LEGISLATIVE UPDATE

SB1 has passed the House and Senate and is awaiting the Governor's signature. Below are some of the major changes that will go into effect on January 1, 2014 if the Governor approves the Bill.

Employee:

"Employee" does not include any person performing services for board, lodging, aid or sustenance received from any religious, charitable or relief organization. '287.020.1

Occupational Disease:

Workers' Compensation is the exclusive remedy for occupational diseases. '287.120.1 & .2

"Occupational diseases due to toxic exposure" include: mesothelioma, asbestos, berylliosis, coal workers pneumoconiosis, bronchiolitis obliterans, silicosis, silicotuberculosis, manganism, acute myelogenous, leukemia and myelodysplastic syndrome. '287.020.11

In cases of "occupational diseases due to toxic exposure" (but not including mesothelioma) which result in permanent and total disability or death, the claimant shall receive 200% of the state's AWW for 200 weeks. Currently using the state's AWW of $788.33, this would amount to $157,666.00. '287.200.4

Mesothelioma cases are treated differently. Employers can elect to accept or reject mesothelioma liability. Employers can elect to insure liability by qualifying as a self-insurer or by becoming a member of a group insurance pool. '287.200.4 A Missouri Mesothelimoa Risk Management Fund will also be created and any employer can participate in the Fund which uses funds collected by members to pay mesothelioma Awards made against any member of the Fund. Participation in the Fund has the same effect as becoming a member of a pool or a self-insured. '287.223

When mesothelioma results in permanent and total disability or death, *if the employer has elected to accept mesothelioma liability*, the claimant shall receive an additional amount of 300% of the state's AWW for 212 weeks from the employer or the group of employers in which the employer is a member. Currently using the state's AWW of $788.33, this would amount to $501,377.88. '287.200.4

If the employer has elected to reject mesothelioma liability, than Workers' Compensation is not the employee's exclusive remedy. In other words, the employee can move forward with his/her claim in civil court. '287.200.4

The benefits for "occupational diseases due to toxic exposure" must be exhausted before the regular PTD or death benefits are paid. '287.200.4

If the claimant dies before the benefits for “occupational diseases due to toxic exposure” are fully paid, the claimant’s spouse or children are entitled to the benefits. If the claimant has no spouse or children, the unpaid benefits go to the claimant’s estate. '287.200.4

The employer has no subrogation rights for any benefits that were paid for an Aoccupational disease due to toxic exposure” when the claimant or his/her dependents receive compensation from a third party claim. '287.150.7

Fund Responsibility:

There no longer will be PPD claims against the Fund. '287.220

PTD cases will be allowed where the prior injury(ies) amount to at least 50 weeks of PPD which is due to an active military disability, a prior workers’ compensation disability, any prior disability which directly and significantly aggravates or accelerates the work-related disability, or is a pre-existing disability to an extremity when there is a subsequent compensable work injury involving the opposite extremity. '287.220

When an employee is entitled to compensation from the Fund, the employer at the time of the last work-related injury shall only be liable for the disability resulting from the subsequent work-related injury considered alone and of itself. '287.220

The Fund is no longer liable for death benefits and medical bill benefits for an injured worker working for an illegally uninsured employer. '287.220

The Fund is no longer responsible for second job wage loss. '287.220

Surcharge:

There is a supplemental surcharge not to exceed 3% in the calendar years 2014 - 2021. The surcharges are for the sole source of payment for Second Injury Fund obligations. '287.715

Medical Fee Disputes

Medical providers are required to apply for reimbursement within 2 years from the date the first notice of disputed medical charges was received by the health care provider for services rendered before July 1, 2013 and within one year if services are rendered on or after that date. '287.140.4

EVIDENCE

One Medical Opinion Relating an Occupational Disease to a Job is Sufficient For Claim to be Found Compensable

Stephen Smith (deceased) v. Capital Region Medical Center, Case No. WD75078 (Mo. App. 2013)

FACTS: The claimant worked in the hospital from 1969 - 2006 as a lab technician. At one time the lab technicians pipetted blood samples using their mouths. The claimant testified that he once got blood in his mouth while doing so. Also, in 1970, he received a blood transfusion following a non work-related hunting accident. The claimant was diagnosed with Hepatitis C in December 1999, and ultimately died on February 27, 2007 of sepsis, Hepatitis C and acute tubular necrosis. Dr. Parmet, the claimant's expert, opined that the claimant's work was Aclearly the largest risk factor and the most probable source" of his Hepatitis C, as well as the prevailing factor. Dr. Bacon, the employer's expert, opined that the claimant likely contracted Hepatitis C when he had the blood transfusion in 1970.

The ALJ concluded that the claimant failed to prove that he contracted an occupationally induced disease, and therefore, his claim was denied. The Commission agreed because there was no evidence of any person with Hepatitis C treated in the employer's facility while the claimant worked there. The Commission noted that the claimant worked at the employer for many years and it would seem that someone with Hepatitis C must have, at some point, treated at the hospital. However, the Commission could not speculate.

HOLDING: The Court reversed the Commission's Decision and remanded the case back to the Commission. The Court noted that Courts have found that in an occupational disease case Aa claimant must submit medical evidence establishing a probability that working conditions caused the disease, although they need not be the sole cause. Even where the causes of a disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee." The Court further noted that Courts have found that the Statute does not require a claimant to establish, by a medical certainty, that his injury was caused by an occupational disease in order to be eligible for compensation. The Court found that Dr. Parmet's opinion was sufficient evidence to meet the claimant's burden on the issue of causation since he opined that the claimant's work was the prevailing factor in him contracting Hepatitis C.

Claim Denied Because Claimant Not An Employee Nor Statutory Employee

Brito-Pacheco v. Tina Hair Salon, Case No. WD75062 (Mo. App. 2013)

FACTS: The claimant, a hairdresser, worked for the employer which was a hair salon owned by Tina Diaz, and she supplied a work station to the hair dressers. Ms. Diaz provided salon business

cards to which hair dressers could add their name. The owner did not schedule appointments, limit or mandate work hours, provide employee benefits, pay taxes or mandate fees. The hair dressers would use the space provided and divide proceeds of compensation paid by the customers. The claimant was covering for another employee when he was shot and killed during a robbery at the salon. The ALJ noted there was no evidence to support Ms. Diaz had the right to control the claimant's work. Therefore, the claimant was unable to sustain his burden of proof regarding the employer/employee relationship. The ALJ looked to whether the claimant was a statutory employee. The Courts have noted that the elements to establish statutory employment were whether the work done was under contract on or about the premises of the employer which was in the usual business of the employer. The ALJ found there was no evidence that the work of the claimant was pursuant to contract either written or verbal, and therefore, the employer was not the claimant's statutory employer. Therefore, the Claim was denied. The Commission affirmed the decision of the ALJ.

HOLDING: The Court upheld the denial of benefits. The Court found that the Commission properly found that the stylist was not a statutory employee because his work was not performed in the usual course of the employer's business, specifically because he was doing his own work rather than work of his employer. The Court noted that the employer simply provided him the facility.

Fund Has No Liability Because Claimant was PTD Prior to Last Work Injury

Schussler v. Treasurer of the State Custodian of the Second Injury Fund, Case No. WD74596 (Mo. App. 2012)

FACTS: The claimant worked for the employer from June 2006 through June 2008. In March 2008 she began to experience symptoms of bilateral carpal tunnel; she reported the carpal tunnel to the employer; and a week later she was terminated. She subsequently underwent two surgeries for carpal tunnel and was released to work without restrictions in April 2009. The employer and the claimant settled, and the claimant then went to a hearing against the Fund for PTD benefits.

It was noted that the claimant had an extensive history with respect to pre-existing conditions involving her knees, her cervical and lumbar spine, brittle type 1 diabetes, Hepatitis C, depression and post-traumatic stress disorder. Dr. Koprivica testified on behalf of the claimant opining that she was PTD as a result of her pre-existing conditions, as well as the 2008 carpal tunnel syndrome. He did note that she had Asignificant industrial disability" prior to her carpal tunnel syndrome. Ms. Titterington, a vocational expert, opined that she was not employable on the open labor market and further noted that she was unemployable Afrom all the restrictions that are in Dr. Koprivica's report, even if the hand injuries were not considered." The ALJ found the claimant was not entitled to benefits from the Fund because she was PTD prior to the carpal tunnel injury. The Commission affirmed the decision of the ALJ.

HOLDING: The Court also found that the Fund was not liable for PTD benefits because the claimant was PTD prior to the carpal tunnel. The Court noted that the fact that the claimant maintained employment with the employer did not bar a finding that she was PTD. The Courts have made it clear that the Commission is not prevented from finding that the claimant is PTD simply because she holds limited, sporadic and/or highly accommodated employment. The Court noted that the test is whether the claimant could compete in the open labor market, and certainly the fact that the employer discharged the claimant almost immediately after learning of her carpal tunnel syndrome suggests that her employment was tenuous.

PROCEDURE

Appellate Court Only Has Jurisdiction to Review Commission's Final Award, Not Temporary Award

Maria White v. Anderssen Mobile X-ray Service, Case No. ED98181 (Mo. App. 2012)

FACTS: The claimant was a staff technologist and her job duties involved taking x-rays at various locations throughout the metropolitan area. She drove the employer's minivan containing the employer's equipment, films and office paper. The gas and vehicle repairs were paid for by the employer. The claimant was to be in the office by 3:00 P.M. and was to call 30 minutes before her shift, or 2:30 P.M., to see if there were any assignments or she was to go directly to the employer's office. The claimant called the dispatcher and was on her way to the office when she was in a motor vehicle accident which occurred at 3:10 P.M. In the Temporary Award, the ALJ found that this was not a case of a casual drive to work in which the claimant was driving from her home to the employer and concluded that the accident arose out of and in the course and scope of her employment. The Commission affirmed this Temporary Award noting that its Award was also Temporary.

HOLDING: The Court found that it was without jurisdiction to review the Commission's Temporary Award. The Court noted that '287.495 only allows appellate review of a final award. The Court further noted that before the 2005 Amendments appellate courts created two exceptions allowing appellate review of a temporary award. The first was when the award was one of permanent total disability and the second was when the employer denies all liability. The Court acknowledged that the 2005 Amendments did not alter the Commission's authority to enter temporary or partial awards or its appellate jurisdiction. However, the Amendments did change the construction of the Statute, to a strict construction.

The Court looked to a prior decision, *Norman v. Phelps County Regional Med. Ctr.* (Mo. App. 2008). In *Norman*, the Court did not apply the exception to the general rule that employers can appeal the temporary award of the Commission as long as the employer denied all liability. The *Norman* Court found that application of the prior judicially-created exception would violate the clear legislative intent to limit appellate review to a final award from the Commission. Therefore,

it determined that it lacked jurisdiction to review the Commission's temporary or partial award. Here, in this case, the Court noted that the employer argued that the Commission's Award was a final award, but it was not. The Commission designated its award in this case as a ATemporary Award," and expressly stated that the proceedings were continued and held open until a final award could be made. Therefore, since the Commission's Award was not final, the Court could not review it.

Editor's Note: The Court did not address whether the Commission has the right to review an ALJ's Temporary Award.

Minor Dependents Entitled to Continuing PTD Benefits for Life (Applies only if Claim was pending from January 9, 2007 through June 26, 2008)

David Spradling (deceased) v. Treasurer of the State of Missouri as Custodian of the Second Injury Fund Case No. SD31907 (Mo. App. 2013)

FACTS: The claimant alleged that in August or September 1998 he was injured while lifting pallets while working for the employer. He initially filed his Claim in September 1998, and several amended Claims thereafter. On November 30, 2005 the claimant passed away from causes unrelated to his work injury. At the time of the injury, the claimant had three minor children and there was no dispute that each of them were dependents. On October 27, 2008, the claimant's dependents filed an amended Claim alleging they were entitled to the claimant's continuing PTD benefits. The dependents settled their Claim against the employer and proceeded to a hearing against the Fund for PTD benefits.

The ALJ found that the claimant was PTD prior to his death, and that the Fund was liable for PTD benefits. The ALJ also found that the three dependents should receive his benefits continuing after his death for life. The Commission affirmed the Award of the ALJ.

HOLDING: The Fund appealed arguing that the minor dependents were only entitled to benefits until they attained the age of 18, at which time benefits ceased. The Court disagreed noting that dependent status is determined at the time of the injury, not the time of death and all three children were dependents at the time of the injury.

The Court then looked to whether the dependents were entitled to an Award of Alifetime workers' compensation benefits." The Court noted that *Schoemehl* applies. Please note that the *Schoemehl* Court found that when an injured worker dies from causes unrelated to the work injury, the worker's dependents become the Aemployee" for purposes of receiving PTD benefits. The Court further noted it has been held that surviving dependents are deemed to have the same rights as the employee under the Statute. As a result, the law in effect at the time of the claimant's injury required compensation to be paid for PTD benefits not only over the lifetime of the claimant, but also over the lifetime of any of his surviving dependents. Therefore, the Court found that the Commission was correct in determining that the claimant's dependents were

entitled to receive PTD benefits for their lifetime, despite the fact that their entitlement to death benefits would, in most cases, cease when they reached the age of 18.

VA Entitled to Become a Party in a Workers' Compensation Proceeding

United States Department of Veteran Affairs v. Karla O. Boresi, Case No. SC92541 (Mo. S.Ct. 2013)

FACTS: The claimant alleged that on November 20, 2002 he sustained a work-related injury. He received care and treatment for that injury in the amount of $18,958.53 from the VA medical facility. It was undisputed that the employer did not authorize care at the VA facility. The VA filed a Motion in the claimant's workers' compensation proceeding asserting its right under 38 U.S.C ' 1729 (2006) which allows it to intervene in an action or proceeding brought by the veteran against a third party to recover charges they have paid which were Aincurred incident to the veteran's employment and...covered under workers' compensation law or plan." The ALJ overruled the VA's Motion on the ground that she had no authority to permit the intervention. The VA filed a Petition in the Circuit Court again asking to be able to intervene in the workers' compensation proceeding and after a hearing, the Court denied the VA's Petition. The VA then appealed to the Court of Appeals, who transferred the case to the Supreme Court.

HOLDING: The Supreme Court found that although Missouri Workers' Compensation Statutes do not allow the VA to intervene in the proceedings, 38 U.S.C ' 1729 (2006), a federal law, does allow the VA to intervene. Pursuant to the Supremacy Clause of the United States, which states that federal laws are supreme, the VA had the right to intervene in the workers' compensation proceeding, and therefore the Court directed the ALJ to allow the VA to intervene.

COMMISSION DECISIONS

Employer Found Responsible For PTD Benefits After Conservatively Treated Back Injury

In **William Rook v. Bodine Aluminum and Treasurer of Missouri as the Custodian of the Second Injury Fund, Injury No. 07-041658,** the claimant sustained a herniated disc at L4-5 on April 22, 2007. He treated conservatively with Dr. Coyle with injections and physical therapy and was then released from care. He subsequently saw Dr. Kuntz, an unauthorized physician, who recommended a 3-level fusion which the claimant did not undergo. However, the employer did send him back to Dr. Coyle who disagreed with Dr. Kuntz's assessment and again placed the claimant at MMI. It was noted that he had extensive pre-existing injuries to his low back including a central disc protrusion at L4-5 and L5-S1 and he had been diagnosed with transverse myelitits and treated with traction therapy. It was further noted that the claimant was symptom free for three years prior to his injury. The ALJ opined that the claimant was PTD as a result of a combination of his pre-existing disabilities and the primary low back injury. The ALJ determined that the employer was liable for 40% PPD referable to the body, and the Fund was responsible

for PTD benefits. The Fund filed a timely Application for Review alleging the employer rather than the Fund was liable for PTD benefits.
The Commission agreed with the Fund opining that the employer, not the Fund, was liable for PTD benefits. The Commission noted that the ALJ failed to consider the effects of the work injury in isolation before inquiring as to the claimant's pre-existing conditions. The Commission noted that the claimant's testimony showed that after his work injury he needed to lie down 5 - 6 times per day, which precluded him from competing in the open labor market. The claimant testified that this began after his work injury. Therefore, the Commission found that the employer, not the Fund, was liable for PTD benefits because the claimant was PTD due to the work injury alone.

Commission Can Only Double Benefits Awarded By ALJ and Unpaid By Employer

In **Jennifer Thomas v. Forsyth Care Center, Injury No. 05-080783**, the ALJ issued a Temporary or Partial Award ordering the employer to provide medical care, as may be authorized and directed by Dr. Cornelison, which is reasonable and necessary and causally related to the accident. Thereafter, the employer failed to pay for various treatments ordered by the doctor, despite the fact that the doctor made it clear in her records that she continued to make recommendations and was unable to obtain authorization from the employer. The claimant asked that the Commission double the amount of the TTD both paid and unpaid by the employer, the medical expenses paid by the employer, and the amount of PTD benefits owed from the date of the Final Award.

The Commission noted that the only discretion they have with respect to doubling any Award is when an ALJ orders benefits to be paid and then the employer does not pay them. Therefore, the Commission cannot double any amounts the employer paid to the claimant, nor can it double any amount that was not ordered by the ALJ. It is noted in this case that the ALJ did not order the employer to pay TTD or PTD benefits. The Commission noted that it would be inclined to order such a doubling in this case, however, they were unable to do so because the claimant failed to prove the value of medical expenses ordered by the ALJ and unpaid by the employer because the claimant did not put any of her medical bills into evidence to establish the dollar value of the medical treatments which she was unable to obtain due to the employer's conduct. Therefore, the Commission affirmed the ALJ's Decision in not doubling any part of the Award. The Commission did go on to condemn the employer's refusal to comply with the ALJ's Temporary Award, and noted that the employer offered no explanation for refusing to authorize any treatments recommended by the doctor.

Editor's Note: Please note that pursuant to previous Commission decisions, the ALJ cannot direct the employer to authorize treatment with a specific physician, as the employer has the right to choose the physician. However, the employer in this case did not make that argument, as the Commission noted that it was silent on why it refused any recommended treatment.

Claimant on Job Site Walking to Truck and Tripping Over Pile of Dirt Found Compensable

In **Milton Young v. Boone Electric Cooperative, Injury No. 08-123324,** the claimant was on a job site walking to his bucket truck to get materials for the job when he stepped on frozen dirt and his left knee buckled and popped, causing him to fall down. Other crew members helped him to his feet, at which time he experienced another pop in his left knee. The ALJ found that the claimant sustained a left knee sprain arising out of and in the course of his employment on January 4, 2008. The employer appealed arguing that the claimant did not sustain an unexpected traumatic event or unusual strain and also that the claimant was equally exposed to that risk or hazard in his normal non-employment life. Therefore, his accident did not occur in the course and scope of his employment.

The Commission found that this was an Aunexpected traumatic event or an unusual strain" as the claimant testified credibly that he tripped on a pile of dirt and fell, which would qualify as a traumatic event. The employer argued that the injury was not compensable because he was merely walking to his truck. However, the Commission noted that the claimant was not merely walking to his truck, but instead fell because he stepped on a pile of frozen dirt. The Commission found that the record did not contain substantial and competent evidence to support a finding that the claimant was equally exposed to the risk of stepping on a pile frozen dirt and falling in his normal non-employment life. Therefore, the claimant's left knee injury arose out of and in the course of his employment and his injury was compensable.

Claimant PTD Due to Work Injury and Prior Shoulder Injury

In **Daneen Pennington v. Treasurer of Missouri as Custodian of the Second Injury Fund, Injury No. 10-020750,** the claimant sustained an injury to her back lifting a box of paper. She treated conservatively and eventually underwent surgery with Dr. Ciccarelli. She was then released from care with permanent restrictions of no lifting over 25 pounds, and she settled her claim against the employer for 22.5% of the body. The claimant then proceeded to a hearing against the Fund for PTD benefits. The ALJ denied the claimant's claim against the Fund concluding that the claimant was PTD due to the work injury alone.

The Commission disagreed and found that the claimant was PTD as a result of her work injury and her pre-existing disability, specifically a prior shoulder injury. The Commission noted that the ALJ determined that after her prior shoulder injury the doctor released her from his care without any restrictions. However, the Commission noted that this was not quite accurate, and it was clear from the doctor's final report that the claimant was still having problems with her shoulder and although she did not have any specific restrictions, she was to limit her activities to those that she could tolerate. The Commission further noted that the claimant testified that her

shoulder had continued to bother her after she was released from care. Also, the Commission disagreed with the ALJ's finding that the expert opinions of Michael Dreiling, who found that the claimant was PTD as a result of her work injury and her pre-existing shoulder disability, and the opinion of Dr. Stuckmeyer, who noted that the claimant's shoulder condition was a hindrance to her employment, were not credible. The Commission reversed the Award of the ALJ and opined that the claimant was PTD and entitled to benefits from the Fund.

Employer Not Entitled to Reduction in Benefits for Drug Violation

In **Tyler Kelsey v. Loy Lange Box Company, Injury No. 08-114802,** the claimant sustained an injury to his left upper extremity on December 30, 2008. Dr. Goldfarb performed two surgeries and released the claimant from treatment in August 2009. The employer alleged a 50% reduction in all three benefits because the claimant's drug test on his day of injury was positive which was in violation of the employer's drug policy. The Employer's Alcohol and Drug Policy provided in part that employees shall not use prohibited drugs while on the job or on company property. Also, employees are not allowed to work while under the influence of illegal drugs. The policy ends by stating that the Employer will not tolerate use on the premises or allow employees to work while under the influence of drugs.

At the hearing, the drug test was admitted into evidence and both parties had expert testimony. It was noted that the claimant's drug test was positive for marijuana metabolite, carboxy-THC, which lasts in the body for an average of 3 days after smoking or ingesting marijuana. However, the test showed that THC, marijuana's active ingredient that causes the physical effects or altered sensation, was no longer in the claimant's system.

The ALJ found that the claimant did not violate the employer's drug policy because he was not impaired at the time of this injury. The ALJ noted that the experts agreed that the claimant had smoked or ingested marijuana before the injury, and noted that it was difficult to pinpoint the exact time of usage. The experts further agreed that there was no evidence suggesting the claimant was physically impaired at the time of the accident, and even if the claimant had smoked marijuana right before he left for work, he would not have been suffering an impairment or physical effect at the time of the accident, which was four hours into his shift. Also, the medical records revealed no suspicion on the part of the staff at the hospital that the claimant was impaired by any drug. Therefore, the employer was not entitled to a reduction in benefits. The Commission affirmed the decision of the ALJ.

Editor's note: Please note it appears that this decision relied on the employer's policy which didn't state that the employer is a Adrug free" work place. It simply noted that employees can not use drugs on the premises or be under the influence.

Claimant Sustained Accident However No Disability Since Treating With Injections Weeks Prior to Injury

In **Lester Taylor v. Penmac Personnel Services, Inc., v. Ace American Insurance Company, Injury No. 08-089380,** the claimant was riding on a bus driven by a co-worker, at which time the co-worker made a turn, cutting the corner too tightly which caused the bus to travel into a ditch. The claimant fell out of his seat and onto the floor, and the co-worker continued to proceed uninterrupted to the destination. Upon arrival, the claimant got off the bus and expressed concern that his feet had become numb and he was experiencing pain in his low back. It was noted the claimant had a multitude of prior medical conditions including prior injuries to his lower back. In fact, the claimant had received epidural injections just 6 weeks before this incident. Both medical experts agreed that there were no acute findings on the MRI. The claimant's expert also admitted that the claimant was given the same restrictions after the work injury as he had prior to the injury. The employer's expert opined that the claimant did not sustain any permanent disability as a result of the work injury.

The ALJ found that the claimant did sustain an accident which caused him to sustain a soft tissue injury to his lumbar spine. However, the ALJ noted that it was significant that the claimant was treating and had undergone epidural steroid injections in his low back a month and a half prior to the injury. Also, according to the expert testimony, there was no change in pathology between an MRI which was performed before the work injury, and the MRI that was performed after the work injury. Furthermore, the claimant’s symptoms prior to and after the injury were essentially the same. Therefore, the ALJ found that the claimant did not sustain any permanent disability as a result of the work injury. The Commission affirmed the Award of the ALJ.