JUNE 2008

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National Safety Month – "Safety Pays"

By: Greg Godfrey, Executive Director, Evans & Dixon, L.L.C.

For our clients, making safety a priority is crucial to organizational and financial success. Focusing on workplace safety will prevent claims, reduce costs and allow management to focus its efforts and resources on other priorities. With a team of over 60 attorneys focused on insurance defense, Evans & Dixon is dedicated to educating its clients on workplace safety, we provide claims prevention and when an accident occurs, cost-effective solutions to reduce claim costs and get workers back on the job.

Safety in Numbers

Given the correlation between a safe workplace and the financial health of an organization, creating and promoting a "safety culture" where everyone recognizes their part in achieving zero accidents is critical. According to the Missouri Department of Insurance, in 2007 insurance companies wrote almost $980 million in workers' compensation premiums. Those insurance companies paid out almost $525 million on claims. Reported injuries were down 1.1 percent from 2006. And compared to 2005, fatal workplace injuries were down 10.3 percent. Despite a decline in the number of reported injuries, claims filed and workplace fatalities, every year injured employees cost employers, insurance companies and the state millions of dollars – all of which are preventable.

Improving Safety Means Lowering Your Work Comp Premiums

One way to improve the bottom-line is by lowering workers' compensation premiums. Before savings can start, it is important to understand how premiums are determined. According to the Missouri Department of Insurance, "insurance companies base rates on loss data, by job classification code as compiled by the National Council of Compensation Insurance." The NCCI is also responsible for maintaining the job-classification code system and administering the "experience-rating plan."

The experience-rating plan is used to tailor the cost of workers' compensation insurance to each employer, and acts much like a safe-driver discount program. Comparing losses and safety results of an employer to other similar type employers' results in an "experience modification factor." Fewer accidents and losses than an industry average results in a modification factor lower than 1.00, and a reduction in premium costs. Higher accident rates and losses result in a modification factor higher than 1.00 and larger premium costs. Recommendation - review your company's insurance policy and make sure employees and payroll are listed by correct job-classification code.

Available Resources for Improving Your Safety Program

As noted above, developing and implementing a safety program is vital to organizational success. Getting employees to believe they are instrumental in making a safety program successful falls in the lap of management. Developing a safety program is the easy part, developing a safety culture is more difficult as it takes both time and commitment. To help in the process, here's a list of resources available to Missouri employers.

Missouri Workers' Safety Program

Section 287.123 RSMo and 8 CSR 50-7 requires all insurance carriers writing workers' compensation insurance to provide comprehensive safety engineering and management services to employers upon request. This free program includes conducting on-site visits with certified safety consultants/engineers to help employers identify workplace safety and health hazards. The program also assists employers in implementing a comprehensive safety and health program.

To get a complete list of the program's benefits, visit HYPERLINK "http://www.dolir.mo.gov/ls/mwsp/index.htm" http://www.dolir.mo.gov/ls/mwsp/index.htm.

On-Site Safety and Health Consultation

"The Division of Labor Standards' On-Site Safety and Health Consultation Program" is a free and confidential service available to Missouri employers, whose purpose is compliance assistance in meeting federal **Occupational Safety and Health Administration** regulations." Upon an employer's request, a trained safety consultant makes a workplace visit. The consultant's goal is to identify problems, suggest corrective action and provide education for further accident prevention. This service is free to small Missouri employers who request it and it is completely confidential, with no information shared with OSHA Enforcement.

For more information about the On-Site Safety and Health Consultation program or to apply for a free on-site safety and health consultation, please visit HYPERLINK "http://www.dolir.mo.gov/ls/safetyconsultation/" http://www.dolir.mo.gov/ls/safetyconsultation/.

Evans & Dixon is happy to provide clients and other groups with attorney speakers and consultants experienced in workplace safety. With attorneys in offices across the state of Missouri, we can provide an educational experience to further help your organization to develop a safety culture that works. For more information or to schedule a seminar, please contact Andrea Shomidie at 314-552-4115 or ashomidie@evans-dixon.com. ■

IN THIS ISSUE

Schoemehl v. Second Injury Fund Update

By: James B. Kennedy, Member

Recently, two very significant developments occurred which may limit the application of the *Schoemehl v. Second Injury Fund* decision in existing cases and which will abrogate the decision completely in cases based upon future injuries.

As reported in our April 2007 edition of the Evans & Dixon newsletter in the article titled "Employee Dies, But Benefits Survive," *Schoemehl v. Second Injury Fund* is the Supreme Court decision in which the Court held that the surviving dependents of permanently and totally disabled employees who die from unrelated causes succeed to those life-time disability payments. This surprising and unforeseen decision immediately spurned a substantial amount of litigation as claimants' attorneys scrambled to attempt to revive cases that were thought to no longer be viable, and also was met with vigorous activity in the General Assembly to limit or abrogate this decision. Although these efforts fell short during the 2007 legislative session, some positive results did occur in 2008, and these will be described in more detail below.

On May 13, 2008, the Missouri Court of Appeals, Eastern District, handed down their decisions in *Cox v. Second Injury Fund* and *Winberry v. Second Injury Fund*. In both cases, the Court ruled that the Industrial Commission was correct in dismissing, for lack of jurisdiction, the surviving dependents' efforts to succeed to the deceased employees' permanent total disability benefits. In both cases, the employee died after receiving an award of PTD benefits that had become final by the date of death. Since, in each of these cases, unlike *Schoemehl*, the award had become final, the Court ruled that the dependents' efforts to have the PTD benefits reinstated by the action of the Industrial Commission did not transform the prior final awards into pending awards, nor did those actions vest the Industrial Commission with authority to make a new determination of benefits based upon the dependents' claims.

The same two cases were decided by the same Court earlier but after entering their decisions, the Court of Appeals, on the Court's own motion, ordered the cases transferred to the Supreme Court. However, the Supreme Court declined to review the cases and transferred them back to the Court of Appeals, and the Court then issued opinions consistent with those the Court had entered initially.

Thus, unless the dependents of deceased permanently and totally disabled employees who die from unrelated causes after the PTD award has become final can find relief in the circuit courts, it appears that the application of the *Schoemehl* decision will be limited to those situations where the award of PTD benefits had not become final prior to the injured employee's death. Another possible exception is a case where the award contained findings on dependency and *Schoemehl* language, and some such awards may have been written since *Schoemehl* was decided but have also now become final.

Then, bi-partisan efforts on the part of a number of business associations, workers' compensation attorneys and legislators came to a successful culmination with the passage of House Bill 1883. This legislation addresses the *Schoemehl* decision in several different ways. First, it makes the definition of "employee" contained within §287.020.1 subject to certain limitations contained in §287.200. Second, that limitation is the addition to §287.200 of language indicating that the word "employee" "shall not include the injured worker's dependents, estate or other persons to whom compensation may be payable as provided in sub-section .1 of §287.020." Third is the inclusion in §287.230.2 of language indicating that only compensation for permanent partial disability under §287.190 succeeds to the surviving dependents. Fourth, §287.230.3 contains a statement of legislative intent indicating that it is the legislature's purpose to reject and abrogate (by name) the holding in *Schoemehl* and "all cases citing, interpreting, applying or following this case."

This legislation contains an emergency clause that means that it will go into effect immediately when signed by Governor Blunt.

Although these developments were met with a collective sigh of relief on the part of industry, a caution is in order. That is, a number of cases are pending in various circuit courts around Missouri which involve efforts on the part of a number of "Schoemehl dependents" to enforce a prior PTD award as one would enforce an open medical award based upon the argument that the *Cox* and *Winberry* decisions on jurisdiction have left many dependents with rights created by the *Schoemehl* decision but with no remedy to enforce those rights. It is too early to tell if one or more of those efforts will succeed. Stay tuned! ■

Floyd Wilcut v. Innovative Warehousing Update

By: George T. Floros, Member

In the February 2008 newsletter we reported on the Floyd Wilcut v. Innovative Warehousing case. To recap, Mr. Wilcut was injured in a motor vehicle accident and taken to a hospital where he refused a life-saving blood transfusion due to his faith as a Jehovah's Witness. Due to the refusal he passed away days later. His widow sued for death benefits under The Workers' Compensation Act. While the Administrative Law Judge initially awarded benefits, the Labor and Industrial Relations Commission reversed the award finding the refusal unreasonable. The Court of Appeals then reversed the Commission, finding the refusal not unreasonable due to Wilcut's religious beliefs. The case was then transferred to the Missouri Supreme Court where oral arguments were heard in November 2007. In an unusual move, however, the Supreme Court opted not to rule on the case, remanding it back to the Court of Appeals.

Since then the Court of Appeals has reissued its previous decision reversing the Commission's denial of benefits and remanded the matter back to the Commission for further proceedings in accordance with their opinion.

On May 2, 2008, the Labor and Industrial Relations Commission reissued a ruling in accordance with the opinion of the Court of Appeals, reversing its own decision in June 2006. Pursuant to the Court's mandate, the Commission found death benefits are owed to the widow from the date benefits terminated in May 2002 until she loses her status as a dependent under the statute.

Clearly there are far-reaching ramifications of this decision as well as a number of unanswered questions. Would the result have been the same had the employee been of a different religion? How would the decision have been different if the employee had not died, but only sustained additional disability as a result of the refusal? These and a number of other questions must be addressed before this issue is completely resolved in the eyes of the law. ■

New Digital Dictation System Allows Better Service, Faster Response

By: Greg Godfrey, Executive Director

We have entered the digital age! All 102 of our attorneys and staff are now using BigHand Digital Dictation software, allowing us to boost our productivity and provide exceptional service. This cutting edge voice productivity system replaces outdated tape equipment and allows attorneys to record information digitally from any location and transfer via computer.

The system allows staff to access and complete assignments quickly and efficiently and it allows management to easily monitor and track workflow in all three offices. As a result, we are able to improve the overall speed at which documents get out the door to clients, and provide outstanding client service.

We are please to be the first law firm in St. Louis to implement BigHand Digital Dictation.

For more information on BigHand, visit www.bighand.com. ■

Employer Ordered to Pay Wages for Time Lost Attending Workers' Compensation Medical Appointment

By: Robert N. Hendershot, Member

In a Decision rendered on March 27, 2008, the Eighth Circuit United States Court of Appeals awarded 3.8 hours of wages to an hourly employee under the federal Fair Labor Standards Act for time missed from work to attend a doctors appointment in regards to a work-related injury. Howser vs. ABB, Inc.

The Court noted that under the Department of Labor Regulation, (Chapter 29, Sec. 206(a) of the United Code) provides that "time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitute hours worked." The employer's Workers' Compensation Third Party Administrator had scheduled the appointment. The Court ruled that the employer includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." The Court referred to a Department of Labor opinion letter that explained that "if the employer or the employer's agent (insurance carrier) arranged for the employee to see a doctor during the employee's normal working hours, the time spent traveling to and from and visiting the doctor's office would be compensable hours of work."

The Court noted that when the appointment was originally scheduled, the employee elected to take unpaid leave to attend the appointment. The Court noted that Fair Labor Standards Act rights are statutory and cannot be waived under most circumstances and could not be waived except fewer than two circumstances neither of which applied in this case.

It should be noted that the Court ordered the employer to pay wages for the lost time. Although the Court did not specifically address the issue, it appears that based on their reasoning regular wages would have to be paid by the employer if the time lost was during the employee's normal working hours on the day the employee was scheduled to work. It should be noted that in ordering the payment of wages for the lost time, the Court did not address the employer's liability to pay workers' compensation benefits for this same lost time since the Court was only exercising their jurisdiction to interpret and apply the FSLA.

In August, 2005, the Missouri Legislature amended the Missouri Workers' Compensation Act and added the following language in Section 140(14):

> "The employer may allow or require employee to use any of the employee's accumulated paid leave, personal leave, or medical or sick leave to attend medical treatment, physical rehabilitation, or medical evaluations during work time. The intent of this subsection is to specifically supercede and abrogate any case law that contradicts the expressed language of this Section."

Although the Howser decision did not address the employer's workers' compensation liability in any respect, it appears that the ruling in effect abrogates Section 287.140(14) since where a state statute and a federal statute conflict the principle of federal preemption invalidates the state statute where the state law would, as here, impede the achievement of the federal objective addressed by the federal law. ■

Published Quotes From Your Evans & Dixon Attorneys

Healthy Childcare, April/May, 2008.
"Liability in the Childcare Setting,"
by ***Howard Gosnell***

"No matter how qualified your staff is, it is a good idea to have a policy of regular in-service training."

Human Resources Executive, October 2, 2007.
"Widow Receives Disability Benefits," by Scott Flander

"Although the ruling only applies to Missouri for now, courts in other states with similar workers' compensation laws could look to the case for guidance, according to ***James B. Kennedy***, whose St. Louis law firm, Evans & Dixon, filed a brief with the court supporting the employers' point of view."

Springfield News-Leader, July 19, 2007.
"Court decision to expand workers' compensation needs legislative fix,"
by ***James B. Kennedy and Robert N. Hendershot II***

"The implications of this decision [Schoemehl v. Treasurer of the State of Missouri] are dramatic, and unless the effect of this decision is reversed, the cost to Missouri employers and insurers will increase significantly."

Risk Management Magazine, September 2007.
"Employee Dies, Benefits Survive,"
by ***Mary Anne Lindsey and James B. Kennedy***

"Schoemehl has, in effect, created an entirely new category of workers' compensation beneficiaries – the surviving dependents of a permanently and totally disabled employee who dies from unrelated causes."

St. Louis Post-Dispatch, April 15, 2007.
"Compensation Ruling Puts New Burden on Business,"
by ***James B. Kennedy***

"When the Missouri Supreme Court denied the Second Injury Fund's motion for rehearing on March 20 in the recent Schoemehl case, it caused the Missouri Workers' Compensation Law to take a step backward."

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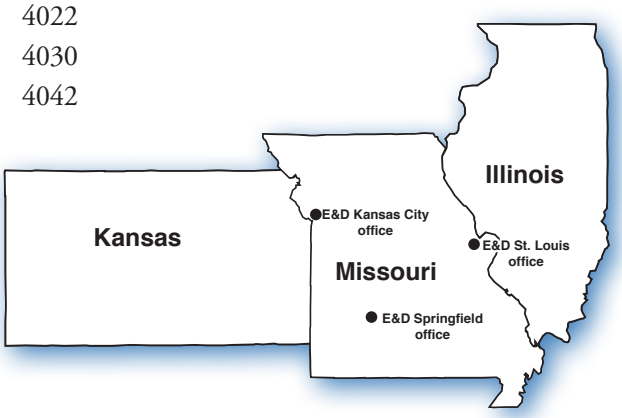

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CASE VERDICTS

Melissa Lantz v. Monsanto Chemical Company

FACTS: In this Missouri workers' compensation case, the claimant was a 35 year old chemist claiming permanent total disability from sensitivity to irritant fumes after two instances of chemical exposure and a resulting adjustment disorder which kept her from working for five years. The chemical exposure incident kept her at home with various air filtration equipment as supported by Dr. Tuteur (internal medicine and pulmonary disease). The claimant testified that she felt trapped in her home and that she had to make several adjustments in order to stay away from any smells which might cause an adverse reaction. This determination was challenged by Dr. Jacobs (internal medicine and pulmonary disease) who did objective pulmonary testing for over three years showing very little evidence of lung dysfunction.

Dr. Mangelsdorf (psychiatrist) diagnosed the claimant with depression and anxiety due to problems with adjusting to her new sensitivity to fumes and chemicals. He assigned a 50% permanent partial disability for these psychological problems alone. Dr. Stillings (psychiatry and neurology) found that the claimant was exaggerating some of her symptoms, diagnosed her with somatoform disorder, and assessed a 1% to 2% permanent partial disability based on a very mild aggravation of this disorder from the incidents at work.

FINDINGS: The Administrative Law Judge Landolt rejected the claim for the adjustment disorder which was affirmed by the Labor and Industrial Relations Commission. She was awarded 25% to the body as a whole for permanency as she failed to prove her condition prevented her from engaging in gainful employment which was necessary for her to claim permanent total disability. Dr. Tuteur's testimony was not considered credible in light of the objective pulmonary testing by Dr. Jacobs. The Court of Appeals affirmed the disability determination.

Edward M. Vokoun represented Monsanto Chemical Company.

John Weissinger v. NES Equipment Services

FACTS: In this Missouri workers' compensation case, the claimant was working through the union for NES Equipment Services doing highway maintenance work. On September 27, 2004, he was driving a truck for the purpose of painting lines on the highway when a semi-tractor trailer rear-ended his vehicle. The accident resulted in authorized conservative treatment with Dr. Ray (neurosurgeon), who diagnosed a herniation at C3-4 and disc protrusion at 7-8. The claimant also underwent pain management with Dr. Graham. Dr. Ray released him at maximum medical improvement on May 6, 2005 with no permanent restrictions. The claimant then sought unauthorized treatment with Dr. Cova (pain management) including numerous narcotic medications, muscle relaxants, physical therapy, injections, and a TENS unit. Medicaid paid more than $8,000.00 for this treatment.

Claimant sought permanent total disability benefits from the employer/insurer despite a prior cervical fusion performed by Dr. Ray and no surgery for the injury at issue. Temporary total disability payments and future medical were also at issue.

FINDINGS: Chief Administrative Law Judge Knowlan denied permanent total disability benefits finding that the claimant's medical and vocational evidence was not credible. Permanent partial disability benefits were awarded for 40% to the body as a whole and future medical care was left open. Reimbursement for unauthorized medical expenses was denied due to the employer neither denying medical treatment, nor waiving its right to select and approve the treating physicians. The claimant's request for additional temporary total disability was also denied due to a finding that he was no longer in the healing period and that the condition had reached a point that no further progress was anticipated.

A potential appeal to the Labor and Industrial Relations Commission is pending.

Sabrina D. Merritt represented the employer, NES Equipment Services.

Yolanda Bridges v. Holiday Inn

FACTS: In this Missouri workers' compensation case, the claimant was employed as a front-desk guest services clerk at Holiday Inn beginning in July of 1997. She worked an average of 35 to 40 hours per week. Her duties included checking in and checking out guests, taking reservations, running the switchboard, and handling cash transactions.

The claimant began experiencing bilateral hand complaints in 2004. Her employer sent her to Dr. Ollinger. He diagnosed her with bilateral carpel tunnel syndrome, but opined it was not work related. The claimant displayed risk factors of gender, age, obesity, and smoking. Dr. Ollinger (plastic surgeon) also considered the physical aspects of job force, repetition, awkward posture, contact stress, and the duration factors for each of these physical aspects. Dr. Poetz (family practitioner) found work the prevailing factor with no explanation for his conclusion.

FINDINGS: The case was tried in a hardship hearing before Administrative Law Judge J. Karla Boresi who discussed the statutory changes; specifically the need for occupational exposure to be the prevailing factor in causing both the resultant medical condition and disability. It was found that the claimant's testimony was credible. Thus, it became a credibility battle of the experts.

The Administrative Law Judge found the opinion of Dr. Ollinger to be more credible and convincing than that of Dr. Poetz, finding in favor of the employer on the issue of causation. The claimant did not sustain her burden of proving that her job duties were the prevailing factor in the development of bilateral carpel tunnel syndrome. Medical treatment and all other benefits were denied.

Nanci Martin represented the client, Gallagher Bassett, Kansas City.

Brian Kimble v. Francis Howell R-III School District

FACTS: In this Missouri workers' compensation case, the claimant was employed as a maintenance man with the Francis Howell School District and injured his back while helping another employee lift a pallet jack into the back of a truck in July of 2004. After the back injury, the claimant suffered a related deep vein thrombosis, weight gain, low back pain, right leg pain, and the loss of his gallbladder.

Prior to the July 2004 injury, the claimant suffered a work-related injury to his back requiring surgery in 1993. He received a settlement for 40% of the body as a whole referable to this injury. The claimant injured his back a second time in 2002 resulting in a 5% permanent partial disability. The claimant is also blind in his right eye, had a hammertoe since childhood, and had a prior work-related injury to his left shoulder.

The claimant argued that he was entitled to temporary total disability, permanent partial disability, future medical treatment, and that the July 2004 injury had left him permanently and totally disabled.

FINDINGS: The Administrative Law Judge found that the claimant was not a credible witness with regard to the issue of whether or not he did, in fact, work during the period for which temporary total disability was in dispute. It was further determined that the claimant did work light duty and, as a result, the judge ruled in favor of the employer and insurer on the temporary total disability issue.

The Administrative Law Judge concluded that there was no evidence that the July 2004 back injury by itself left the claimant permanently and totally disabled. With regard to the permanency issue, 30% of the body as a whole was awarded, referable to the low back, despite any pre-existing disability, and 5% to the body as a whole related to the deep vein thrombosis.

The claimant has the burden of proving that his work related injury requires future medical treatment. In this case, the differing opinions of two evaluating doctors were compared and the Administrative Law Judge found that Dr. Doll's expert medical opinion (physiatrist specializing in spinal injuries) was more credible than that of Dr. Volarich (D.O. specializing in diagnostic imaging). On the issue of future medical, it was concluded that the employer and insurer was not liable.

Michael F. Banahan represented the client, Francis Howell R-III School District and Missouri United School Insurance Counsel (MUSIC).

Roberta Knipp v. Five West Foods

FACTS: In this Missouri workers' compensation case, the claimant alleged that she had been injured unable to work since December 18, 2002. She was receiving permanent total disability from Social Security at the time of trial.

Dr. Grangnani rated her with a 20% permanent partial disability to the shoulder and Dr. Meyers rated her with an 80% permanent partial disability to the shoulder. The outstanding demand at the time of trial was for 80% to the shoulder ($43,306.05) plus 5 years and 6 months of temporary total disability which, came to $66,732.38. An offer had been made of 20% of the shoulder, or $10,826.51.

RESULTS: At trial, movies were produced that indicated the employee was not a credible witness. After a post-trial conference with Administrative Law Judge Gorman, the case was settled for $6,000.00, representing 11% of the shoulder.

Robert E. Bidstrup represented the insurer, Zenith Insurance Company.

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To Our Readers:

Thank you for reading this edition of the Evans & Dixon workers' compensation newsletter. Our newsletter is written by our attorneys and is geared towards trends and topics current in the workers' compensation industry.

During June 2008, Evans & Dixon, L.L.C., in partnership with the National Safety Council, is celebrating National Safety and Client Appreciation Month. Our firm realizes the importance of promoting workplace safety and lower workers' compensation expenses. The success of your organization depends on it.

Educating your employees and co-workers on the importance of workplace safety is our top priority. Our team of well-qualified attorneys would like to offer your organization an educational seminar geared towards safety and claims prevention. To learn how your organization can be more pro-active in the claims process and schedule a seminar, please call me at 314-621-7755. Thank you.

Best regards,

Timothy M. Tierney

Workers' Compensation Practice Group Leader