

September 16, 2005

TO: All MADA Self-Insured Workers' Compensation Trust Members

RE: Missouri Workers' Compensation Reform

Dear Member:

As previously reported, Senate Bill 1 & 130 became law effective August 28, 2005. The new law provides for major changes in the Missouri Workers' Compensation Law and it is expected to have a positive impact on lowering the overall costs associated within the workers' compensation system. The significant changes are highlighted on the attached summary sheet for your review.

As many of you have also heard, the new law contained language that could be construed as contrary to the legitimate purpose of the workers' compensation statute and could open an employer up to potential civil action from an injured employee. The State Legislature has called a special session to deal with the erroneous statutory language which began September 1<sup>st</sup>. Should you be served with a civil action as a result of any employee being injured, please immediately call our office and fax or mail the petition to MADA, and also notify your other liability insurance providers. Otherwise, please continue to report all employee injury claims via [www.mada.com](http://www.mada.com) as you normally would. As information becomes available from the special session, we will advise the membership accordingly.

MADA's Workers' Compensation Trust emphasizes that although the workers' compensation changes will provide better defense of workers' compensation claims, the employers will still be required to file all reported occurrences with MADA. This is particularly important in order for MADA to quickly investigate the claim facts and legitimacy. An employer should never refuse to report an injury. Any notice provided by an employee of a potential injury/claim to a supervisor or manager should be fully documented by the dealership personnel with the dealership's claim coordinator reporting to MADA in a timely manner. Each employee should sign the reporting requirement and pre-selected provider notification form and other safety policies. We have enclosed new copies that should be distributed to all employees for their signature as these have been updated to include the revised reduction of benefits allowed by the new law. These policies are also available online. A signed copy should be retained in each employee's file for future reference should an injury occur.

We have also enclosed a workers' compensation seminar flyer for your registration convenience or you may also register via MADA's website at [www.mada.com](http://www.mada.com). The seminars will focus on the new law, provide members that attend a renewal premium seminar credit and we will be announcing SIGNIFICANT 2006 rate reductions. As always, we encourage members to focus on their loss control program as this is the ultimate key in controlling your workers' compensation claims and associated costs.

If you have any questions, please contact our office at (800) 246-2667.

Sincerely,



Sherri Hunger, Fund Manager  
MADA Self-Insured Workers' Compensation Trust

Kevin Riley, Chairman  
MADA Self-Insured Workers' Compensation Trust

Sam Barbee, Executive Vice President  
Missouri Automobile Dealers' Association

## 2005 Missouri Workers' Compensation Reform – Key Provisions

### Effective date of the new law is 8/28/2005

<p><b>Accident &amp; Injury Definition:</b></p> <p>Accidents now must be an “unexpected traumatic event or unusual strain identifiable by specific time and place during a single work shift”.</p> <p>Accident or occupational disease must be the “prevailing factor” (the primary factor in relation to any other factor) in causing both the resulting medical condition or disability.</p> <p><b>Extension of Premises:</b></p> <p>Accidents in company cars en route to and from work are not compensable under the new law. Accidents not occurring on employer-owned or controlled property may not be compensable.*</p> <p><b>Safety Rules &amp; Devices:</b></p> <p><b>25-50% reduction in benefits</b> for safety violations by employees if employer makes a reasonable effort to cause employees to use safety devices or inform employees of safety policy. **</p> <p><b>Alcohol &amp; Drugs:</b></p> <p><b>Benefits denied</b> when employee tests positive for alcohol over legal Missouri BAC (.08%). Employers must have a drug free workplace rule/policy in place.</p> <p>Positive tests for drug/alcohol following an accident can result in <b>50% reduction in benefits. Forfeiture of benefits</b> if drug/alcohol is the cause of the injury.</p> <p>Refusal to take post-accident drug test results in <b>forfeiture of benefits. <u>The claim must still be reported to MADA for investigation and documentation.</u></b></p> <p><b>Fraud Penalties:</b></p> <p>Penalties increased from class A misdemeanor to Class D felony and fines “up to ten thousand dollars or double the value of the fraud whichever is greater”.</p> <p><b>Compensation:</b></p> <p>Employers may allow or require employees to use personal time or leave to attend medical appointments during work time.</p>	<p><b>Disqualification for Temporary Total Disability (TTD)</b></p> <p>Employees cannot receive TTD benefits while receiving unemployment compensation.</p> <p>If the injured employee returns to work and is terminated from that employment due to “post-injury misconduct” the employee is not eligible to receive temporary partial or temporary total disability benefits. <u>The phrase “post injury misconduct” does not include absence from the work place due to an injury unless the employee is capable of working with restrictions, as certified by an authorized physician.</u></p> <p>MADA must be notified in the event of any change in employment status and we encourage dealers to consult with their legal counsel regarding employment issues.</p> <p><b>Permanent Partial Disability (PPD)</b></p> <p>Objective medical findings shall prevail over subjective medical findings if inconsistent or conflicting medical opinions exist.</p> <p><b>Accident Notice:</b></p> <p>Employee has 30 days to report accident to the employer for the claim to be viable (30 days from date of diagnosis for occupational disease), unless employer was <u>not</u> prejudiced by failure to receive notice. **</p> <p>** MADA requires that all claims be reported within 2 business days. Employers must be more stringent in documenting and reporting injuries. <b>Please complete the enclosed Injury Reporting /Pre-Selected Provider Policy and have each current employee sign and retain a copy in your file.</b> If an employee does not report timely, this will provide MADA with a notice defense to support a denial.</p> <p>Please be sure to establish a reporting procedure within your supervisory/management structure. We commonly see that the employee reports an injury to the supervisor; however, this is not relayed to the claims coordinator for reporting to MADA &amp; authorization of the <u>initial medical treatment only</u>. Upon completion of the investigation, we find that the employee did provide notice to a supervisor or department manager and then the claim must be deemed “timely reported”.</p> <p><b>Administrative Law Judges:</b></p> <p>Imposes a strict interpretation vs. current liberal interpretation of statute as well as an impartial review of evidence.</p>
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\* MADA requires all accidents, including motor vehicle accidents, be reported so that we can fully investigate and rule on compensability.

MADA has been trained on the new workers' compensation law. These changes will require our service team to be even more pro-active. We will be performing additional investigations including statements, requesting copies of dealership policies signed by employees, copies of personnel files including short term and long term disability and unemployment filings. We are optimistic that these steps will reduce your loss exposures. We ask that you provide any requested information or other known pertinent information to us timely in order to assist in your claims administration.

Sept 13, 2005

## The Glitch

By Chris Archer,  
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The original version of the house substitute bill to SB 1 and 130 contained the following language:

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

However, the final (Truly Agreed To and Finally Passed) version of SB1 and 130 approved by the legislature and signed by the governor read:

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

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

Trying to correct the error in special session, the Senate did not pass an emergency clause, that required a 2/3 vote margin, therefore it will not be effective any sooner than 90 days after the conclusion of the special session. Mo.CONST. art. III, § 29. The senate passed the fix with the House voting on it this week- Tuesday or Wed 9-13 or 9-14. Depending on when the session ends, the likely result will be that the window of potential liability will be from August 28 till the end of the year.

Because such corrective legislation necessarily would be substantive, it is doubtful that it will be applied retroactively to August 28, 2005. Thus, a gap between the incorrect and corrected versions of the new law seems likely.

Also, while the *content* of section 287.110 of the new workers’ compensation law was in error, the legislative process in passing and enacting the new law appears correct. Therefore, it seems doubtful the Supreme Court would change the express wording of the statute. See, *State ex rel. Ashcroft v. Blunt*, 696 S.W.2d 329 (Mo. banc 1985), where the Court held only that inadvertent errors in the legislative *process* nullify the passage of a bill.

There is certainly some valid concern over the "glitch" but the glitch, in my opinion, does not and will not be interpreted to overturn and trump the Act and exclusive jurisdiction. To so interpret, the court would be giving no effect at all to the plain language in 287.120.1 and 2.

A rule of statutory construction that a court will follow is when confronted with conflicting statutes, they are to interpret them both to minimize the conflict. It is therefore more likely the case that they won't or can't ignore the plain explicit language in 287.120(1) and (2) because of the reference in 287.110.1 to section 287.120. That would violate the judicial maxim of interpreting conflicting provisions in the most consistent way possible. Also, the court will attempt to give effect to the language and intent of the language within a section whenever possible.

The more likely interpretation in my opinion is that a court when interpreting 287.110 that references section 287.120, will allow a civil remedy where 287.120 exclude or references a forfeiture of benefits. An example would be a mental stress case caused from being demoted that is specifically excluded as not compensable in 287.120 may, by action of 287.110(1), allow a claimant to pursue a civil remedy. That interpretation allows for a more consistent interpretation of the provisions giving some effect to both sections.

Creative attorneys can certainly attempt to use the other provisions in 287.120 in the same way although the penalty provisions for safety or drugs allows for benefits but provides for a penalty or reduction, preserving jurisdiction under 287.120(1) or so I would argue.

Perhaps the drunk driver who sustains an injury where there is no dispute that the alcohol was the proximate cause of the accident, can pursue his employer if the employer authorized, served or paid for the alcohol at a function. This example would certainly suggest that employers in Missouri thru the end of the year should not authorize, supply, condone or pay for any alcohol at an Employer function. By the Democrats refusal to allow the emergency clause to be applied, you could say that employer Christmas parties may be dry and perhaps a bit less festive this year.

Perhaps if the claimant refuses to take a drug test, resulting in the forfeiture of his benefits by operation of section 287.120, he or she could pursue a civil case if there is some negligence theory that could be asserted

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The broader interpretation of the possible ramification of the glitch, that would apply to causes of actions (injuries or accidents) that occur between 8-28 and the end of the year, would be where a claimant pursues comp benefits for an accident or injury and the same is successfully defended based upon the new definition of accident or that the accident was idiopathic or not one "arising out of and in the course of," that the claimant can then pursue a civil remedy. The argument would be that 287.110(1) that states this chapter

shall apply to all case except... **“those addressed in section 287.120”** does include section 287.120.1 and .2 that state as follows:

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 [his] 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.

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This broader interpretation is of some concern if the court interprets the glitch to open the civil courts to negligence cases filed by employees against their employers wherever or whenever the comp court denies a claimant’s case.

The language in 287.120.1:” . Every employer subject to the provisions of this chapter ... shall be released from all other liability” suggests a more narrow interpretation is in order however. It doesn’t read: Every employer “who pays benefits” ....

In addition, the language in 287.120. 2 that “The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee” does not mean: “Unless I get comp. benefits...” This is further support for my argument that a more narrow interpretation of the potential problems with the “glitch” noted above is more likely.

The last comment and point that should be mentioned is that there is a difference between the forfeiture of benefits and a lack of jurisdiction. The glitch opens the door for blurring the distinction. An example would be a comp claim that is filed after three years beyond the last payment “on account of the injury” thus barred by the statute of limitations. Jurisdiction is denied by the DWC but this historically did not mean that the claimant can pursue a civil case where the statute of limitations is longer. This is because the language above in 287.120.1 and 2 has not been interpreted to mean that either you pay comp or the claimant gets to sue. Employers subject to the Act are provided protection and exclusive jurisdiction from employee suits.

As a practical matter, the “glitch” suggests that Employers should exercise caution in aggressively asserting a defense to the comp case where there exists potential Employer negligence, even on a high comparative fault basis, realizing that the successful defense in comp, will invite the civil suit, and a courts interpretation of the impact of the “glitch.”

Although I maintain the more narrow interpretation above is more likely, there certainly are no guarantees how a court will interpret what was an obvious drafting or editing error in SB1 and 130.

**The Full text of the applicable provisions:**

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

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 [his] 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 [willful] 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, [which rule has been kept posted in a conspicuous place on the employer's premises,] the compensation and death benefit provided for herein shall be reduced [fifteen] 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 [diligent] 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, [which rule or policy has been kept posted in a conspicuous place on the employer's premises,] the compensation and death benefit provided for herein shall be reduced [fifteen] fifty percent if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs[; provided, that it is shown that the employee had actual knowledge of the rules or policy so adopted by the employer and, provided further that the employer had, prior to the injury, made a diligent effort to inform the employee of the requirement to obey any reasonable rule or policy adopted by the employer].

(2) If, however, the use of alcohol or nonprescribed controlled drugs in violation of the employer's rule or policy [which is posted and publicized as set forth in subdivision (1)] is the proximate cause of the injury, then the benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited. [The forfeiture of benefits or compensation shall not apply when:

(a) The employer has actual knowledge of the employee's use of the alcohol or nonprescribed controlled drugs and in the face thereof fails to take any recuperative or disciplinary action; or

(b) If, as part of the employee's employment, he is authorized by the employer to use such alcohol or nonprescribed controlled drugs.]

(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 [voluntary] recreational activity or program is the [proximate] 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:

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

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

(c) 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.