

**No. SC 88368**

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**IN THE  
SUPREME COURT OF MISSOURI**

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MISSOURI ALLIANCE FOR RETIRED AMERICANS, et al.,  
Plaintiffs-Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,  
DIVISION OF WORKERS' COMPENSATION,  
Defendant-Respondent.

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Appeal from the Cole County Circuit Court  
Nineteenth Judicial Circuit  
Honorable Byron L. Kinder, Judge

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**BRIEF OF *AMICUS CURIAE***

**THE WORKERS INJURY LAW AND ADVOCACY GROUP**

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## **STATEMENT OF JURISDICTION**

The sole issue in this action is the validity of the Workers Compensation Law, RS Mo ch. 287, under the Constitution of the United States and of the State of Missouri. This Court therefore has exclusive appellate jurisdiction under Article V, section 3, of the Missouri Constitution

## **STATEMENT OF FACTS**

### **I. THE ENACTMENT OF SB1.**

SB1 became effective August 28, 2005. With its enactment, the rights of Missouri workers were dramatically reduced. SB1 treats older and disabled Missouri workers differently than younger Missouri workers. SB1 in effect turns the Missouri workers' compensation system into an economic development program by decreasing the premiums to employers and decreasing the coverage purportedly to compete with other states in a race to the bottom of the barrel for the least amount of workers' compensation protection.

### **II. THE PROVISIONS OF SB1**

In essence the provisions of SB1 intentionally exclude workers' compensation benefits to specific categories of Missouri workers and limits the purpose of the Act by legislating away the remedies which were agreed to by the workers and the employers in the early 1900s.

Under § 287.020.2, as amended, now defines “accident” as an “unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, 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 compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.”

Sec 287.020.3(1) mandates that the employee’s burden of proof on the issue of causation for a work-related injury must rise to a showing that work was “the prevailing factor.” “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” “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.”

Sec. 287.067.2 raises the standard necessary for a compensable occupational disease. An occupational exposure must be “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.”

Sec. 287.067.3 states that a occupational disease due to repetitive motion is compensable only if the occupational exposure 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.”

Sec. 287.020.3(1) and § 287.067.2 eliminate medical only claims in that it requires that the accident be the prevailing factor in causing “both the resulting medical condition and disability.”

Sec. 287.020.3 (3) completely deletes compensability when an injury results directly or indirectly from idiopathic causes.

Sec. 287.067.2 limits an injury by occupational disease if work was only a triggering or precipitating factor. 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.

Sec. 287.067.3 recognizes an injury due to repetitive motion “only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” The effect of SB1 excludes claims of employees for occupational disease due to exposure on the job and claims for repetitive motion injuries due to repeated trauma that was part of normal work activity.

Sec. 287.190.6(3), reduces any award of compensation “by an amount proportional to the permanent partial disability determined to be a preexisting disease or condition or attributed to the natural process of aging sufficient to cause or prolong the

disability or need of treatment.” These provisions excluded from coverage certain older and disabled workers.

Sec. 287.190.6 (2) mandates that “where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.”

Sec. 287.020.5 denies as compensable “injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee’s home to the employer’s principal place of business or from the employer’s principal place of business to the employee’s home.”

Sec. 287.040.4, Sec. 287.041, and Sec. 287.043 exclude from coverage the owner-operator of a motor vehicle working for a for-hire motor carrier.

Sec. 287.067.6 limits benefits for lung disease, heart disease and other occupational diseases due to smoke, gases, carcinogens and inadequate oxygen to paid firefighters of paid fire departments and paid police officers of a paid police department.

Sec. 287.120.6(3) mandates that an employee’s refusal to take a test for alcohol or a non-prescribed controlled substance, “at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a non-prescribed controlled substance by the claimant or if the employer’s policy clearly authorizes post-injury testing.” Furthermore, Sec. 287.120.6(3) mandates that a blood alcohol level constituting legal intoxication “shall

give rise to a rebuttable presumption that the voluntary use of alcohol under such circumstances was the proximate cause of the injury,” resulting in loss of all benefits under §287.120.6(2).

Sec. 287.120.6(1) takes away half the employee’s compensation if the injury was sustained “in conjunction with the use of alcohol or non-prescribed controlled drugs,” in violation of the employer’s rule or policy.

Sec. 287.120.5 cuts benefits by up to 50% for injury or death caused in part by the employee’s failure to use a safety device provided by the employer or obey an employer’s safety rule.

Sec. 287.170.4 eliminates indemnity benefits if the employee is terminated from post injury employment based upon the employee’s post injury misconduct. “Post injury misconduct shall not include absence from the work place due to an injury unless the employee is capable of working with restrictions, as certified by a physician.”

Sec. 287.390.5 provides that “where an offer of settlement is made in writing and filed with the division by the employer, an employee is entitled to one hundred percent of the amount offered, provided such employee is not represented by counsel at the time the offer is tendered. Where such offer of settlement is not accepted and where additional proceedings occur with regard to the employee’s claim, the employee is entitled to one hundred percent of the amount initially offered. Legal counsel representing the employee shall receive reasonable fees for services rendered.

Sec. 287.020.10 eliminates all prior judicial interpretations of “accident”, “occupational disease”, “arising out of”, and “in the course of the employment.”

Sec. 287.800 mandates that the provisions of the Act be construed strictly against the injured worker.

### **III. THIS LITIGATION**

Plaintiffs are 66 labor unions representing many of Missouri's two and a half million workers, whose members are directly affected by Missouri's Workers' Compensation Law, along with four labor councils and one not-for-profit organization. On November 30, 2005, Plaintiffs filed their Petition for Declaratory Judgment, challenging the constitutionality of the amendments to the Workers' Compensation Law enacted in SB1.

Plaintiffs' Petition alleged both that the changes made by SB1 rendered the Workers' Compensation Law unconstitutional in its entirety and that specific provisions of SB1 violated the federal and Missouri constitutions. In the interest of judicial economy, Plaintiffs moved for Judgment on the Pleadings and then for Partial Summary Judgment, praying for a declaration that SB1 was unconstitutional in its entirety in that it deprived injured workers of an adequate substitute remedy for their common law remedies and that SB1 lacked a rational relationship to a legitimate state purpose. Plaintiffs reserved their allegations under the remaining counts that specific provisions of SB1 were unconstitutional. Defendant filed cross motions for Judgment on the Pleadings and for Summary Judgment.

On January 9, 2007, the circuit court denied Plaintiff's motion and granted Defendant's Motion for Judgment on the Pleadings with respect to Counts I and III, and

granted Defendant's Motion for Summary Judgment as to the remaining counts. Plaintiffs filed a timely notice of appeal on Feb. 13, 2007.

#### **IV. INTEREST OF AMICUS CURIAE WILG**

WILG, the Workers Injury Law and Advocacy Group, is a national non-profit membership organization dedicated to representing the interests of millions of workers and their families who, each year, suffer the consequences of work-related injuries or occupational diseases and who need expert legal assistance to obtain medical care and other relief under workers= compensation programs. In this capacity, and as part of its mission, WILG files this brief as *amicus* to the Court, after having obtained the consent of Appellants and Appellee to do so.

#### **POINTS RELIED UPON**

##### I.

The Trial Court Erred in Denying Plaintiffs' Motion for Judgment on the Pleadings and Granting Defendant's Motion Because Missouri's Workers Compensation Law, As Amended by SB1, Violates the Fourteenth Amendment Due Process Clause and the Due Process and Open Courts Guarantees of the Missouri Constitution in That the Law No Longer Assures Workers Certain Compensation for Work Related Injuries Without Regard to Fault.

*New York Central R. Co. v. White*, 243 U.S. 188, 203 (1917)

*Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. 1986)

*Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 340-45 (Ore. 2001)

**ARGUMENT**

- I. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND GRANTING DEFENDANT'S MOTION BECAUSE MISSOURI'S WORKERS COMPENSATION LAW, AS AMENDED BY SB1, VIOLATES THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND THE DUE PROCESS AND OPEN COURTS GUARANTEES OF THE MISSOURI CONSTITUTION IN THAT THE LAW NO LONGER ASSURES WORKERS CERTAIN COMPENSATION FOR WORK RELATED INJURIES WITHOUT REGARD TO FAULT.**
- A. SB1 Turns the Workers' Compensation System Into an Economic Development Program by Decreasing Premiums and by Decreasing Coverage to Allegedly Compete with Other States in a Race to the Bottom of the Barrel for Less Workers' Compensation Protection.**

Workers' compensation is a form of insurance that provides medical care and compensation for employees who are injured in the course of employment, while abrogating the employee's right to sue their employer for the tort of negligence. While schemes differ between jurisdictions, provision can be made for weekly payments in place of wages, compensation for economic loss (past and future), reimbursement or payment of medical and like expenses, and benefits payable to the dependents of workers killed during employment. Cash benefits are established by state formulas with maximum

benefit level. The benefits are administered on a state level, primarily by the state department of labor.

Workers' Compensation Acts across the country are a heavily bureaucratic, adversarial system that generally short change injured workers. A. Widman, Workers' Compensation A Cautionary Tale, p. 2 (2006). To the extent that workers' compensation rate reductions have occurred, such rate reductions come at the expense of the injured workers, because lawmakers slash benefits and push many of the injured workers out of the system and into other social programs, such as social security disability, Medicare, Medicaid, and group health insurance. A. Widman, Workers' Compensation A Cautionary Tale, p. 2 (2006). SB1 is no exception, however, SB1 is more draconian than any other changes that have been instituted to date across the country.

“Workers' compensation is an unfortunate example of how a seemingly fair program can be manipulated by political forces into a nightmare for those it was originally meant to help. Once an area of law is removed from the civil justice system, it becomes vulnerable to money, politics and influence-peddling. This happens either through aggressive industry lobbying of legislators, political influence on the agencies charged with implementing the system, or orchestrated media efforts. All have happened to workers' compensation.” A. Widman, Workers' Compensation A Cautionary Tale, p. 3 (2006).

“Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or

the employee's dependents against the employer and insurance carrier. This is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts.” 6-100 Larson's Workers' Compensation Law § 100.01.

“The operative fact in establishing exclusiveness [of jurisdiction] is that of actual coverage, not of election to claim compensation in the particular case.” 6-100 Larson's Workers' Compensation Law § 100.01. Even if the employee has never made application for compensation, the employee's right to sue his or her employer at common law is barred by the existence of the compensation remedy. *Sedore v. Sayre*, 119 N.Y.S.2d 204 (Sup. Ct. 1953). If the Compensation Commission has made a valid and unappealed award for compensation, this is res judicata on the issue of coverage, and is binding on the court in which the employee attempts to bring his or her common-law suit. *Riggins v. Stong*, 238 A.D.2d 950, 661 N.Y.S.2d 170 (1997); *Ogino v. Black*, 304 N.Y. 872, 109 N.E.2d 884 (1952).

In 1972, the Nixon Administration appointed a bi-partisan commission that produced a unanimous Report of the National Commission on State Workers' Compensation Laws. The Commission declared that “[t]he inescapable conclusion is that State workers' compensation laws in general are inadequate and inequitable. The report listed nineteen ‘essential recommendations,’ all of which focused on expanding benefits to workers: eight recommendations dealt with expanded coverage; nine with increased disability benefits; and two with improvements to medical and rehabilitation benefits.”

McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation ‘Reform,’” 50 Rutgers L. Rev 657 (1998), n. 88, 89 (1998), citing, “The Report of The National Commission on State Workmen’s Compensation Laws,” Washington D.C., July 1972.<sup>1</sup> These recommendations were to further the following goals:

- Broad coverage of employees and of work-related injuries and diseases;
- Substantial protection against interruption of income;
- Provision of sufficient medical care and rehabilitation services;
- Encouragement of safety;
- An effective system for delivery of benefits and services.

“The Report of The National Commission on State Workmen’s Compensation Laws,” Washington D.C., July 1972.

SB1 ignores the Commission’s findings and seeks to establish a new low for coverage of workers’ compensation claims. For example, SB1 contrary to logic and reasoning, in Sec. 287.020.3(3), completely deletes compensability when an injury results directly or indirectly from idiopathic causes. Larsons states that “[w]hen an employee, solely because of a non-occupational heart attack, epileptic fit, or fainting spell, falls and sustains a skull fracture or other injury, the question arises whether the skull fracture (as distinguished from the internal effects of the heart attack or disease, which of course are

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<sup>1</sup> The commission was made up of representatives from business, labor, insurance, the medical profession, academics, and the public.

not compensable) is an injury arising out of the employment.” 1-9 Larson's Workers' Compensation Law § 9.01.

“The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. The long-standing controversial question is whether the effects of an idiopathic fall to the level ground or bare floor should be deemed to arise out of the employment.” 1-9 Larson's Workers' Compensation Law § 9.01. Idiopathic conditions, “although often discussed in the same breath with unexplained falls, is basically different, since unexplained-fall cases begin with a completely neutral origin of the mishap, while idiopathic fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie showing of personal origin.” 1-9 Larson's Workers' Compensation Law § 9.01.

“To anyone who is not familiar with the evolution of the idiopathic-fall doctrine, and who is asked bluntly whether there is any employment contribution when an epileptic falls to the level ground or floor, it might seem too obvious for discussion that the effects of such a fall are no different from what they presumably would be at any other place where the employee might happen to be when the seizure occurs. In order to understand how several courts have finally reached the point where level-floor awards are deemed justified, it is necessary to trace the gradual process by which the requisite employment contribution has been whittled down until this last step has seemed to some courts not

only insignificant but unavoidable.” 1-9 Larson's Workers' Compensation Law § 9.01. Of course, under SB1, there is no coverage for idiopathic conditions regardless of the contribution of the employment.

In *Bledsoe County Highway Dep't. v. Pendergrass*, 205 Tenn. 697, 330 S.W.2d 313 (1959), death benefits were awarded for an un-witnessed fall down steps. In spite of some history of idiopathic falls, any finding of an idiopathic fall here would have been guesswork. *Bledsoe County Highway Dep't. v. Pendergrass*, 205 Tenn. 697, 330 S.W.2d 313 (1959).

In *Pemberton Chevrolet, Inc. v. Harger*, 2005 OK CIV APP 70, 120 P.3d 892, the employee was injured when he fell into a car lift at the workplace. The defendant employer argued that the injury was not compensable because it was attributable to a seizure brought on by alcohol withdrawal. State law disqualified a plaintiff from receiving compensation if he or she "abuses" alcohol. The court here was not willing to call alcohol withdrawal, which in fact stems from abstaining from the use of alcohol, an "abuse" of alcohol. Rather, the court followed the lead of courts in other circuits and labeled withdrawal seizures an idiopathic condition. The employee thus received compensation. *Pemberton Chevrolet, Inc. v. Harger*, 2005 OK CIV APP 70, 120 P.3d 892.

In fact, prior to SB1, the law in Missouri was enunciated in *Wood v. J.R. Green Constr. Co.*, 899 S.W.2d 112 (Mo. Ct. App. 1995), which held that the test set out in *Collins v. Combustion Eng'g Co.*, 490 S.W.2d 394 (Mo. Ct. App. 1973), was overruled by the court's decision in *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo.

1993), the court remanded the case for the Commission to reconsider in light of the new test: an idiopathic fall is compensable if the workplace contributed to the accident, even if the precipitating cause was idiopathic. *Wood v. J.R. Green Constr. Co.*, 899 S.W.2d 112 (Mo. Ct. App. 1995). Of course, Sec. 287.020.10 eliminates all prior judicial interpretations of “accident”, “occupational disease”, “arising out of”, and “in the course of employment”. Sec. 287.020.10.

Not only does SB1 dismantle the intent and purpose of the Act, it mandates in Sec. 287.800, that the provisions of the Act be construed strictly **against** the injured worker. Sec. 287.800. The rule of liberal construction requires that claimant be allowed the more favorable remedy. 4-87 Larson's Workers' Compensation Law § 87.04. Under the liberal construction required of Workmen's Compensation Laws, a mere causal connection is held to be sufficient to satisfy the statutory requirement that the injury be received in the course of and arise out of the employment. And no inquiry is required or made as to whether or not the injured worker at the time and place of injury was acting within the scope of his employment, as required to fix liability under the doctrine of respondeat superior. In such cases where inquiry as to the scope of employment is made, it is not for the purpose of determining that question in the first instance but only to determine the question of causal connection. *Rogers v. Allis-Chalmers Mfg. Co.*, 85 Ohio App. 421, 88 N.E.2d 234, 235 (1949), aff'd, 153 Ohio St. 513, 92 N.E.2d 677 (1950).

In *Smith v. Tompkins County Courthouse*, 60 N.Y.2d 939, 471 N.Y.S.2d 46, 459 N.E.2d 155 (1983), a deputy sheriff whose back was injured when a motorcycle collided with his patrol car, continued to suffer back pain. *Smith v. Tompkins County Courthouse*,

60 N.Y.2d 939, 471 N.Y.S.2d 46, 459 N.E.2d 155 (1983). When all other treatment failed to relieve the pain, his orthopedist ordered a supervised swimming program, which necessarily included lessons because Smith had never learned to swim. *Smith v. Tompkins County Courthouse*, 60 N.Y.2d 939, 471 N.Y.S.2d 46, 459 N.E.2d 155 (1983). The court held that such a program, when prescribed by an orthopedist to rehabilitate a back injury, qualified as "other attendance or treatment," under the principle of liberal construction of the statute, even though a swimming instructor is not a recognized health care professional. *Smith v. Tompkins County Courthouse*, 60 N.Y.2d 939, 471 N.Y.S.2d 46, 459 N.E.2d 155 (1983). Appellate courts have consistently held that the workers' compensation law should be liberally construed to accomplish its economic and humanitarian objectives. *Spyhalsky v. Cross Constr.*, 743 N.Y.S.2d 212, 294 A.D.2d 23 (2002). However, no longer does Missouri acknowledge that the Act should be liberally construed in favor of the injured worker. Sec. 287.800. In its rush to the bottom of the barrel, SB1 has unilaterally eviscerated the benefit of the bargain originally made between employees and employers and obliterated the true intent of the Act, violating due process rights of Missouri workers.

## **B. SB1 Dismantles the Safety Net of Workers' Compensation.**

Each state devises its own workers' compensation system, and state statutes and court decisions guide most of the restrictions and requirements. While each state has its own laws, the following general concepts apply to most workers' compensation systems:

1) When a worker is hurt, workers' compensation is the exclusive remedy against an employer. Lawsuits against employers are not allowed (although if another party causes the injury, such as the manufacturer of defective equipment, suits against this other party are still allowed). Domestic and agricultural workers are usually excluded, as are some federal workers. McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation 'Reform,'" 50 Rutgers L. Rev 657, 670-671, n. 34, 35 (1998).

2) "Two types of compensation are generally allowed: medical benefits and disability (for lost earnings, divided by duration and severity: temporary, permanent, partial, total). Some programs provide limited death benefits. *Id.* at n. 37-39. No compensation is allowed for pain and suffering." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

4) In the case of some disabilities, state lawmakers enact by statute a fixed schedule of benefits (for instance, for an eye or other body part, based on a fixed number of weeks). These schedules ignore actual or projected economic loss. *Id.* at 810.

5) "If a worker is injured, [she or he] files a claim with the state workers' compensation agency that oversees administration of the system. Almost all states require that the injured employee notify the employer promptly of any injury. Usually an informal resolution procedure begins. Many times, however, the claim will be contested in some way, and at this point a more formal adjudicative administrative process begins before the state's workers' compensation board." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

6) “Once the board reaches a decision, a court may only review that decision on questions of law. In other words, an administrative decision may not be appealed to a court purely on the grounds that the administrative court found certain facts to be right or wrong, i.e., a determination of type of injury or duration of benefits.” A. Widman, Workers’ Compensation A Cautionary Tale, p. 5 (2006).

7) “Generally, employers pay premiums to an insurance company or self-insured fund, and, when an employee is injured, [she or he] receives compensation from the insurance company or fund.” A. Widman, Workers’ Compensation A Cautionary Tale, p. 5 (2006).

8) “There are three mechanisms for administering workers’ compensation benefits: a purely state-run system, a state-run system that competes with private insurers, and a purely privately run system. The trend is toward more privately-run systems.”<sup>2</sup> A. Widman, Workers’ Compensation A Cautionary Tale, p. 5 (2006).

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<sup>2</sup> West Virginia is one of the most recent states to switch from a state-run system to a private system. A state-run system retains some governmental oversight and/or regulation over rate-setting, whereas a private system is run entirely by the private insurance companies. Although there are long-standing debates about whether a state-run system or a privately-run system is more effective, many labor activists believe that a privately-run system is more subject to profiteering, since the market generally dictates rates set by private insurance companies.

Prior to SB1, Missouri acknowledged that standard and universally recognized definitions applied to the Act. “Accident” was recognized as an unintentional work-related injury and that the injury was the “unexpected and unforeseen event”. *Downey v. Kansas City Gas Co.*, 92 S.W.2d 580, 586 (Mo. 1936) (granting benefits to worker who gradually developed conjunctivitis from constantly getting soot in his eyes). The basic and indispensable ingredient of "accident" is unexpectedness.<sup>3</sup> 2-42 Larson's Workers' Compensation Law § 42.02.

Other states were similarly aligned. In *Residential & Commercial Constr. Co. v. Industrial Comm'n*, 529 P.2d 427 (Utah 1974), while lifting and transporting lumber, the claimant suffered a lumbosacral strain. *Residential & Commercial Constr. Co. v. Industrial Comm'n*, 529 P.2d 427 (Utah 1974). In a subsequent operation, a bone chip resulting from a congenital anomaly was excised. *Residential & Commercial Constr. Co. v. Industrial Comm'n*, 529 P.2d 427 (Utah 1974). The court held that an accident had occurred, since the lumbosacral strain brought about by lifting was an unanticipated and unintended occurrence, different from what would normally be expected to occur in the usual course of events. *Residential & Commercial Constr. Co. v. Industrial Comm'n*, 529 P.2d 427 (Utah 1974).

The Act, as amended by SB1, must be interpreted in such a way as to make it constitutional. There is a question of the validity of an enactment, in this case SB1, that

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<sup>3</sup> "Event without apparent cause, unexpected event; unintentional act, chance, ... mishap." Pocket Oxford Dictionary, p. 6 (1926 ed.).

destroys common-law rights for personal injury and also destroys the supposed compensation substitute by an inherently insurmountable procedural bar.

In the leading case on the constitutionality of compensation acts, Justice Pitney said: “it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.” *New York Cent. R.R. v. White*, 243 U.S. 188, 201, 61 L. Ed. 667, 674, 37 S. Ct. 247, 252 (1916). Later in the opinion, he suggests that an act might be unconstitutional through the sheer inadequacy of the substituted remedy: “This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable.” 243 U.S. at 205. The case for unconstitutionality of SB1 is strengthened by the existence of a state constitutional provision assuring a remedy for an injury. Missouri Constitution, Article I, Bill of Rights, Section 14, provides “That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.” The draconian amendments set forth in SB1 remove certain remedies previously afforded to injured workers under the Act. No remedy is afforded for injured workers in many of the new provisions, including the new definition of “accident”.

In *Painter Motor Co. v. Ostler*, 617 P.2d 975 (Utah 1980), the Court, in upholding an award for back injury from manipulating heavy boxes, said: "We have previously defined the term 'accident' as an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events. Thus, if an

employee incurs unexpected injuries, including internal failures caused by the duties of his employment he is eligible for compensation under 35-1-45." *Painter Motor Co. v. Ostler*, 617 P.2d at 976.

In *Farmland Ins. v. Dubois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996), the Arkansas statute defines an accidental injury as one "identifiable by time and place of occurrence." Ark. Code Ann. § 11-9-102(5)(A). The statute also provides exceptions for some injuries not identifiable by time and place, but the compensable injury must be the major cause of the disability in those cases. Ark. Code Ann. § 11-9-102(5)(A). The specific incident, which was identifiable by time and place of occurrence, causing the accidental injury was the lifting of a coke canister. *Farmland Ins. v. Dubois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

In *Tomlin v. Densberger Drywall Inc.*, 14 Neb. App. 288, 706 N.W.2d 595 (2005), the "suddenly and violently" element of Nebraska's definition of accident requires a claimant to show that the injury occurred at an "identifiable point in time" after which he or she was required to stop work and seek medical attention. *Tomlin v. Densberger Drywall Inc.*, 14 Neb. App. 288, 706 N.W.2d 595 (2005). Here, the claimant's arthritic shoulder condition developed over a 30-year career of laying drywall, a job requiring heavy, repetitive, overhead work. *Tomlin v. Densberger Drywall Inc.*, 14 Neb. App. 288, 706 N.W.2d 595 (2005). The claimant had to stop work when he had surgery on his shoulder, and when he returned months later, he was only able to do light work. *Tomlin v. Densberger Drywall Inc.*, 14 Neb. App. 288, 706 N.W.2d 595 (2005). The court held that these facts satisfied the "suddenly and violently" requirement of an accident.

*Tomlin v. Densberger Drywall Inc.*, 14 Neb. App. 288, 706 N.W.2d 595 (2005).

SB1 not only set forth a new definition for accident, it raised the level of proof from the accident being a “substantial factor” to the accident being the “prevailing factor”. Sec. 287.020.2 and Sec. 287.020.3(1). The primary test of legal cause in the United States is foreseeability, which is "the fundamental basis of the law of negligence." Harper, *Law of Torts*, 258 (1933). Therefore, "if the harm which has actually occurred is one of the particular risks which made the actor's conduct negligent, it is obviously a consequence for which the actor must be held legally responsible." Harper, *Law of Torts*, 259 (1933). “In other words, the essence of the actor's fault is that, although the consequences of his or her conduct were foreseeable, he or she nevertheless carried on that line of conduct. The foreseeability of the consequences is an inextricable part of the fault-character of the act.” 1-3 Larson's Workers' Compensation Law § 3.06.

Generally workers’ compensation statutes agree that the proof required in a workers’ compensation claim is whether there was substantial evidence to support the award of compensation. Whatever adjectives are chosen to describe the minimum quantity, as distinguished from quality, of evidence necessary to support an award, the net result is about the same. “Among the phrases encountered are "any evidence," "some evidence," "any credible evidence," "substantial evidence," "supported by evidence," and many others.” 8-130 Larson's Workers' Compensation Law § 130.01. The United States Supreme Court has expressly held that "substantial evidence" is not a larger quantity than "any evidence," and since these two phrases sound like the largest and smallest quantum described in the various phrases, presumably the others represent the same concept. *Del*

*Vecchio v. Bowers*, 296 U.S. 280, 80 L. Ed. 229, 56 S. Ct. 190 (1935); *Centrilift v. Evans*, 915 P.2d 391 (Okla. Ct. App. 1995).

In overruling *Hagerman v. Gencorp Automotive*, 457 Mich. 720, 579 N.W.2d 347 (1998), the Michigan Supreme Court construed "the proximate cause" in Sections 418.101 et seq. of the Michigan Compiled laws to mean "a proximate cause," that is, a substantial factor in causing the event, the state high court held that the term means "the sole proximate cause," i.e., "the one most immediate, efficient, and direct cause of the injury or damage." *Hagerman v. Gencorp Automotive*, 476 Mich. 720, 579 N.W.2d 347 (1998).

"A direct physical cause will, of course, fall among those which are included in § 1 of the Workmen's Compensation Act, but the scope of the Act and the inquiry which it enjoins appear to extend also to the general conditions under which the workman has been directed to act. ... These may have amounted to no more than passive and inert surroundings, requisite only to provide circumstances which admitted of the accident being occasioned by his own movement. Active physical causation by the surroundings is not required in order to satisfy what is implied by the expression 'arising out of the employment.'" Haldane, L.J. in *Upton v. Great Cent. Ry.* [1924] A. C. 302 (H.L.).

Likewise the draconian SB1 eliminated any claim for benefits for the owner-operator of a motor vehicle working for a for-hire motor carrier. The prior law set forth in *White v. Dallas & Mavis Forwarding Co.*, 857 S.W.2d 278 (Mo. Ct. App. 1993), held that designation in contract that a truck driver was an "independent contractor" was not controlling in regards to the issue of compensability. *White v. Dallas & Mavis*

*Forwarding Co.*, 857 S.W.2d 278 (Mo. Ct. App. 1993). However, SB1 Sec. 287.040.4, Sec. 287.041, and Sec. 287.043 specifically exclude from coverage the owner-operator of a motor vehicle working for a for-hire motor carrier. Sec. 287.040.4, Sec. 287.041, and Sec. 287.043. Other states side with the majority of jurisdictions which hold that the actual relationship between the parties rather than the label used in the contract determines whether a claimant is an employee or an independent contractor. *Grouse v. DRB Baseball Mgmt., Inc.*, 121 N.C. App. 376, 465 S.E.2d 568 (1996); *Griffin v. North Dakota Workers' Comp. Bureau*, 466 N.W.2d 148 (N.D. 1991) (parties' characterization of relationship in contract does not control if the facts warrant a different conclusion).

In *Workmen's Comp. App. Bd. v. Bond Transp., Inc.*, 22 Pa. Commw. 86, 347 A.2d 788 (1975), the decedent was killed in the crash of his tractor-trailer. *Workmen's Comp. App. Bd. v. Bond Transp., Inc.*, 22 Pa. Commw. 86, 347 A.2d 788 (1975). At the time of his accident, he was hauling steel coils for the defendant, under an equipment lease whereby he leased the truck to the defendant but drove it himself. *Workmen's Comp. App. Bd. v. Bond Transp., Inc.*, 22 Pa. Commw. 86, 347 A.2d 788 (1975). He was carried as an employee on the company's records, was covered by workmen's compensation insurance, and was included as an employee in the company's group insurance policy. *Workmen's Comp. App. Bd. v. Bond Transp., Inc.*, 22 Pa. Commw. 86, 347 A.2d 788 (1975). Federal and state taxes were deducted from his pay, and unemployment compensation premiums were paid for him. *Workmen's Comp. App. Bd. v. Bond Transp., Inc.*, 22 Pa. Commw. 86, 347 A.2d 788 (1975). He was required to follow a set of driver's instructions provided by the company, and the defendant had the right to control the

manner of this performance and determine the loads to be hauled. *Workmen's Comp. App. Bd. v. Bond Transp., Inc.*, 22 Pa. Commw. 86, 347 A.2d 788 (1975). The court held that the decedent was an employee of the defendant, and ordered that compensation be paid to his widow. *Workmen's Comp. App. Bd. v. Bond Transp., Inc.*, 22 Pa. Commw. 86, 347 A.2d 788 (1975). That the agreement designated the decedent as an independent contractor was held insufficient to defeat the preponderance of evidence of an employment relationship. *Workmen's Comp. App. Bd. v. Bond Transp., Inc.*, 22 Pa. Commw. 86, 347 A.2d 788 (1975).

The enactment and application of SB1 dismantled the safety net of workers' compensation benefits for injured workers and voided a recovery for entire segments of the working population in Missouri. By raising the standard of proof to the "prevailing factor" standard, an injured worker is faced with the insurmountable burden to which even a criminal defendant need not ascribe.

### **C. SB1 Deletes the Bargain Struck Between Labor and the Employers.**

Workers' compensation in America was seen as a new system that would help workers – a compromise whereby workers traded their (already limited) rights to go to court over work-related injuries for a system where they would no longer have to prove the employer was at fault for their injuries, a "no-fault" system that would provide automatic compensation for workplace injuries within certain limits. The theory was one of social efficiency - that the cost of injuries should be borne by the manufacturers rather than the employee, the employee's family or the government." A. Widman, Workers'

Compensation A Cautionary Tale, p. 4 (2006). By 1949, every state had passed new workers' compensation law, which created a system of compensation for injuries that did not allow going to court. Hammond and Kniesner, "The Law and Economics of Worker's Compensation," Rand Institute for Civil Justice, 1980.

The recent spate of legislation concentrates on lowering benefits, narrowing eligibility requirements, and putting medical treatment decisions in the hands of the insurance companies. According to Jim Ellenberger at the AFL-CIO's Department of Occupational Safety & Health, all "reform" campaigns sponsored by the insurance industry share the following criteria: insurance company control over the choice of physician; reliance on the more restrictive American Medical Association's Guides to the Evaluation of Permanent Impairment in order to rate injuries – a guide that was not written for this purpose and does not control for particulars of an injury; narrowing the definition of what qualifies as a condition eligible for compensation; much stricter criteria for "proving" a workplace injury; restrictions on attorney's fees; and restrictions on amount and duration of benefits received. See Jay Causey, "Worker's Compensation at the Turn of the Century," July 2000, available on-line at:

<http://www.causeylaw.com/home.php?content=pub6>.

Some specific ways the no-fault standard has been turned on its head are: requiring that work be more than 50 percent of the cause of the injury or illness; requiring that work be a "substantial contributing cause," or "major contributing cause" of the injury; requiring that an occupational injury or disease is "clearly work related" and "a substantial factor in the cause of" the resulting disability; and raising the standard of

causation where there are pre-existing conditions. McCluskey, Martha T., “The Illusion of Efficiency in Workers’ Compensation ‘Reform’,” 50 Rutgers L. Rev 657, 792-93, n. 572-578 (1998).

Statutory compensation law provides a number of advantages to both employees and employers. A schedule is drawn out to stipulate the amounts and forms of compensation an employee is entitled to if she or he has sustained given kinds of injuries. Employers buy insurance against such occurrences. However, the specific form of the statutory compensation scheme may provide detriments. Statutory schemes often award a set amount based on the types of injury. These payments are based on the ability of the worker to find employment in a partial capacity: a worker who has lost an arm can still find work as a proportion of a fully-able person. This does not account for the difficulty in finding work suiting disability. When employers are required to put injured staff on light duty, the employer may simply state that no light duty work exists, and terminate the worker as unable to fulfill specified duties. When new forms of workplace injury are discovered (for instance: stress, repetitive strain injury, silicosis), the law often lags behind actual injury and offers no suitable compensation, forcing the employer and employee back to the courts. Finally, caps on the value of disabilities may not reflect the total cost of providing for a disabled worker. The government may legislate the value of total spinal incapacity at far below the amount required to keep a worker in reasonable living conditions for the remainder of his or her life.

SB1 sets new parameters regarding fault-based liability. Sec. 287.120.6(3) revises the intoxication standard, which now in effect denies rights to the injured worker, when

he or she would otherwise be entitled to indemnity and medical benefits. Sec. 287.120.6(3) mandates that the refusal to take a test for alcohol or a non-prescribed controlled substance at the request of the employer shall result in the forfeiture of benefits. Sec. 287.120.6(3), “When the law sets out to deny compensation on the ground of intoxication, the matter of definition becomes one of extreme gravity. Most analysts have ended by delineating several stages of drunkenness, such as the merry, the affectionate, the pugnacious, the suspicious, the lachrymose, the somnolent, and, finally, the out-cold state. Such subtle and fascinating gradations are, however, of little help when one has to interpret a rule or statute under which a person either is intoxicated or is not.”

2-36 Larson's Workers' Compensation Law § 36.01.

Larson's states that “[s]everal points are well established: proof of intoxication does not follow from evidence of any single one of the following: that the claimant had had a few drinks, nor that there was a smell of liquor on the claimant's breath, nor that the claimant was in possession of a half-empty bottle of whiskey, nor that the claimant enjoyed a general reputation as a heavy drinker. But a combination of some of these, particularly if supported by evidence of the conduct of an intoxicated person, may establish intoxication. It is not, however, necessary to meet the extreme test laid down in the well-known quatrain:

He is not drunk who from the floor  
Can rise again and drink some more;  
But he is drunk who prostrate lies  
And cannot drink and cannot rise.

For example, in *Lee v. Maryman*, 191 So. 733 (La. Ct. App. 1939), there was evidence that a truck driver had been drinking, that his breath smelled of liquor, that he whooped and hollered and attempted to urinate from the running board of his truck and drive the truck at the same time. The court thought this added up to intoxication, and observed that a man did not have to reach the stage of insensibility to qualify as drunk under the Act.” 2-36 Larson's Workers' Compensation Law § 36.01 (citations omitted). SB1 under Sec. 287.120.6(1) takes away half the employee’s compensation if the injury was sustained in conjunction with the use of alcohol or non-prescribed controlled drugs in violation of the employer’s rule or policy. This is true regardless of whether alcohol or non-prescribed controlled drugs contributed to the accident or injury to any extent.

“Under the Ohio scheme, a secretary filing a workers' compensation claim for carpal tunnel syndrome might face the prospect of undergoing drug and alcohol tests. A chemistry teacher burned while putting out an accidental fire caused by a student might be also subjected to the test. Their failure to agree would create a rebuttable presumption that alcohol or drug use caused the injury. Suffering the indignities associated with drug testing was not part of the workers' compensation bargain, concluded the majority. Accordingly, H.B. 122 was unconstitutional.” 2-36 Larson's Workers' Compensation Law § 36.01.

In New York, where intoxication to be a defense must have been the sole cause of the injury, the reported appellate cases show one award involving blood alcohol level of .35%, one of .34%, two of .32%, one of .31%, three of "three-plus," three of .29%, and one each of .215%, .21%, .20%, .19%, .18%, .15%, and .146%. With these may be

compared denials in three cases, one at .3%, one at .22% and one at .29%.” 2-36 Larson's Workers' Compensation Law § 36.01 (citations omitted).

SB1 provides in Sec. 287.120.5, that benefits are cut by up to 50% for injury or death caused in part by the employee's failure to use a safety device provided by the employer or by the employee's failure to obey an employer's safety rule. Sec. 287.120.5. Across the country, workers' compensation acts deal effectively with the employee's failure to use a safety device by the general requirement that the failure to use a safety device must be willful and must be the proximate cause of the injury or death. The standard under SB1 is draconian and limits the benefits in excess of any other state with a much lower standard and eliminating the “willful failure” requirement completely.

In *Dan River, Inc., v. Giggetts*, 34 Va. App. 297, 541 S.E.2d 294 (2001), a truck driver allegedly responsible for an accident in which he sustained considerable injuries was not disqualified from receiving workers' compensation benefits by any intentional misconduct. The Virginia court disagreed with the employer which contended the employee failed to use properly the truck's braking and steering systems in violation of Federal Motor Carrier Safety Regulations. While driving from Virginia to a South Carolina location, the driver crashed his truck as he attempted to avoid a collision with a vehicle driving slow ahead of him. Shortly after the accident, the employer suspended the driver, contending he was driving too fast for conditions. Indeed, at the time of the accident, the area was subjected to heavy fog and rain. The court concluded that the driver's injuries were compensable. Fog, rain and other unusual weather conditions were certainly risks associated with truck driving. To establish a violation of a safety rule, the

employer had to show not only that the rule was reasonable, that the rule was for the driver's benefit, and that the driver knew of the rule, it would have to prove that the driver intentionally performed the forbidden act. All the evidence supported the commission's determination that the driver was driving at the posted speed limit at the time of the accident and that he properly used his vehicle's braking and steering mechanisms. His conduct, at most, was negligent; it was not sufficiently culpable to disqualify him from receiving workers' compensation benefits. *Dan River, Inc., v. Giggetts*, 34 Va. App. 297, 541 S.E.2d 294 (2001).

In *Kimble v. Fibrebond Corp.*, 830 So. 2d 422 (La. App. 2002), writ. denied, 836 So. 2d 69 (La. 2003), an employee working outside on a chilly morning attempted to keep himself and coworkers warm by breaking up small pieces of wood and then burning them in a barrel. The employee was not wearing safety glasses at the time and a splinter entered his eye. The employer defended the workers' compensation claim on the ground that the injury was caused by the employee's failure to wear a safety guard. The court found that while the failure to wear the glasses was, indeed, intentional, it was not the sort of premeditated, deliberate or willful act contemplated by the statute to work as a forfeiture of benefits. *Kimble v. Fibrebond Corp.*, 830 So. 2d 422 (La. App. 2002).

In *Oliver v. Transport Serv. Co.*, 2001-0681 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1203, writ denied, 2002-2007 (La. 10/25/02), 827 So. 2d 1157, the La. Rev. Stat. § 23:1081(1)(c) precluded compensation if the injury was caused by the claimant's "deliberate failure to use an adequate guard or protection against accident provided for him." Where the claimant was injured in a vehicle accident and did not have her seat belt

on at the time, but testified that she "always" wears her seatbelt, the court held that her failure to wear the seatbelt was not "deliberate," but rather amounted an "occasional lapse." *Oliver v. Transport Serv. Co.*, 2001-0681 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1203, writ denied, 2002-2007 (La. 10/25/02), 827 So. 2d 1157.

In *Cavender v. Bodily, Inc.*, 1996 SD 74, 550 N.W.2d 85 (1996), the decedent/employee was killed when the scaffolding he was on collapsed. It was the employer's burden to prove that the employee's failure to use the safety lifeline was a proximate cause of his death. The employer did not meet that burden. It proffered evidence by a professor of physics who did not have the necessary expertise. There was evidence presented by the plaintiff which indicated a probability that the decedent would have been killed even if he wore the lifeline. *Cavender v. Bodily, Inc.*, 1996 SD 74, 550 N.W.2d 85 (1996).

In *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-11, 128 N.M. 601, 995 P.2d 1043, state law provided that a statutory violation or a failure to use a safety device must have been a cause of the injury in order to result in a reduction of benefits. Two employees had received compensable injuries in an auto accident. The court reversed the reduction in benefits for consuming alcohol and not wearing seat belts because there was no evidence that these factors contributed to the accident or to the claimants' injuries. The court did uphold the 10% reduction in the driver's benefits for traveling at an excessive speed. The police report indicated that excessive speed was one of the causes of the accident. *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-11, 128 N.M. 601, 995 P.2d 1043.

Many workers' compensation statutes originally included a legal presumption weighted toward the injured worker. A. Widman, Workers' Compensation A Cautionary Tale, p. 10 (2006). This meant that, by law, the workers' compensation board had to weigh the evidence in a light most favorable to the injured worker. A. Widman, Workers' Compensation A Cautionary Tale, p. 10 (2006). SB1 has effectively eliminated these presumptions. Sec. 287.800 mandates that the provisions of the Act be construed strictly against the injured worker. Sec. 287.800.

**D. SB1 Shifts the Burden of Medical Only Claims to Health Insurance, Medicare, and Medicaid.**

Not only does SB1, eliminate claims when an injury results directly or indirectly from idiopathic causes, it also, in Sec. 287.020.3(1) and Sec. 287.067.2, eliminates medical only claims in that it establishes a two factor test for an accident to be compensable – that the accident be the prevailing factor in causing both the resulting medical condition **and** the resulting disability. Sec. 287.020.3(1) and Sec. 287.067.2 (emphasis added). Therefore, the conundrum is that if there is no disability, there can be no accident.

“An integral and important part of the benefit scheme of all compensation acts is the provision of hospital and medical benefits. These benefits account for about 45 percent of the total benefits paid to injured workers. In forty-five states, the District of Columbia and Puerto Rico, and under the Longshore and Harbor Workers' Act and the

Federal Employees' Compensation Act, such benefits are unlimited as to duration and amount. It is interesting to observe that in the space of about forty years the number of states providing full medical coverage has risen from about a dozen to almost four times that number. This appears to evince agreement with the finding of an authoritative study that 'it is impossible fully to relieve pain and to assure restoration of seriously disabled persons when medical care is arbitrarily limited. Equally important is the convincing evidence that unlimited medical benefits are economically the soundest benefit; that over the long term, they become the least expensive.'” 5-94 Larson's Workers' Compensation Law § 94.01 (citations omitted). However, SB1 severely limits medical benefits.

Contrary to SB1, as a matter of common sense, it seems clear that liability for medical benefits should not be diminished by the fact that, for some reason, income benefits are not payable. In *Howerton v. Goodyear Tire & Rubber Co.*, 191 Kan. 449, 381 P.2d 365 (1963), the employee continued full-wage employment following injury; disability benefits were denied, but medical benefits were awarded. *Howerton v. Goodyear Tire & Rubber Co.*, 191 Kan. 449, 381 P.2d 365 (1963), A volunteer firefighter has been held entitled to medical benefits, although, since he received no wages, it was necessary to deny him weekly indemnity benefits. *Wolf v. City of Altamonte Springs*, 148 So. 2d 13 (Fla. 1962). In Kansas, a similar result has been reached in the case of a claimant who, although partially incapacitated, continued on the same job, performed the same duties, and received the same wages as before. *Shepherd v. Gas Serv. Co.*, 186 Kan. 699, 352 P.2d 48 (1960). There, the employer contended that, because the claimant had no compensable disability, he had no valid claim for any kind of compensation.

Finding that the disability could be cured by treatment, the court affirmed the award of "compensation by way of medical treatment" as a primary obligation of the employer. *Shepherd v. Gas Serv. Co.*, 186 Kan. 699, 352 P.2d 48 (1960).

In fact, under prior case law, in *Dean v. St. Luke's Hosp.*, 936 S.W.2d 601 (Mo. Ct. App. 1997), the claimant showed, under the "reasonable probability" standard, that she would need future medical aid, primarily in the form of prescription anti-inflammatory medications. *Dean v. St. Luke's Hosp.*, 936 S.W.2d 601 (Mo. Ct. App. 1997). It was appropriate for the Commission not to award a sum certain for future treatment, but, rather, to allow the claimant to show in the future that she sustained medical costs that were causally related to her work-related injury. *Dean v. St. Luke's Hosp.*, 936 S.W.2d 601 (Mo. Ct. App. 1997).

It is clear that workers who are permanently disabled are not getting enough compensation and the compensation duration is too short. Data consistently shows that a worker injured at the workplace earns significantly less than before the injury, even after returning to work. For example, according to one Rand Institute for Civil Justice Study, "permanent partial disability claimants injured in 1991-1992 [in California] received approximately 40 percent less in earnings over the four to five years following their injuries than did their uninjured counterparts." Rand Research Brief, "*Compensating Permanent Workplace Injuries*," 1998. Moreover, "for workers with minor disabilities, benefits replace a small fraction of lost wages." An earlier Rand ICJ report, released in 1991 found that "injured workers recovered a lower percentage of their accident costs than all accident victims (54.1%) and that workers' compensation only compensated

about 30% of the costs of long-term disabilities from work accidents.” Rand Research Brief, “*Compensating Permanent Workplace Injuries*,” 1998. If an injured worker is unable to find suitable work at all, the results are even worse because wage loss continues, yet many benefits run out. The system simply does not work for the permanently disabled. 50 Rutgers L. Rev. 657, 699 (1998) n. 156, 157 (citing Deborah R. Hensler et al., *Comensation for Accidental Injuries In the United States* 107 fig. 4.8 (1991). "This court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee." *New York Cent. R.R. v. White*, 243 U.S. 188, 200 (1917).

"[D]ecisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change." *Arizona Employers' Liability Cases*, 250 U.S. 400, 419 -20 (1919). Accordingly, a state statute which provided an exclusive system to govern the liabilities of employers and the rights of employees and their dependents to compensation for disabling injuries and death

caused by accident in certain hazardous occupations,<sup>4</sup> was held not to constitute a denial of due process in rendering the employer liable irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow-servants, nor in depriving the employee or his dependents of the higher damages which, in some cases, might be rendered under these doctrines. *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

Likewise, an Act which allowed an injured employee an election of remedies permitting restricted recovery under a compensation law although guilty of contributory negligence, and full compensatory damages under the Employers' Liability Act, did not deprive an employer of property without due process of law. *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919). SB1, however, violates this pact. The amendments to the Act are arbitrary and unreasonable changes to a heretofore statute that represented a fair and just compromise between the employer and the employee.

#### **E. SB1 Chills the Availability of Counsel to Injured Workers.**

Proposals that limit attorney fees make it hard for injured workers to find legal representation. These restrictions ultimately reduce attorney involvement in workers' compensation, which makes the injured worker that much more vulnerable. A. Widman, Workers' Compensation A Cautionary Tale, p. 10 (2006).

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<sup>4</sup> In determining what occupations may be brought under the designation of "hazardous," the legislature may carry the idea to the "vanishing point." *Ward & Gow v. Krinsky*, 259 U.S. 503, 520 (1922).

SB1 provides in Sec. 287.390.5 that an offer of settlement made to an unrepresented injured worker which is not accepted, but which is made in writing and filed with the division by the employer, the injured worker is entitled to one hundred percent of the amount offered, even if there are additional proceedings with legal counsel. Sec. 287.390.5. “The majority of attorneys' fee statutes, like the Florida statute, condition the award of fees on whether the claimant prevails, a requirement which not infrequently occasions the need for court interpretation of how much success is required.” 8-133 Larson's Workers' Compensation Law § 133.02.

There are basically two scenarios involving the award of attorney fees. There are attorney fees which are added on to the award of benefits and taxed against the employer and there are attorney fees which are paid out of the injured worker's award of compensation. Under both scenarios, the labor and industrial commission oversees the award of attorney fees.

“There is a growing trend toward adding fees to the claimant's award in at least some cases. Although attempts to reach this result by judicial decision have been generally unsuccessful, the Longshore Act and a substantial majority of states have statutory provisions for add-on fees in certain instances. Of course, these statutes vary widely; some provide for add-on fees only on appeal, or as a penalty, but a significant number of statutes either allow or direct the commission to add the claimant's attorneys' fees in all cases in which the employer has failed to make voluntary payment. These statutes differ from the penalty-type statutes in that there is ordinarily no requirement that the refusal be shown to have been unreasonable or arbitrary. The function of the

limitation to cases of refusal of payment, then, is primarily to ensure that the lawyer's services were necessary, not to punish a recalcitrant employer.” 8-133 Larson's Workers' Compensation Law § 133.02 (citations omitted).

“The original version of the New Jersey statute presented this danger in even more acute form, by depriving the claimant's lawyer of all compensation if, at any time prior to the hearing, the employer offered full compensation which was ultimately paid. Thus, the claimant's attorney might put in hundreds of dollars' worth of time on an apparently contested claim, only to be maneuvered out of all payment by an eleventh-hour offer by the employer. The New Jersey statute was amended in 1952 to confine the cut-off to cases in which the tender or payment was "at a reasonable time, prior to any hearing." This amendment, like the New Mexico provision requiring that the offer must have been made five business days or more prior to the trial, does at least prevent the last-minute undercutting of the claimant's attorney's rights by an offer, but it does not change the inherent possibility, present in both statutes, that the employer may evade liability to the claimant's attorney for a substantial amount of work merely because, within the time limit of the statute, an offer of compensation is made-an offer, indeed that the efforts of the claimant's attorney may have had a major part in inducing.” 8-133 Larson's Workers' Compensation Law § 133.02 (citations omitted).

Del. Code Ann. tit. 19, § 2127(a) provides: "[a] reasonable attorney's fee in an amount not to exceed 30% of the award or \$2,250, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under this chapter and Chapter 23, and taxed as costs against a party." Del. Code Ann. tit. 19, § 2127(a). Ark. Stat. Ann. §

81-1332 provides specifically for fees to be paid to the claimant's attorney. Ark. Stat. Ann. § 11-9-715. Limitation on the percentage of attorneys' fees has been allowed. N.J. Rev. Stat. § 34:15-64(a) provides that the "official conducting any hearing under this chapter, may allow to the party in whose favor judgment is entered, costs of witness fees and a reasonable attorney fee, not exceeding 20% of the judgment..." N.J. Rev. Stat. § 34:15-64(a).

In *Ruggery v. N.C. Dept. of Corrections*, 135 N.C. App. 270, 520 S.E.2d 77 (1999), attorney fees for the plaintiff were justified in this case because the employer lacked a reasonable ground for defending against the claim. The employee had a right to seek necessary medical treatment from a physician of his choice when the employer's physician refused to provide treatment to the employee. Also the employer conceded that the employee had a compensable injury but improperly charged the employee with vacation and sick time for time spent undergoing further treatment. *Ruggery v. N.C. Dept. of Corrections*, 135 N.C. App. 270, 520 S.E.2d 77 (1999).

Injured workers are entitled to seek representation when they have a claim for workers' compensation. However, a right without a meaningful opportunity to exercise it is really no right at all. See generally *Taylor v. Hubbell*, 188 F.2d 106 (9th Cir. 1951), cert. denied, 342 U.S. 818, 72 S.Ct. 32, 96 L.Ed. 618; *Hampton v. Chatwin*, 109 Ariz. 98, 505 P.2d 1037 (1973). SB1 limits the recovery of an attorney in cases where an offer of settlement made to an unrepresented injured worker which is not accepted, but which is made in writing and filed with the division by the employer, the injured worker is entitled to one hundred percent of the amount offered, even if there are additional proceedings

with legal counsel. Sec. 287.390.5. In such scenarios, although there may be many justiciable issues, an injured worker may be precluded from engaging the services of counsel.

### **CONCLUSION**

For the foregoing reasons, we urge this Court to reverse the order of the court below.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

- (1) That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, and the signature block contains 11,649 words (as determined by Microsoft Office Word 2003 software);
- (2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and
- (3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this \_\_\_\_\_ day of June, 2007, to:

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**APPENDIX**

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**Citation of law.**

287.010. This chapter shall be known as "The Workers' Compensation Law".

## **Definitions--intent to abrogate earlier case law.**

287.020. 1. 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, including executive officers of corporations. Any reference to any employee who has been injured shall, when the employee is dead, also include his dependents, and other persons to whom compensation may be payable. The word "employee" shall also include all minors who work for an employer, whether or not such minors are employed in violation of law, and all such minors are hereby made of full age for all purposes under, in connection with, or arising out of this chapter. The word "employee" shall not include an individual who is the owner, as defined in subsection 43 of section 301.010, RSMo, and operator of a motor vehicle which is leased or contracted with a driver to a for-hire motor carrier operating within a commercial zone as defined in section 390.020 or 390.041, RSMo, or operating under a certificate issued by the Missouri department of transportation or by the United States Department of Transportation, or any of its subagencies.

2. 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.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of 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.

(2) 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.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(4) 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.

(5) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

4. "Death" when mentioned as a basis for the right to compensation means only death resulting from such violence and its resultant effects occurring within three hundred weeks after the accident; except that in cases of occupational disease, the limitation of three hundred weeks shall not be applicable.

5. Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee's home to the employer's principal place of business or from the employer's principal place of business to the employee's home are not compensable. 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.

6. The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

7. As used in this chapter and all acts amendatory thereof, the term "commission" shall hereafter be construed as meaning and referring exclusively to the labor and industrial relations commission of Missouri, and the term "director" shall hereafter be construed as meaning the director of the department of insurance of the state of Missouri or such agency of government as shall exercise the powers and duties now conferred and imposed upon the department of insurance of the state of Missouri.

8. The term "division" as used in this chapter means the division of workers' compensation of the department of labor and industrial relations of the state of Missouri.

9. For the purposes of this chapter, the term "minor" means a person who has not attained the age of eighteen years; except that, for the purpose of computing the compensation provided for in this chapter, the provisions of section 287.250 shall control.

10. In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *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 all cases citing, interpreting, applying, or following those cases.

## **Liability of employer--contractors, subcontractors.**

287.040. 1. Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

2. The provisions of this section shall not apply to the owner of premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor but such independent contractor shall be deemed to be the employer of the employees of his subcontractors and their subcontractors when employed on or about the premises where the principal contractor is doing work.

3. In all cases mentioned in the preceding subsections, the immediate contractor or subcontractor shall be liable as an employer of the employees of his subcontractors. All persons so liable may be made parties to the proceedings on the application of any party. The liability of the immediate employer shall be primary, and that of the others secondary in their order, and any compensation paid by those secondarily liable may be recovered from those primarily liable, with attorney's fees and expenses of the suit. Such recovery may be had on motion in the original proceedings. No such employer shall be liable as in this section provided, if the employee was insured by his immediate or any intermediate employer.

4. The provisions of this section shall not apply to the relationship between a for-hire motor carrier operating within a commercial zone as defined in section 390.020 or 390.041, RSMo, or operating under a certificate issued by the Missouri department of transportation or by the United States Department of Transportation, or any of its subagencies, and an owner, as defined in subdivision (43) of section 301.010, RSMo, and operator of a motor vehicle.

**For-hire motor carrier not an employer of a lessor--definition.**

287.041. Notwithstanding any provision of sections 287.030 and 287.040, for purposes of this law, in no event shall a for-hire motor carrier operating within a commercial zone as defined in section 360.041, RSMo, or section 390.020, RSMo, or operating under a certificate issued by the Missouri department of transportation or by the United States Department of Transportation, or its subagencies, be determined to be the employer of a lessor, as defined at 49 C.F.R. Section 376.2(f), or of a driver receiving remuneration from a lessor, as defined at 49 C.F.R. Section 376.2(f), provided, however, the term "for-hire motor carrier" shall in no event include an organization described in Section 501(c)(3) of the Internal Revenue Code or any governmental entity.

**Abrogation of case law regarding definition of owner.**

287.043. In applying the provisions of subsection 1 of section 287.020 and subsection 4 of section 287.040, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "owner", as extended in the following cases: Owner Operator Independent Drivers Ass'n., Inc. v. New Prime, Inc., 133 S.W.3d 162 (Mo. App. S.D., 2004); Nunn v. C.C. Midwest, 151 S.W.3d 388 (Mo. App. W.D., 2004).

**Occupational disease defined--repetitive motion, loss of hearing, radiation injury, communicable disease, others.**

287.067. 1. In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

2. An injury by occupational disease is compensable only if the occupational exposure 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. 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.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure 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. 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.

4. "Loss of hearing due to industrial noise" is recognized as an occupational disease for purposes of this chapter and is hereby defined to be a loss of hearing in one or both ears due to prolonged exposure to harmful noise in employment. "Harmful noise" means sound capable of producing occupational deafness.

5. "Radiation disability" is recognized as an occupational disease for purposes of this chapter and is hereby defined to be that disability due to radioactive properties or substances or to Roentgen rays (X-rays) or exposure to ionizing radiation caused by any process involving the use of or direct contact with radium or radioactive properties or substances or the use of or direct exposure to Roentgen rays (X-rays) or ionizing radiation.

6. Disease of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart or cardiovascular system, including carcinoma, may be recognized as occupational diseases for the purposes of this chapter and are defined to be disability due to exposure to smoke, gases, carcinogens, inadequate oxygen, of paid firefighters of a paid fire department or paid police officers of a paid police department certified under chapter 590, RSMo, if a direct causal relationship is established, or psychological stress of firefighters of a paid fire department if a direct causal relationship is established.

7. Any employee who is exposed to and contracts any contagious or communicable disease arising out of and in the course of his or her employment shall be eligible for benefits under this chapter as an occupational disease.

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

**Liability of employer set out--compensation increased or reduced, when--use of alcohol or controlled substances or voluntary recreational activities, injury from--effect on compensation --mental injuries, requirements, firefighter stress not affected.**

287.120. 1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person. The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.

2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.

3. No compensation shall be allowed under this chapter for the injury or death due to the employee's intentional self-inflicted injury, but the burden of proof of intentional self-inflicted injury shall be on the employer or the person contesting the claim for allowance.

4. Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.

5. Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

6. (1) Where the employee 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, the compensation and death benefit provided for herein shall be reduced fifty percent if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs.

(2) If, however, the use of alcohol or nonprescribed controlled drugs in violation of the employer's rule or policy is the proximate cause of the injury, then the benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited.

(3) The voluntary use of alcohol to the percentage of blood alcohol sufficient under Missouri law to constitute legal intoxication shall give rise to a rebuttable presumption that the voluntary use of alcohol under such circumstances was the proximate cause of the injury. A preponderance of the evidence standard shall apply to rebut such presumption. An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section 195.010, RSMo, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

7. Where the employee's participation in a recreational activity or program is the prevailing cause of the injury, benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited regardless that the employer may have promoted, sponsored or supported the recreational activity or program, expressly or impliedly, in whole or in part. The forfeiture of benefits or compensation shall not apply when:

(1) The employee was directly ordered by the employer to participate in such recreational activity or program;

(2) The employee was paid wages or travel expenses while participating in such recreational activity or program; or

(3) The injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition.

8. Mental injury resulting from work-related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events.

9. A mental injury is not considered to arise out of and in the course of the employment if it resulted from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action taken in good faith by the employer.

10. The ability of a firefighter to receive benefits for psychological stress under section 287.067 shall not be diminished by the provisions of subsections 8 and 9 of this section.

**Temporary total disability, amount to be paid--method of payment --  
disqualification, when--post injury misconduct defined.**

287.170. 1. For temporary total disability the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made. The amount of such compensation shall be computed as follows:

(1) For all injuries occurring on or after September 28, 1983, but before September 28, 1986, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to seventy percent of the state average weekly wage, as such wage is determined by the division of employment security, as of the July first immediately preceding the date of injury;

(2) For all injuries occurring on or after September 28, 1986, but before August 28, 1990, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to seventy-five percent of the state average weekly wage, as such wage is determined by the division of employment security, as of the July first immediately preceding the date of injury;

(3) For all injuries occurring on or after August 28, 1990, but before August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred percent of the state average weekly wage;

(4) For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage;

(5) For all injuries occurring on or after September 28, 1981, the weekly compensation shall in no event be less than forty dollars per week.

2. Temporary total disability payments shall be made to the claimant by check or other negotiable instruments approved by the director which will not result in

delay in payment and shall be forwarded directly to the claimant without intervention, or, when requested, to claimant's attorney if represented, except as provided in section 454.517, RSMo, by any other party except by order of the division of workers' compensation.

3. An employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation.

4. If the employee is terminated from post-injury employment based upon the employee's post-injury misconduct, neither temporary total disability nor temporary partial disability benefits under this section or section\* 287.180 are payable. As used in this section, the phrase "post- injury misconduct" shall not include absence from the workplace due to an injury unless the employee is capable of working with restrictions, as certified by a physician.

**Permanent partial disability, amount to be paid--permanent partial disability defined--permanent total and partial total disability require certification by physician on compensability--award reduced when.**

287.190. 1. For permanent partial disability, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with sections 287.170 and 287.180, respectively, the employer shall pay to the employee compensation computed at the weekly rate of compensation in effect under subsection 5 of this section on the date of the injury for which compensation is being made, which compensation shall be allowed for loss by severance, total loss of use, or proportionate loss of use of one or more of the members mentioned in the schedule of losses. SCHEDULE OF LOSSES

Weeks

- (1) Loss of arm at shoulder ..... 232
- (2) Loss of arm between shoulder and elbow ..... 222
- (3) Loss of arm at elbow joint ..... 210
- (4) Loss of arm between elbow and wrist ..... 200
- (5) Loss of hand at the wrist joint ..... 175
- (6) Loss of thumb at proximal joint ..... 60
- (7) Loss of thumb at distal joint ..... 45
- (8) Loss of index finger at proximal joint ..... 45
- (9) Loss of index finger at second joint ..... 35
- (10) Loss of index finger at distal joint ..... 30
- (11) Loss of either the middle or ring finger at the proximal joint ..... 35
- (12) Loss of either the middle or ring finger

at second joint .....	30
(13) Loss of either the middle or ring finger at the distal joint .....	26
(14) Loss of little finger at proximal joint .....	22
(15) Loss of little finger at second joint .....	20
(16) Loss of little finger at distal joint .....	16
(17) Loss of one leg at the hip joint or so near thereto as to preclude the use of artificial limb .....	207
(18) Loss of one leg at or above the knee, where the stump remains sufficient to permit the use of artificial limb .....	160
(19) Loss of one leg at or above ankle and below knee joint .....	155
(20) Loss of one foot in tarsus .....	150
(21) Loss of one foot in metatarsus .....	110
(22) Loss of great toe of one foot at proximal joint ..	40
(23) Loss of great toe of one foot at distal joint ....	22
(24) Loss of any other toe at proximal joint .....	14
(25) Loss of any other toe at second joint .....	10
(26) Loss of any other toe at distal joint .....	8
(27) Complete deafness of both ears .....	180
(28) Complete deafness of one ear, the	

other being normal ..... 49

(29) Complete loss of the sight of one eye ..... 140

2. If the disability suffered in any of items (1) through (29) of the schedule of losses is total by reason of severance or complete loss of use thereof the number of weeks of compensation allowed in the schedule for such disability shall be increased by ten percent.

3. For permanent injuries other than those specified in the schedule of losses, the compensation shall be paid for such periods as are proportionate to the relation which the other injury bears to the injuries above specified, but no period shall exceed four hundred weeks, at the rates fixed in subsection 1. The other injuries shall include permanent injuries causing a loss of earning power. For the permanent partial loss of the use of an arm, hand, thumb, finger, leg, foot, toe or phalange, compensation shall be paid for the proportionate loss of the use of the arm, hand, thumb, finger, leg, foot, toe or phalange, as provided in the schedule of losses.

4. If an employee is seriously and permanently disfigured about the head, neck, hands or arms, the division or commission may allow such additional sum for the compensation on account thereof as it may deem just, but the sum shall not exceed forty weeks of compensation. If both the employer and employee agree, the administrative law judge may utilize a photograph of the disfigurement in determining the amount of such additional sum.

5. The amount of compensation to be paid under subsection 1 of this section shall be computed as follows:

(1) For all injuries occurring on or after September 28, 1983, but before August 28, 1990, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to forty-five percent of the state average weekly wage, as such wage is determined by the division of employment security, as of the July first immediately preceding the date of injury;

(2) For all injuries occurring on or after September 28, 1981, the weekly compensation shall in no event be less than forty dollars per week;

(3) For all injuries occurring on or after August 28, 1990, but before August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-

thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty percent of the state average weekly wage;

(4) For all injuries occurring on or after August 28, 1991, but before August 28, 1992, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty-two percent of the state average weekly wage;

(5) For all injuries occurring on or after August 28, 1992, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty-five percent of the state average weekly wage.

6. (1) "Permanent partial disability" means a disability that is permanent in nature and partial in degree, and when payment therefor has been made in accordance with a settlement approved either by an administrative law judge or by the labor and industrial relations commission, a rating established by medical finding, certified by a physician, and approved by an administrative law judge or legal advisor, or an award by an administrative law judge or the commission, the percentage of disability shall be conclusively presumed to continue undiminished whenever a subsequent injury to the same member or same part of the body also results in permanent partial disability for which compensation under this chapter may be due; provided, however, the presumption shall apply only to compensable injuries which may occur after August 29, 1959.

(2) Permanent partial disability or permanent total 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. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

(3) Any award of compensation shall be reduced by an amount proportional to the permanent partial disability determined to be a preexisting disease or condition or attributed to the natural process of aging sufficient to cause or prolong the disability or need of treatment.

**Compromise settlements, how made--validity, effect, settlement with minor dependents--employee entitled to one hundred percent of offer, when.**

287.390. 1. Parties to claims hereunder may enter into voluntary agreements in settlement thereof, but no agreement by an employee or his or her dependents to waive his or her rights under this chapter shall be valid, nor shall any agreement of settlement or compromise of any dispute or claim for compensation under this chapter be valid until approved by an administrative law judge or the commission, nor shall an administrative law judge or the commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter. No such agreement shall be valid unless made after seven days from the date of the injury or death. An administrative law judge, or the commission, shall approve a settlement agreement as valid and enforceable as long as the settlement is not the result of undue influence or fraud, the employee fully understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement.

2. A compromise settlement approved by an administrative law judge or the commission during the employee's lifetime shall extinguish and bar all claims for compensation for the employee's death if the settlement compromises a dispute on any question or issue other than the extent of disability or the rate of compensation.

3. Notwithstanding the provisions of section 287.190, an employee shall be afforded the option of receiving a compromise settlement as a one-time lump sum payment. A compromise settlement approved by an administrative law judge or the commission shall indicate the manner of payment chosen by the employee.

4. A minor dependent, by parent or conservator, may compromise disputes and may enter into a compromise settlement agreement, and upon approval by an administrative law judge or the commission the settlement agreement shall have the same force and effect as though the minor had been an adult. The payment of compensation by the employer in accordance with the settlement agreement shall discharge the employer from all further obligation.

5. In any claim under this chapter where an offer of settlement is made in writing and filed with the division by the employer, an employee is entitled to one hundred percent of the amount offered, provided such employee is not represented by counsel at the time the offer is tendered. Where such offer of settlement is not accepted and where additional proceedings occur with regard to the employee's claim, the employee is entitled to one hundred percent of the amount initially offered. Legal counsel representing the employee shall receive reasonable fees for services rendered.

6. As used in this chapter, "amount in dispute" means the dollar amount in excess of the dollar amount offered or paid by the employer. An offer of settlement shall not be construed as an admission of liability.

**Law to be strictly construed.**

287.800. 1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.