10. 287.120.7 – Recreational Activities

The former law specifically excluded from coverage only injuries that resulted from participation in a *voluntary* recreational activity that "the employer may have promoted, sponsored or supported". The new law deletes the word "voluntary", apparently intending to exclude more injuries from coverage that result from recreational activities. However, an injury resulting from a recreational activity still is compensable if the employee is: (1) "directly ordered by the employer to participate in" the recreational activity, OR (2) "paid wages or travel expenses while participating in" the recreational activity, OR (3) injured "on the employer's premises due to an unsafe condition" the employer had actual knowledge of while participating in a recreational activity that the employer also was aware of. 287.120.7

#### 11. 287.127 – Posted Notice of Rights

Requires the addition of the following language to the mandatory placards that employers must post: "Employees who fail to notify their employer within 30 days may jeopardize their ability to receive compensation, and any other benefits under this chapter." 287.127.1(2)

#### 12. 287.128 – Fraud Provisions

■ **Insurance Fraud:** Makes it a Class D Felony for an insurance company or self-insurer to "knowingly and intentionally refuse to comply with known and legally indisputable compensation obligations with intent to defraud." 287.128.2 Also, a penalty of either \$10,000 or double the fraud's value (whichever is greater) applies. 287.128.4

■ **Fraud and Non-Compliance Investigation:** Makes it a class A misdemeanor to "Knowingly make or cause to be made a false or fraudulent material statement to an investigator of the division in the course of the investigation of fraud or noncompliance." 287.128.3 (8)

■ **Invalid Certificate of Insurance:** Makes it a class D felony “for any person, company, or other entity to prepare or provide an invalid certificate of insurance as proof of workers’ compensation insurance.” (no intent requirement) Also, a penalty of either \$10,000 or double the fraud’s value (whichever is greater) applies. 287.128.5.

■ **Failure to Insure Penalty:** “Any employer who knowingly fails to ensure his liability” shall be guilty of a class A misdemeanor and liable for a penalty “up to three times the annual premium” (instead of double), or a \$50,000 fine (instead of \$25,000). 287.128.7

■ **Disclosure of Documents:** All reports, records, tapes and photographs that are submitted to the Fraud Unit of the attorney general’s office are confidential and not subject to the “Sunshine Law”. However, the new law now will allow the Fraud Unit’s records to be released to local, state, or federal law enforcement authorities upon written request. 287.128.9

■ **Fraud Statute of Limitations** for these crimes is three years “after discovery of the offense by an aggrieved party.” Thus, conceivably, if a party committed a fraud in 2005 that was not discovered until 2012, the statute of limitations would not expire until 2015. 287.128.11

### 13. 287.129 – Health Care Provider Fraud

Increases the penalty for certain crimes by health care providers to a D Felony if there was a previous conviction.

### 14. 287.140 – Medical/Mileage/Sick Leave/Temporary Disability Benefits

■ **Mileage:** Clarifies that an employee will receive mileage reimbursement only when required to submit to medical examinations or treatment “outside of the local or metropolitan area from the employee’s principal place of employment” – not from the employee’s place of injury or residence as under the old law. 287.140.1

■ **Temporary Total Disability (“TTD”):** Deletes language that allowed TTD for time missed from work while receiving physical therapy or undergoing an employer-requested permanent disability evaluation. 287.140.1

■ **Leave In Lieu of Temporary Disability:** Adds new subsection 14 empowering employers to “allow or require” injured employees to use their “paid leave, personal leave, or medical or sick leave“ when they miss work “to attend to medical treatment, physical rehabilitation, or medical evaluations during work time.” In addition, this new section nullifies “any case law that contradicts the express language of this section.”

This section *does not appear* to empower an employer to require an injured employee who is unable to work to use his leave benefits instead of paying TTD. Instead, this section seems to apply to an employee who has been released to return to work after an injury but still must leave work for an occasional medical appointment, physical rehabilitation, or a disability evaluation. Then, rather than paying the employee temporary partial disability, the employer may require the employee to use his accrued leave benefits. Interestingly, the United States Court of Appeals for the 8<sup>th</sup> Circuit held on June 21, 2005 that “. . .

nothing in the [current] Missouri Workers' Compensation Law prohibits an employer from requiring an injured employee to use paid-leave benefits . . ." in this situation. *Local 2379, United Automobile Aerospace and Agricultural Implement Workers of America v. ABB, Inc.*, 412 F.3d 982 (8<sup>th</sup> Cir. 2005). Thus, according to this decision, the "change" intended by this provision of the new law already was allowed under the old law.

**15. 287.143 – Vocational Evaluations**

Requires employees to submit to a vocational rehabilitation assessment requested by the employer or insurer. Under the old law an employee could refuse to be evaluated by a vocational expert selected by the employer.

**16. 287.150 – Employer Subrogation Lien on 3<sup>rd</sup> Party Death Recoveries**

Adds language giving employers a subrogation lien on third party recoveries on death cases only. The former language that the employer would receive a credit for sums paid or payable to the extent of the settlement or recovery in death cases also remains. 287.150.2

**17. 287.170 – Unemployment Compensation/Post-Injury Termination**

Changes subsection 3 to disqualify an employee from receiving TTD during any time the employee is receiving unemployment benefits, and adds new subsection 4 that empowers employers to terminate all temporary disability benefits for employees who are terminated for *post* injury misconduct. Reading this provision strictly, if it is discovered *after* the injury that the employee had engaged in pre-injury misconduct, although the employer may be able to fire the employee it is unclear whether it could use this new subsection also to terminate disability benefits.

**18. 287.190 – Permanent Partial Disability (“PPD”)**

■ **Permanent Disability Defined:** tightens the definition by mandating that “disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings.” 287.190.6(2)

■ **Objective Medical Findings** are defined as “those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.” 287.190.6(2)

■ **Preexisting Disability Credit:** New subsection reduces compensation awarded by any disability due to a preexisting disease or condition that contributed to the overall rating. Does not specifically address *asymptomatic* preexisting conditions. 287.190.6(3)

**19. 287.197 – Occupational Hearing Loss**

■ **Hearing Loss:** Brings the hearing loss standards up to date and provides that future standard changes will be adopted by the division by rule. *See, Thatcher v TWA*, 69 S.W. 3d 533 (Mo.App.WD 2002). 287.197.2

■ **One-Month Separation:** Reduces the time an employee has to be separated from noisy work from six months to one month before the employee can file a claim for hearing loss. 287.197.7

**20. 287.203 – Hardship Hearing Costs**

The former statute read that in hearings to restore TTD benefits that had been provided but subsequently terminated, the “Reasonable cost of recovery *shall* be awarded to the prevailing party”. While occasionally an employer would prevail and recover its costs, typically it was claimants who were prevailing – not because of any bias – but because, by design, this is a type of hearing that only a claimant could request. The new statute employs the much softer language already found in 287.560 that provides that costs “may” be assessed at the fact finder’s discretion if the proceedings have been brought, prosecuted or defended without reasonable grounds – again, something the Statute already contained. This greatly mitigates the threat of costs being assessed against an employer for improperly terminating TTD.

**21. 287.215 – Surveillance Video Not A “Statement”**

Under the old law “statements” made by a claimant could not be used at trial unless the employer disclosed that it had such evidence pursuant to a claimant’s request under §287.215. The Supreme Court ruled in *Fisher v. Waste Management*, 58 SW3d 523 (Mo. 2001) that even a silent surveillance video was a statement and thus had to be disclosed. The new law now will lead to an opposite conclusion as it specifically states that a “videotape, motion picture, or a visual reproduction of an image” is not a “statement”. Thus, surveillance videos now do not have to be disclosed prior to a trial. The new law also extends the time – from 15 to 30 days – allowed to provide statements that still are covered under this section.

**22. 287.253 – Bonuses**

This new section allows for up to 3% of an employee’s yearly salary to not be used in calculating the employee’s average weekly wage. The intent is to encourage employers to provide bonuses to employees without being penalized by having to pay a higher compensation rate that otherwise would be inflated by this one-time (or annual) act of beneficence.

**23. 287.380 – Reports of Injury**

The new law gives employers 30 days – instead of 10 – after becoming aware of an injury to file a Form 1 Report of Injury with the Division. The law remains that if the Report of Injury is not filed within 30 days, a 3-year statute of limitations applies. The law also still requires that “employers shall report injuries to their insurance carrier, or third-party administrators” within five days of the injury or within five days of when the employee reported it, whichever is later. 287.380.1

## 24. 287.390 – Compromise Settlements

■ **Settlements Shall be Approved:** Adds requirement that an ALJ shall approve a settlement: (1) as long as it is not the result of undue influence or fraud, **and** (2) the employee fully understands his rights, **and** (3) voluntarily accepts the terms. 287.390.1

■ **Offers Before Representation:** Adds new subsection 5 that provides **IF** (1) an unrepresented employee is made an offer of settlement in writing, (2) that is filed with the division, (3) which the employee does not accept when unrepresented, **THEN** where additional proceedings occur “with regard to the employee’s claim”, the employee is entitled to 100% of the amount initially offered. The new subsection adds that “legal counsel representing the employee . . . shall receive reasonable fees”. This appears to codify the current practice already followed at the division. 287.390.5

## 25. 287.420 – Written Notice

States that notice has to be given within 30 days of an accident and bars a claim *unless the employee can prove that the employer was not prejudiced* by failing to receive the notice. Occupational disease and repetitive trauma cases have to give written notice within 30 days of diagnosis of the condition or prove the employer was not prejudiced. The good cause exception for not giving timely notice has been deleted.

## 26. 287.510 – Temporary Award Penalty Reduced

Under the old law, if an employer failed to comply with any part of a temporary award, the entire value – even amounts it already paid – could be doubled as a penalty. Under the new law, only of the amount “of compensation ordered and unpaid” may be doubled. And, the term “compensation” includes not only actual cash compensation (such as temporary disability benefits) but also the value of medical benefits. In *Ford v. Wal-Mart Associates, Inc.*, 155 S.W.3d 824 (Mo. App. E.D. 2005), Wal-Mart complied with the judge’s award and provided \$25,341.29 in TTD and \$10,735.83 of the doctor’s \$32,181.10 fees; it disputed \$21,445.27 of the doctor’s fees and wanted to address that issue at a final hearing. However, the Labor Commission penalized Wal-Mart by doubling both the TTD it already had paid *and* the *total amount* of the medical fees. Thus, Wal-Mart’s penalty was \$57,522.39 (\$25,341.29 + \$32,181.10) – not just the \$21,445.27 in disputed medical fees. Under the new law, only the \$21,445.27 could be doubled.

## 27. 287.610 – Administrative Law Judges

■ **Additional Judges:** the current statute authorizes 30 judges; the new statute increases that number to 40 judges. Currently, only 26 ALJ positions are funded and filled. Therefore, while 14 new ALJs could be appointed, how many positions the Legislature makes appropriations for will determine the number appointed. This section also requires the division’s director to publish and maintain on the division’s web site the appointment dates or initial dates of service for all ALJs. 287.610.1

■ **ALJ Review Committee:** The new law expands on the accountability provisions ALJs already were subject to that Governor Ashcroft signed into law through H.B. 975 in

1992. Since 1992, an “administrative law judge review committee“ (“the committee”) has been authorized to evaluate the “conduct, performance and productivity” of ALJs. The new law changes the committee’s composition and gives it more duties. Under the new law, the committee has six-members (with only five having a vote). The governor appoints two members: the division director – who chairs the committee – and one non-voting member, who must come from the commission on retirement, removal, and discipline of judges. The other four committee members include one person appointed by each of the following: Senate president pro tem, senate minority leader, speaker of the house, and house minority leader. Each position is for two years and is unpaid, except for the division director who serves for the duration of his/her tenure as division director. 287.610.9(2)

■ **Performance Audits:** The division director, as a member of the committee, must establish “written performance audit standards” by October 1, 2005. The director “in conjunction with the committee” shall complete a “performance audit” of all ALJs by August 28, 2006 (287.610.2) and every two years thereafter. [287.610.9(1)]. The committee votes within 30 days of each performance audit giving each ALJ either a vote of “confidence” or “no confidence”. (287.610.5). The committee reports the audit and vote results to the governor “no later than the first week of each legislative session immediately following” each audit. [287.610.9(1)]. Any ALJ who receives two or more no confidence votes “may have their appointment immediately withdrawn”. 287.610.9(1)

■ **Retention Votes:** in addition to the performance audits and confidence votes every 2 years, ALJs also are subject to a “retention vote” – presumably by the committee – every 12 years. Any ALJ who has received two or more no confidence votes “shall not receive a vote of retention.” 287.610.3. Timing of retention votes is based on years of service:

- The 13 ALJs with the most years of service have a retention vote on August 28, 2008;
- The next 13 ALJs have their retention vote on August 28, 2012;
- Any other ALJs have their retention vote on August 28, 2016.

## 28. 287.615 – Chief Legal Counsel

Creates this new position in lieu of the former “chief legal advisor” position and eliminates references to legal advisors. The chief legal counsel must be “located at the division office in Jefferson City” [also see §287.812(5)]

## 29. 287.616 – Legal Advisors

This entire section which created the legal advisor position is repealed, effective January 1, 2006 upon which date the Division no longer will have legal advisors. Under the old law, there were 23 legal advisors (all attorneys) who primarily handled cases involving workers who did not have a lawyer.

## 30. 287.710 – Insurer Tax Issues

Tax due by insurers and self insurers “shall be based upon the **application of the current calendar year’s tax rate to the premium** for the immediately preceding taxable year ending” December 31. (New wording in **bold**).

### 31. **287.715 – Second Injury Fund Surcharge Cap**

Employers pay a percentage of their workers' compensation premium (surcharge) to subsidize the benefits and expenses of the state's Second Injury Fund (the Fund). The new law limits the surcharge percentage "not to exceed three percent" beginning January 1, 2006. A March 30, 2005 actuarial study reflected that the Fund required a 3.5% surcharge in 2005, a 4.5% surcharge in 2006 and a 5.0% surcharge in 2007. 287.715.2

### 32. **287.800 – Strict Construction - Not "Liberally Construed"**

■ **Strictly Construed:** Deletes the mandate that the workers' compensation law "shall be liberally construed" and supplants it with the requirement that it shall be construed strictly – by ALJs, legal advisors, the Commission, the division, and "any reviewing" court. 287.800.1

■ **Weigh Impartially:** ALJs, legal advisors, the Commission, and the division "shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts." 287.800.2 (Note: this section still refers to legal advisors because most of the new law is effective on August 28, 2005, but legal advisors are not eliminated until January 1, 2006.)

### 33. **287.801 – Judicial Powers**

Effective January 1, 2006, only ALJs, the Commission, and appellate courts are empowered to review workers' compensation claims. [New Section]

### 34. **287.804 – Religious Exception**

An employee may file an application to be excepted from workers' compensation coverage if both the "employee and employer are members of a recognized religious sect or division, as defined in 26 U.S.C. 1402(g)" and are conscientiously opposed to accepting public or private insurance benefits. Exception may be prospective only. Reportedly, this was added to the new law with Missouri's Amish communities in mind. [New Section]

### 35. **287.808 – Burdens of Proof**

This new section specifies the following:

- **Affirmative Defenses:** must be proved by the employer
- **Entitlement to Compensation:** must be proved by the employee.
- **Facts:** must establish that they are "more likely to be true than not true."

### 36. **287.865 – Bankrupt Self-Insurers and Proofs of Claim**

Requires the division to give claimants who also are employees of bankrupt self-insurers written notice that they must file a proof of claim with the bankruptcy court.

### 37. **287.957 – Experience Modification Factors**

Prohibits experience modification factor (“mod factor”) adjustments for any injury the employer pays the total medical costs not to exceed \$1,000 **and** lost time is not more than the first three days of disability. The old law limited such mod factor adjustments only to cases where the employer paid medical not to exceed \$500; the new law further allows up to three days of lost time without a mod factor adjustment. Employers utilizing this provision still must report the injury as required by §287.380.

### 38. **Effective Dates**

All of the new law goes into effect on Sunday, August 28, 2005, EXCEPT for sections 287.615, 287.616, and 287.812. Those sections eliminate legal advisors and references to them, and are not effective until Sunday, January 1, 2006.

### 39. **Substantive or Procedural?**

Even though the new law becomes effective on August 28, 2005 (except for §§287.615, 287.616, and 287.812 which are not effective until January 1, 2006), questions still may arise as to what injuries the new law will apply. In that regard, there are two sets of injuries: those that occur after the new law’s effective date and those that occurred before the new law’s effective date. Clearly, the new law will apply to all injuries that occur after its effective date. However, some provisions of the new law still may apply to injuries that occur before its August 28, 2005 effective date.

The question of whether a new provision applies to an injury that arose before the law’s effective date is answered by determining if the new provision is “substantive” or “procedural”. Substantive provisions take away or weaken rights under existing law, or create a new obligation or impose a new duty. Such provisions will only apply to injuries that occur on or after the August 28, 2005 effective date. An example of a substantive provision would include the new definition that to be compensable an accident must be the “prevailing factor” – instead of simply “a substantial factor” – in causing the injury. The new definition narrows what injuries will be compensable and, thus, takes away existing rights. Without doubt, almost all of the new law’s provisions are substantive and will apply only to injuries that occur on or after August 28, 2005.

However, “procedural” provisions can apply to injuries that occur before the August 28, 2005 effective date. A provision is “procedural” if it alters “the machinery used to effect the suit.” *See, Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo. App. W.D. 1996). The new law contains several provisions that arguably only are procedural. These include:

- §287.127 – Changes the language to be included in the posted notice of rights
- §287.128.9 – Allows disclosure of fraud and non-compliance investigation materials to law enforcement authorities
- §287.203 – Changes what costs are allowed in a hardship hearing
- §287.215 – Surveillance videos no longer will be statements.
- §287.380 – Lengthens the time allowed for an employer to file a Report of Injury from 10 to 30 days

No doubt creative legal minds will advocate that many other provisions are – and are not – applicable to *their* case. Of course, the final determination of whether a provision is substantive or procedural – or, in fact, what any provision of the new law means – will not be determined either by administrative law judges or the Labor and Industrial Relations Commission, but by the state’s appellate and Supreme Court.

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