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Workers' comp: One year later



Mike Banahan of Evans & Dixon was one of the brains behind the workers' comp law.

BY SCOTT LAUCK

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The numbers assigned to legislative bills only indicate the order in which they were filed, but it was probably fitting that 2005's workers' compensation reform was known as Senate Bill 1. It was one of the top priorities of Gov. Blunt's administration, one of the major partisan fights of the session and, ultimately, one of the first bills signed into law.

The bill went into effect ex-

actly one year ago today. On its first birthday, the new law — now contained in Chapter 287 of the Missouri Revised Statutes — remains controversial and is in some ways immature, lacking a body of case law to define it. Nonetheless, workers' compensation lawyers on both sides of the table say there have been changes — though perhaps they have more to do with those who wrote the law than the law itself.

"We're not going to know how the law's going to be interpreted (for a few more years)," said Mike Banahan, a workers' comp defense lawyer with Evans & Dixon LLC in St. Louis. "We've seen already how the law's impacted — positively, for employers and insurers — the system."

The workers' comp law made a number of substantial changes to the way workers are compensated for on-the-job injuries. Among the most significant new provisions was giving compensation only for injuries where an at-work accident was the "prevailing" factor in the resulting medical condition, rather than the "substantial factor" standard of the old law. In simple terms, that means

that people with ongoing health problems may not be fully compensated if a work injury aggravates their pre-existing condition.

The law also severely penalizes employees who are injured after using drugs or alcohol or failing to use safety devices, even if such behavior didn't actually cause the accident. In such instances, employees may lose a quarter to a half of any benefits — under prior law, they stood to lose 15 percent. In addition, an employee who is legally intoxicated could forfeit all of his or her benefits.

Sen. John Loudon, R-Chesterfield, sponsored the senate bill that became the workers' comp law. He said in the last year, the existence of a "bright line" between the workers' comp system and regular group health insurance has brought rate decreases for employers.

"They're perceiving that the law is going to work more sanely," he said.

A drop in cases

According to the Missouri Department of Labor and Industrial Relations' Division of Workers' Compensation, the

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numbers of claims and injuries reported to the division have fallen in the last year, compared to the same period the previous year. Between Aug. 28, 2004 and Aug. 27, 2005, the division recorded 22,159 claims filed and 142,906 injuries reported.

During Aug. 28, 2005 to Aug. 21, 2006, the division recorded 17,738 claims and 134,168 reported injuries. Those numbers represent drops of about 20 percent and 6 percent, respectively.

John Larsen, a workers' comp plaintiffs' lawyer with Larsen, Feist & Hess PC in St. Louis, said those numbers don't surprise him, since one effect of the new law is to limit access to the system.

"In terms of my practice, I've seen very little difference," he said. "Maybe I'm lucky, but I've not been involved in cases where drug use resulted in forfeiture of benefits, or resulted in the insurance company claiming a benefit reduction."

Statistics on settlement values were not readily available, and lawyers interviewed for this story had conflicting opinions on whether less money was changing hands. But all generally agreed that any change in settlement values has had less to do with specifics of the law than with a new atmosphere in the realm of workers' compensation.

A 'conservative' environment
To date, the state's adminis-

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trative law judges have dealt with only 12 cases where the new law applies, according to the workers' compensation division, and no case has yet gone before the Labor and Industrial Relations Commission, which serves as the appellate level in workers' compensation cases.

"The wheels of justice aren't on a fast track sometimes," said Bill Ringer, the public member of the three-person commission.

So what accounts for the change? Banahan noted that the old law was more "liberal," while today's environment is much more "conservative."

"The pendulum, which I think may have swung too far to this side, is starting to swing back," he said. "I would not agree that the pendulum has swung back too far."

He wasn't speaking of partisan politics but rather the way in which state statutes were construed by the courts. Still,

the political sense is also applicable.

The 2005 legislative session marked the first time in 80 years that Republicans controlled the House, Senate and governor's office in Missouri, and they took quick advantage of it, passing not only workers' comp reform but also tort reform and a number of other business-friendly laws.

In two years, Gov. Matt Blunt has appointed two of the three Labor and Industrial Relations Commission members: Ringer, and employers' representative Alice Bartlett. Fourteen of the state's administrative law judges were selected during the Blunt administration, including six judges with no prior connection to the division.

Sheelah Yawitz, president of the 15,000-member Missouri Merchants and Manufacturers Association, said a more conservative feeling came to workers' compensation dealings "virtually the day after the (2004) elections, even with the old law."

Yawitz's organization runs one of the state's largest self-insured workers' comp funds and helped craft the new law. In her opinion, previous industrial commissions under Democratic administrations gave "ridiculous" award amounts that have now been reined in, bringing "common sense" to the workers' comp system.

And even though judges and

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the commission have barely begun to define the law, they've already been put on notice as to what the Legislature deems acceptable. The new law specifically provides that statutes are to be construed "strictly," and goes so far as to invalidate, by name, three Missouri cases that had expanded workers' comp law.

"It's known that we have a more conservative commission and it is known that the law has changed," Yawitz said. "The legislature is saying 'Hey judges, we want you to look at the letter of the law.'"

Plaintiffs' lawyers say the change has been noted.

"In 25 years that I've been doing this, I've never seen legislation that specifically overruled court decisions," Larsen said. "That's bad feeling that bleeds into the legislative process."

Still, plaintiffs' lawyers note that while the atmosphere has changed, they have not yet had any quarrels with the way the labor and industrial commission conducts itself. Mike Korte, a private practice workers' comp lawyer in St. Louis, said the commission has been "methodical and business-like."

"I think a lot of people thought the labor commission was going to come in and just clamp down on the system, and it really has not done so," he said.

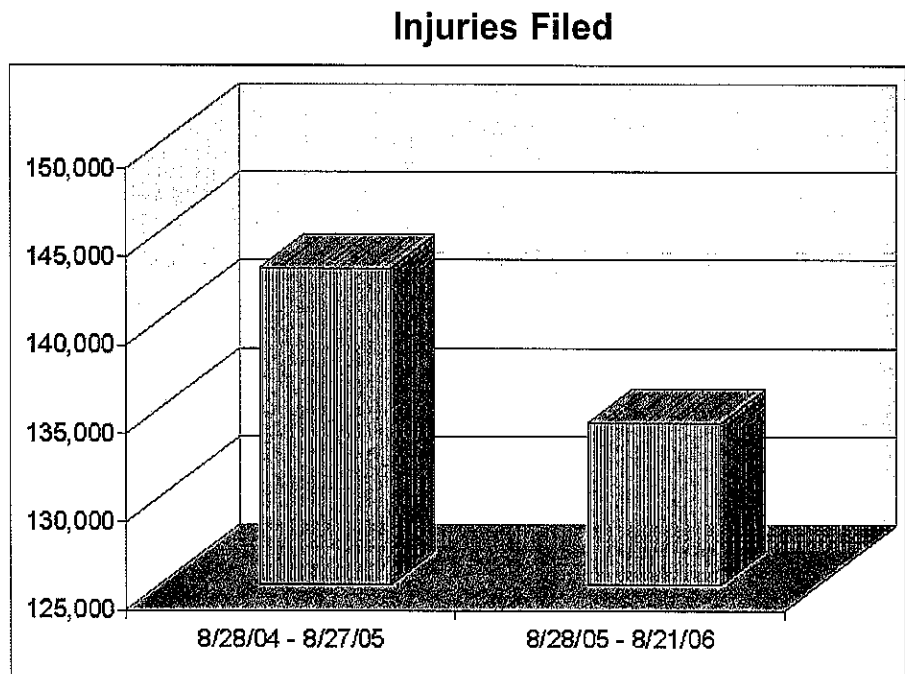
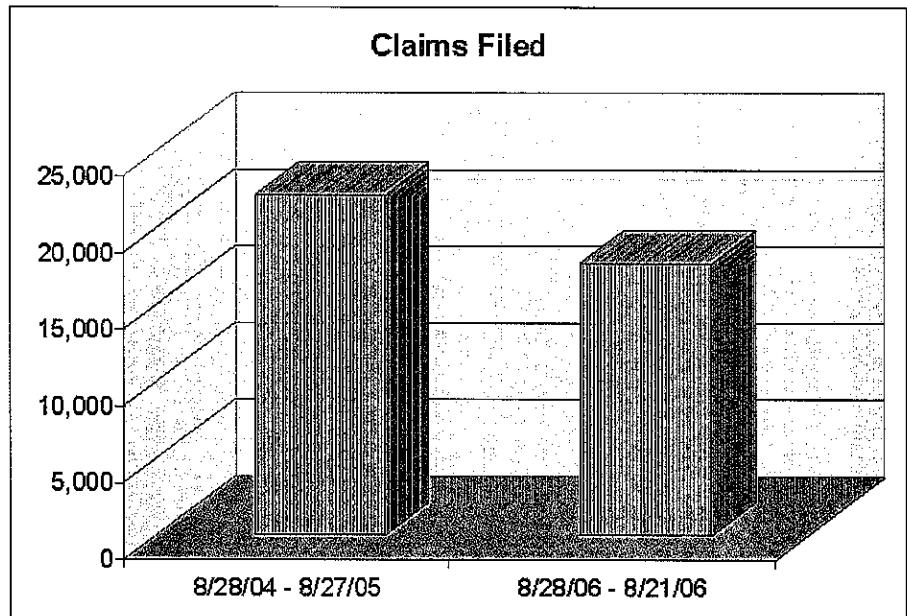
A constitutional challenge

Of course, plaintiffs lawyers

fully expect to disagree with at least some decisions that commission does make in the next few years, as guidelines for the law are brought out. But in the meantime, a lawsuit filed last year is seeking to invalidate the

law as unconstitutional.

In a nine-count suit filed in Cole County Circuit Court on Nov. 30, 2005, 72 plaintiffs - mostly unions - alleged that the law "breaches the social con-



tract by unilaterally negating much of the quid pro quo given to employees in exchange for their common law rights." Among the counts are that the law violates workers' rights to due process, that the law discriminates against older workers and others without a rational basis, and that its drug and alcohol policies violate the freedom from unreasonable searches and seizures.

The plaintiffs' lawyer, John B. Boyd of Boyd & Kenter PC in Kansas City, could not be reached for comment.

Asked for comment, the Mis-

souri Attorney General's Office, which is defending the lawsuit, referred to its filed pleadings.

"Due process does not provide the plaintiffs with a right to a law that is an 'adequate substitute' for common law remedies," the pleading says in its summary. "The challenged law does rest on a rational basis and therefore passes constitutional muster."

The case is scheduled for a hearing in October, but in the meantime lawyers appear to be practicing as normal.

"I don't have attorneys saying to me, 'I'm just going to wait

until October when this is all found to be unconstitutional," Banahan said.

Larsen said he believes the law is unconstitutional but doubts that the case will ultimately be successful.

"The work comp system permeates our legal system at a level where no judge, even if they agreed with the plaintiffs in that case, is likely to hold the system invalid," he said.



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