

THE CONSTITUTIONAL CHALLENGE TO THE MISSOURI WORKERS' ACT

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The History Behind the Constitutional Challenge

Prior to 1926, workers injured in Missouri had no legal recourse against their employers other than a tort action in civil court. Under the civil court system, the worker had to prove negligence on the part of his employer. The system was uncertain and slow. During the long process, workers and their families often became destitute and many times they did not recover damages from their negligent employers. In addition, employers faced the growing cost of liability insurance and the uncertainty of unlimited damages being awarded by judges and juries.

Because of this, Missouri created a workers' compensation system in 1926 as a way to provide limited but certain benefits such as medical care, compensation for time missed from work, and compensation for permanent injuries to injured workers. Claims were to be handled through an administrative process that was designed to provide these benefits without delay while at the same time controlling the cost to employers. As a compromise, injured workers gave up their right to sue their employers in civil court in exchange for receiving fixed benefits without the burden of proving fault. By agreeing to a no-fault system, employers received protection from unlimited and unpredictable jury awards.

Over the years, the legislature re-wrote this piece of social legislation and for the most part, expanded workers' protections. However, this changed in 2005 when conservative lawmakers passed SB1. This new law cut certain workers completely out of the system and limited access to others without providing an alternative remedy. To justify their sweeping reform, lawmakers argued that the runaway cost of workers' compensation insurance drove business out of Missouri.

Cost of Workers' Compensation Insurance

In 1993, the legislature deregulated workers' compensation insurance, allowing rates to be set by competition rather than by state regulators. For the most part, this deregulation resulted in a less costly and more efficient system. Statistics show that jobs grew in Missouri, that job injuries and deaths were reduced and that the cost of workers' compensation premiums declined. This continued throughout the 1990's.

However, in 2001, insurance premiums began to increase. According to the Division of Workers Compensation, the increase resulted from poor investment returns in a weak economy, terrorism and a sharp increase in reinsurance costs, not due to a rise in claims. In fact, statistics show the number of workers' compensation claims actually declined during this time. Despite what some conservative politicians were

spinning, the workers' compensation system in Missouri was not broken, but rather external factors were driving up the cost.

By 2004, the insurance market had stabilized. Workers' Compensation rates were to be cut in 2005. Despite this, in early 2005, Governor Blunt and other conservative Missouri lawmakers argued for a major overhaul of the system in order to effectively compete with other states and protect Missouri jobs. The result was the enactment of SB1, which became effective on August 28, 2005.

Cutting Workers Out of the System

One of the most significant changes made by the 2005 law involves narrowing the definition of a "compensable injury." Now, work must be "the prevailing (primary) factor" in causing both the medical condition and the disability. The previous standard only required that work be "a substantial factor." This amendment is aimed at eliminating certain claims made by the aging work force and claims for occupational diseases such as carpal tunnel syndrome.

The 2005 law also narrowed the definition of "accident." An accident now is defined as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing 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." The prior law did not require objective symptoms of an injury to be compensable. This new provision is aimed at excluding claims for such conditions as strains and tendinitis, where the only symptoms or signs of injury are pain and/or dysfunction.

In addition, several 2005 amendments establish fault-based defenses that can result in the reduction or complete forfeiture of benefits for the worker. For example, one such defense involves the use of alcohol at work. Specifically, if the blood alcohol level was above the legal limit at the time of the accident, there is a presumption that the use of alcohol was the proximate cause of the injury, and the worker loses all benefits. Although this presumption is rebuttable, it requires the worker to prove that alcohol was not the cause of the injury. This burden is higher than that which is required in civil court. This provision, among others, brings fault into a no-fault system and once again eliminates certain injured workers. In all cases, where any amount of alcohol is present at the time of the work injury, the 2005 amendments also allow for a reduction in benefits of up to 50%, even if alcohol played no role in the cause of the injury.

Limiting the Injured Workers' Fair Access to the System

In addition to cutting certain workers out of the system, the 2005 changes also impacted the injured worker's ability to access the system in a fair and unbiased way. Specifically, under the 2005 law, Administrative Law Judges are now subject to performance evaluations by a review committee led by the director of the Division of Workers' Compensation. The committee evaluates the judges' performance every two

years and votes to retain or remove judges. This provision places politics into the system and challenges the judges' independent judicial function.

Further, the 2005 law eliminated entirely the position of the Legal Advisor. For over 25 years, the Division of Workers' Compensation had employed Legal Advisors to act in the same capacity as an Associate Administrative Law Judge with the power to approve compromise settlements. Legal Advisors had become integral to the operation of the Division of Workers' Compensation, particularly in St. Louis where hundreds of cases were discussed and often resolved by non-represented workers with the help of this unbiased third party. Not only did 23 dedicated public servants lose their jobs, but the injured worker who seeks to resolve his claim without an attorney has also lost protection. Without the Legal Advisors, the Administrative Law Judges alone are charged with approving settlements.

The 2005 law instructs the Administrative Law judges to approve all settlements as long as they are not the result of undue influence or fraud. The judges are specifically prevented from providing information, answering questions or hearing the facts of any case on behalf of a non-represented claimant at a conference. As a result, those workers who attend settlement conferences without the benefit of legal representation put themselves at risk of receiving lower and inadequate compensation for permanent injuries, plus other possible benefits.

With regard to receiving less compensation for permanent injuries, an article written by Scott Lauck for Missouri Lawyers Weekly compared the amount of compensation received by individuals who were not represented by an attorney to those who were represented during the year immediately after the change in the law. In his analysis of the Division of Workers' Compensation statistics, Lauck concluded that non-represented workers received significantly less than the represented injured workers even after taking into account attorney's fees.

Non-represented workers may also unknowingly forfeit compensation from the Missouri Second Injury Fund. The Second Injury Fund provides compensation to injured workers for certain pre-existing disabilities. But, the work injury must meet the threshold of 12.5% permanent partial disability of the body as a whole or 15% permanent partial disability of a major extremity in order to qualify for additional money. If a claim is settled for less than the required threshold, the worker might lose thousands of dollars.

Moreover, workers on Social Security Disability who settle claims may jeopardize the amount of monthly income from Social Security if certain precautions are not taken in the settlement agreement. Those workers who also are eligible or may become eligible for Medicare when they resolve a claim, could risk losing all or part of their Medicare benefits.

The Constitutional Challenge

On November 30, 2005, a coalition of local, regional, and statewide unions and other effected groups filed a lawsuit to challenge the constitutionality of the SB1 amendments to the Missouri Workers' Compensation Law. The suit alleges that the amendments violate the Due Process Clause of the United States and Missouri Constitutions because (1) they are arbitrary and do not adequately address the stated objective of the legislation (controlling the cost of workers' compensation insurance); (2) there is no rational basis to believe that the law will increase or retain employers in Missouri by cutting the cost of workers' compensation insurance; and (3) the law no longer provides an adequate remedy to injured workers who are now cut out of or have limited access to the workers' compensation system. Other courts, such as in Oregon, have found similar changes to its workers' compensation statute to be unconstitutional.

The suit also claims that the amendments invade the neutrality of the judiciary by imposing performance audits by a committee appointed by politicians, in violation of the Separation of Powers Clause. Other legal claims, such as violation of equal protection, are also asserted.

Proponents of the amendments argue that they are constitutional and that compensation is still available for workers injured on the job through the workers' compensation system or in a civil court. They argue that there is a factual, objective basis for the legislature reasonably to believe that the bill accomplishes its purpose.

Oral arguments were presented to the Missouri Supreme Court on November 29, 2007. The Court could strike down the entire statute as unconstitutional, or only eliminate those provisions it deems to be illegal. If the Court finds that all amendments are unconstitutional, the workers' compensation law in effect prior to the amendments would control future claims, at least until the State's politicians change it again. If the 2005 changes are found to be constitutional, business and the insurance industry will celebrate a victory over the working people of Missouri.

No matter what the Supreme Court decides, Missouri workers have rights under the workers' compensation statute, and they should pursue those benefits. Our commitment to fighting for those benefits will continue.

Ann Dalton is a partner with Hammond, Shinnars, Turcotte, Larrew & Young. She has practiced in the area of Workers' Compensation for over 15 years. With her partner, Joe Larrew, and Bob Mandava, the three attorneys have over 50 years of combined experience in representing injured workers in Missouri and Illinois.