

FIRST REGULAR SESSION

HOUSE BILL NO. 321

97TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVES HAAHR (Sponsor), WALKER, RHOADS, CORNEJO, HICKS, FITZPATRICK, LEARA, JONES (50), HOUGH, HINSON, ELMER, MILLER, ROWDEN, WILSON, LAFAVER, ENGLUND, AUSTIN, MCKENNA, MAYFIELD, FITZWATER, SPENCER, LANT, COLONA, MITTEN, HANSEN, BERNSKOETTER, SCHUPP, MESSENGER, JUSTUS, HURST AND LOVE (Co-sponsors).

0919L.01H

D. ADAM CRUMBLISS, Chief Clerk

AN ACT

To repeal sections 287.141, 287.220, 287.280, and 287.715, RSMo, and to enact in lieu thereof five new sections relating to the second injury fund, with an emergency clause.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Sections 287.141, 287.220, 287.280, and 287.715, RSMo, are repealed and
2 five new sections enacted in lieu thereof, to be known as sections 135.1185, 287.141, 287.220,
3 287.280, and 287.715, to read as follows:

**135.1185. Any entity required to pay the annual surcharge authorized by section
2 287.715, shall be allowed a credit against the tax otherwise due under chapter 143, not
3 including sections 143.191 to 143.265, in an amount equal to one-half of the amount paid
4 under section 287.715 that exceeds three percent, but is less than six percent, of the
5 policyholder's or self-insured's workers' compensation net deposits, net premiums, or net
6 assessments for the previous policy year, rounded up to the nearest one-half of a
7 percentage point. The amount of the tax credit claimed shall not exceed the amount of the
8 taxpayer's state income tax liability in the tax year for which the credit is claimed.**

**9 2. The provisions of the tax credit authorized under this section shall automatically
10 sunset on October 31, 2019, unless reauthorized by an act of the general assembly.**

**11 3. This section shall terminate on July first of the calendar year immediately
12 following the calendar year in which the program authorized under this section is sunset.**

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

287.141. 1. The purpose of this section is to restore the injured person as soon as possible and as nearly as possible to a condition of self-support and maintenance as an able-bodied worker by physical rehabilitation. The provisions of this chapter relating to physical rehabilitation shall be under the control of and administered by the director of the division of workers' compensation. The division of workers' compensation shall make such rules and regulations as may be necessary to carry out the purposes of this section, subject to the approval of the labor and industrial relations commission of Missouri.

2. The division of workers' compensation shall continuously study the problems of physical rehabilitation and shall investigate all rehabilitation facilities, both private and public, and upon such investigation shall approve as qualified all such facilities, institutions and physicians as are capable of rendering competent physical rehabilitation service for seriously injured industrial workers. Rehabilitation facilities shall include medical, surgical, hospital and physical restoration services. No facility or institution shall be considered as qualified unless it is equipped to provide physical rehabilitation services for persons suffering either from some specialized type of disability or general type of disability within the field of industrial injury, and unless such facility or institution is operated under the supervision of a physician qualified to render physical rehabilitation service and is staffed with trained and qualified personnel and has received a certificate of qualification from the division of workers' compensation. No physician shall be considered as qualified unless he has had the experience prescribed by the division.

3. In any case of serious injury involving disability following the period of rendition of medical aid as provided by subsection 1 of section 287.140, where physical rehabilitation is necessary if the employer or insurer shall offer such physical rehabilitation to the injured employee and such physical rehabilitation is accepted by the employee, then in such case the director of the division of workers' compensation shall be immediately notified thereof and thereupon enter his approval to such effect[, and the director of the division of workers' compensation shall requisition the payment of forty dollars per week benefit from the second injury fund in the state treasury to be paid to the employee while he is actually being rehabilitated, and shall immediately notify the state treasurer thereof by furnishing him with a copy of his order]. But in no case shall the period of physical rehabilitation extend beyond twenty weeks except in unusual cases and then only by a special order of the division of workers' compensation for such additional period as the division may authorize.

4. In all cases where physical rehabilitation is offered and accepted or ordered by the division, the employer or insurer shall have the right to select any physician, facility, or institution that has been found qualified by the division of workers' compensation as above set forth.

36 5. If the parties disagree as to such physical rehabilitation treatment, where such
37 treatment appears necessary, then either the employee, the employer, or insurer may file a request
38 with the division of workers' compensation for an order for physical rehabilitation and the
39 director of the division shall hear the parties within ten days after the filing of the request. The
40 director of the division shall forthwith notify the parties of the time and place of the hearing, and
41 the hearing shall be held at a place to be designated at the discretion of the division. The director
42 of the division may conduct such hearing or he may direct one of the administrative law judges
43 to conduct same. Such hearing shall be informal in all respects. The director of the division
44 shall, after considering all evidence at such hearing, within ten days make his order in the matter,
45 either denying such request or ordering the employer or insurer within a reasonable time, to
46 furnish physical rehabilitation, and ordering the employee to accept the same, at the expense of
47 the employer or insurer. [When the order requires physical rehabilitation, it shall also include
48 an order to requisition the payment of forty dollars per week out of the second injury fund in the
49 state treasury to the injured employee during such time as such employee is actually receiving
50 physical rehabilitation.]

51 6. In every case where physical rehabilitation shall be ordered, the director of the
52 division may, in his discretion, order the employer or insurer to furnish transportation to the
53 injured employee to such rehabilitation facility or institution.

54 7. As used in this section, the term "physical rehabilitation" shall be deemed to include
55 medical, surgical and hospital treatment in the same respect as required to be furnished under
56 subsection 1 of section 287.140.

57 8. An appeal from any order of the division of workers' compensation hereby created to
58 the appellate court may be taken and governed in all respects in the same manner as appeals in
59 workers' compensation cases generally under section 287.495.

287.220. 1. All cases of permanent disability where there has been previous disability,
2 **and when the injury causing the permanent disability occurred prior to July 1, 2013,** shall
3 be compensated as herein provided. **No cases of permanent disability where there has been**
4 **previous disability, and when the injury causing the permanent disability occurred prior**
5 **to July 1, 2013, shall be filed against the second injury fund after July 1, 2015.**
6 Compensation shall be computed on the basis of the average earnings at the time of the last
7 injury. If any employee who has a preexisting permanent partial disability whether from
8 compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to
9 employment or to obtaining reemployment if the employee becomes unemployed, and the
10 preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty
11 weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent
12 permanent partial disability, according to the medical standards that are used in determining such

13 compensation, receives a subsequent compensable injury resulting in additional permanent
14 partial disability so that the degree or percentage of disability, in an amount equal to a minimum
15 of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only,
16 equals a minimum of fifteen percent permanent partial disability, caused by the combined
17 disabilities is substantially greater than that which would have resulted from the last injury,
18 considered alone and of itself, and if the employee is entitled to receive compensation on the
19 basis of the combined disabilities, the employer at the time of the last injury shall be liable only
20 for the degree or percentage of disability which would have resulted from the last injury had
21 there been no preexisting disability. After the compensation liability of the employer for the last
22 injury, considered alone, has been determined by an administrative law judge or the commission,
23 the degree or percentage of employee's disability that is attributable to all injuries or conditions
24 existing at the time the last injury was sustained shall then be determined by that administrative
25 law judge or by the commission and the degree or percentage of disability which existed prior
26 to the last injury plus the disability resulting from the last injury, if any, considered alone, shall
27 be deducted from the combined disability, and compensation for the balance, if any, shall be paid
28 out of a special fund known as the second injury fund, hereinafter provided for. If the previous
29 disability or disabilities, whether from compensable injury or otherwise, and the last injury
30 together result in total and permanent disability, the minimum standards under this subsection
31 for a body as a whole injury or a major extremity injury shall not apply and the employer at the
32 time of the last injury shall be liable only for the disability resulting from the last injury
33 considered alone and of itself; except that if the compensation for which the employer at the time
34 of the last injury is liable is less than the compensation provided in this chapter for permanent
35 total disability, then in addition to the compensation for which the employer is liable and after
36 the completion of payment of the compensation by the employer, the employee shall be paid the
37 remainder of the compensation that would be due for permanent total disability under section
38 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for
39 the purposes as in this section provided and for special weekly benefits in rehabilitation cases
40 as provided in section 287.141. Maintenance of the second injury fund shall be as provided by
41 section 287.710. The state treasurer shall be the custodian of the second injury fund which shall
42 be deposited the same as are state funds and any interest accruing thereon shall be added thereto.
43 The fund shall be subject to audit the same as state funds and accounts and shall be protected by
44 the general bond given by the state treasurer. Upon the requisition of the director of the division
45 of workers' compensation, warrants on the state treasurer for the payment of all amounts payable
46 for compensation and benefits out of the second injury fund shall be issued. **For all injuries**
47 **occurring on and after July 1, 2013, compensation for the balance of the combined**
48 **permanent disability herein described shall no longer be payable by the second injury**

49 **fund. Instead, compensation for the balance of the combined permanent disability herein**
50 **described shall be payable by the employer or its insurer, in addition to the permanent**
51 **disability attributable to the last injury alone.**

52 2. In all cases in which a recovery against the second injury fund is sought for permanent
53 partial disability, permanent total disability, or death, the state treasurer as custodian thereof shall
54 be named as a party, and shall be entitled to defend against the claim. The state treasurer, with
55 the advice and consent of the attorney general of Missouri, may enter into compromise
56 settlements as contemplated by section 287.390, or agreed statements of fact that would affect
57 the second injury fund. **The state treasurer, with the advice and consent of the attorney**
58 **general of Missouri, may enter into compromise settlements with dependents of claimants,**
59 **whether finally adjudicated or not, arising from the Missouri Supreme Court's decision**
60 **in Schoemehl v. Treasurer of Missouri, 217 S.W.3d 900 (Mo.2007).** All awards for
61 permanent partial disability, permanent total disability, or death affecting the second injury fund
62 shall be subject to the provisions of this chapter governing review and appeal. For all claims
63 filed against the second injury fund on or after July 1, 1994, the attorney general shall use
64 assistant attorneys general except in circumstances where an actual or potential conflict of
65 interest exists, to provide legal services as may be required in all claims made for recovery
66 against the fund. Any legal expenses incurred by the attorney general's office in the handling of
67 such claims, including, but not limited to, medical examination fees, expert witness fees, court
68 reporter expenses, travel costs, and related legal expenses shall be paid by the fund.
69 Effective July 1, 1993, the payment of such legal expenses shall be contingent upon annual
70 appropriations made by the general assembly, from the fund, to the attorney general's office for
71 this specific purpose.

72 3. If more than one injury in the same employment causes concurrent temporary
73 disabilities, compensation shall be payable only for the longest and largest paying disability.

74 4. If more than one injury in the same employment causes concurrent and consecutive
75 permanent partial disability, compensation payments for each subsequent disability shall not
76 begin until the end of the compensation period of the prior disability.

77 5. If an employer fails to insure or self-insure as required in section 287.280, funds from
78 the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses
79 **incurred relating to claims for injuries occurring prior to July 1, 2013,** to cure and relieve
80 the effects of the injury or disability of an injured employee in the employ of an uninsured
81 employer, or in the case of death of an employee in the employ of an uninsured employer, funds
82 from the second injury fund may be withdrawn to cover fair, reasonable, and necessary expenses
83 **incurred relating to a death occurring prior to July 1, 2013,** in the manner required in
84 sections 287.240 and 287.241. In defense of claims arising under this subsection, the treasurer

85 of the state of Missouri, as custodian of the second injury fund, shall have the same defenses to
86 such claims as would the uninsured employer. Any funds received by the employee or the
87 employee's dependents, through civil or other action, must go towards reimbursement of the
88 second injury fund, for all payments made to the employee, the employee's dependents, or paid
89 on the employee's behalf, from the second injury fund pursuant to this subsection. The office of
90 the attorney general of the state of Missouri shall bring suit in the circuit court of the county in
91 which the accident occurred against any employer not covered by this chapter as required in
92 section 287.280.

93 6. Every [three years] **year, until no fund liabilities remain**, the second injury fund
94 shall have an actuarial study made to determine the solvency of the fund **taking into**
95 **consideration any existing balance carried forward from a previous year**, appropriate
96 funding level of the fund, and forecasted expenditures from the fund. The first actuarial study
97 shall be completed prior to July 1, [1988] **2014**. The expenses of such actuarial studies shall be
98 paid out of the fund for the support of the division of workers' compensation.

99 7. The director of the division of workers' compensation shall maintain the financial data
100 and records concerning the fund for the support of the division of workers' compensation and the
101 second injury fund. The division shall also compile and report data on claims made pursuant to
102 subsection 9 of this section. The attorney general shall provide all necessary information to the
103 division for this purpose.

104 8. All claims for fees and expenses filed against the second injury fund and all records
105 pertaining thereto shall be open to the public.

106 9. Any employee who at the time a compensable work-related injury is sustained **prior**
107 **to July 1, 2013**, is employed by more than one employer, the employer for whom the employee
108 was working when the injury was sustained shall be responsible for wage loss benefits applicable
109 only to the earnings in that employer's employment and the injured employee shall be entitled
110 to file a claim against the second injury fund for any additional wage loss benefits attributed to
111 loss of earnings from the employment or employments where the injury did not occur, up to the
112 maximum weekly benefit less those benefits paid by the employer in whose employment the
113 employee sustained the injury. The employee shall be entitled to a total benefit based on the total
114 average weekly wage of such employee computed according to subsection 8 of section 287.250.
115 The employee shall not be entitled to a greater rate of compensation than allowed by law on the
116 date of the injury. The employer for whom the employee was working where the injury was
117 sustained shall be responsible for all medical costs incurred in regard to that injury.

118 **10. The division shall pay any liabilities of the fund in the following priority:**

119 **(1) Expenses related to the legal defense of the fund, under subsection 2 of this**
120 **section;**

121 **(2) Permanent total disability awards in the order in which such claims are settled**
122 **or finally adjudicated;**

123 **(3) Permanent partial disability awards in the order in which such claims are**
124 **settled or finally adjudicated;**

125 **(4) Medical expenses incurred prior to July 1, 2013, under subsection 5 of this**
126 **section.**

127

128 **Such liabilities shall be paid to the extent the fund has a positive balance. Any unpaid**
129 **amounts shall remain an ongoing liability of the fund until satisfied.**

130 **11. All cases of permanent disability where there has been previous disability and**
131 **when the injury causing the permanent disability occurred on or after July 1, 2013, shall**
132 **be subject to adjudication under the workers' compensation system.**

287.280. 1. Every employer subject to the provisions of this chapter shall, on either an
2 individual or group basis, insure his entire liability thereunder, except as hereafter provided, with
3 some insurance carrier authorized to insure such liability in this state, except that an employer
4 or group of employers may themselves carry the whole or any part of the liability without
5 insurance upon satisfying the division of their ability so to do. If an employer or group of
6 employers have qualified to self-insure their liability under this chapter, the division of workers'
7 compensation may, if it finds after a hearing that the employer or group of employers are
8 willfully and intentionally violating the provisions of this chapter with intent to defraud their
9 employees of their right to compensation, suspend or revoke the right of the employer or group
10 of employers to self-insure their liability. If the employer or group of employers fail to comply
11 with this section, an injured employee or his dependents may elect after the injury either to bring
12 an action against such employer or group of employers to recover damages for personal injury
13 or death and it shall not be a defense that the injury or death was caused by the negligence of a
14 fellow servant, or that the employee had assumed the risk of the injury or death, or that the injury
15 or death was caused to any degree by the negligence of the employee; or to recover under this
16 chapter with the compensation payments commuted and immediately payable[; or, if the
17 employee elects to do so, he or she may file a request with the division for payment to be made
18 for medical expenses out of the second injury fund as provided in subsection 5 of section
19 287.220]. If the employer or group of employers are carrying their own insurance, on the
20 application of any person entitled to compensation and on proof of default in the payment of any
21 installment, the division shall require the employer or group of employers to furnish security for
22 the payment of the compensation, and if not given, all other compensation shall be commuted
23 and become immediately payable; provided, that employers engaged in the mining business shall
24 be required to insure only their liability hereunder to the extent of the equivalent of the maximum

25 liability under this chapter for ten deaths in any one accident, but the employer or group of
26 employers may carry their own risk for any excess liability. When a group of employers enter
27 into an agreement to pool their liabilities under this chapter, individual members will not be
28 required to qualify as individual self-insurers.

29 2. Groups of employers qualified to insure their liability pursuant to chapter 537 or this
30 chapter, shall utilize a uniform experience rating plan promulgated by an approved advisory
31 organization. Such groups shall develop experience ratings for their members based on the plan.
32 Nothing in this section shall relieve an employer from remitting, without any charge to the
33 employer, the employer's claims history to an approved advisory organization.

34 3. For every entity qualified to group self-insure their liability pursuant to this chapter
35 or chapter 537, each entity shall not authorize total discounts for any individual member
36 exceeding twenty-five percent beginning January 1, 1999. All discounts shall be based on
37 objective quantitative factors and applied uniformly to all trust members.

38 4. Any group of employers that have qualified to self-insure their liability pursuant to
39 this chapter shall file with the division premium rates, based on pure premium rate data, adjusted
40 for loss development and loss trending as filed by the advisory organization with the department
41 of insurance, financial institutions and professional registration pursuant to section 287.975, plus
42 any estimated expenses and other factors or based on average rate classifications calculated by
43 the department of insurance, financial institutions and professional registration as taken from the
44 premium rates filed by the twenty insurance companies providing the greatest volume of workers'
45 compensation insurance coverage in this state. The rate is inadequate if funds equal to the full
46 ultimate cost of anticipated losses and loss adjustment expenses are not produced when the
47 prospective loss costs are applied to anticipated payrolls. The provisions of this subsection shall
48 not apply to those political subdivisions of this state that have qualified to self-insure their
49 liability pursuant to this chapter as authorized by section 537.620 on an assessment plan. Any
50 such group may file with the division a composite rate for all coverages provided under that
51 section.

52 5. Any finding or determination made by the division under this section may be reviewed
53 as provided in sections 287.470 and 287.480.

54 6. No rule or portion of a rule promulgated under the authority of this section shall
55 become effective unless it has been promulgated pursuant to the provisions of section 536.024.

56 7. Any records submitted pursuant to this section, and pursuant to any rule promulgated
57 by the division pursuant to this section, shall be considered confidential and not subject to
58 chapter 610. Any party to a workers' compensation case involving the party that submitted the
59 records shall be able to subpoena the records for use in a workers' compensation case, if the
60 information is otherwise relevant.

287.715. 1. For the purpose of providing for revenue for the second injury fund, every
2 authorized self-insurer, and every workers' compensation policyholder insured pursuant to the
3 provisions of this chapter, shall be liable for payment of an annual surcharge in accordance with
4 the provisions of this section. The annual surcharge imposed under this section shall apply to
5 all workers' compensation insurance policies and self-insurance coverages which are written or
6 renewed on or after April 26, 1988, including the state of Missouri, including any of its
7 departments, divisions, agencies, commissions, and boards or any political subdivisions of the
8 state who self-insure or hold themselves out to be any part self-insured. Notwithstanding any
9 law to the contrary, the surcharge imposed pursuant to this section shall not apply to any
10 reinsurance or retrocessional transaction.

11 2. Beginning October 31, 2005, and each year thereafter, the director of the division of
12 workers' compensation shall estimate the amount of benefits payable from the second injury fund
13 during the following calendar year and shall calculate the total amount of the annual surcharge
14 to be imposed during the following calendar year upon all workers' compensation policyholders
15 and authorized self-insurers. The amount of the annual surcharge percentage to be imposed upon
16 each policyholder and self-insured for the following calendar year commencing with the calendar
17 year beginning on January 1, 2006, shall be set at and calculated against a percentage, not to
18 exceed three percent, of the policyholder's or self-insured's workers' compensation net deposits,
19 net premiums, or net assessments for the previous policy year, rounded up to the nearest one-half
20 of a percentage point, that shall generate, as nearly as possible, one hundred ten percent of the
21 moneys to be paid from the second injury fund in the following calendar year, less any moneys
22 contained in the fund at the end of the previous calendar year. All policyholders and self-insurers
23 shall be notified by the division of workers' compensation within ten calendar days of the
24 determination of the surcharge percent to be imposed for, and paid in, the following calendar
25 year. The net premium equivalent for individual self-insured employers and any group of
26 political subdivisions of this state qualified to self-insure their liability pursuant to this chapter
27 as authorized by section 537.620 shall be based on average rate classifications calculated by the
28 department of insurance, financial institutions and professional registration as taken from
29 premium rates filed by the twenty insurance companies providing the greatest volume of workers'
30 compensation insurance coverage in this state. For employers qualified to self-insure their
31 liability pursuant to this chapter, the rates filed by such group of employers in accordance with
32 subsection 2 of section 287.280 shall be the net premium equivalent. The director may advance
33 funds from the workers' compensation fund to the second injury fund if surcharge collections
34 prove to be insufficient. Any funds advanced from the workers' compensation fund to the second
35 injury fund must be reimbursed by the second injury fund no later than December thirty-first of
36 the year following the advance. The surcharge shall be collected from policyholders by each

37 insurer at the same time and in the same manner that the premium is collected, but no insurer or
38 its agent shall be entitled to any portion of the surcharge as a fee or commission for its collection.
39 The surcharge is not subject to any taxes, licenses or fees. **When all liabilities against the
40 second injury fund have ended, the director shall continue to collect the surcharge from
41 all policyholders and self-insurers for the remainder of the calendar year and shall transfer
42 any balance of the second injury fund on January first of the following year to the workers'
43 compensation fund.**

44 **3. In order to maintain the fiscal solvency of the second injury fund, should the
45 anticipated collections authorized in subsection 2 of this section fail to be sufficient to meet
46 its current and anticipated legal obligations, provide funds to settle cases, and provide
47 funds for the administration of the fund for the following calendar year, the director of the
48 division of workers' compensation, at the time of estimating the amounts of benefits
49 payable from the second injury fund under subsection 2 of this section, shall determine the
50 amount of revenue so required. Notwithstanding subsection 2 of this section to the
51 contrary, such necessary funds as determined by the director shall be collected with a
52 supplemental surcharge, not to exceed three percent, calculated in like manner as
53 authorized in subsection 2 of this section. All policyholders and self-insurers shall be
54 notified by the division of workers' compensation of the supplemental surcharge percent
55 to be imposed for such period of time as part of the notice provided in subsection 2 of this
56 section. This subsection shall expire on October 31, 2019.**

57 **4.** All surcharge amounts imposed by this section shall be deposited to the credit of the
58 second injury fund.

59 [4.] **5.** Such surcharge amounts shall be paid quarterly by insurers and self-insurers, and
60 insurers shall pay the amounts not later than the thirtieth day of the month following the end of
61 the quarter in which the amount is received from policyholders. If the director of the division
62 of workers' compensation fails to calculate the surcharge by the thirty-first day of October of any
63 year for the following year, any increase in the surcharge ultimately set by the director shall not
64 be effective for any calendar quarter beginning less than sixty days from the date the director
65 makes such determination.

66 [5.] **6.** If a policyholder or self-insured fails to make payment of the surcharge or an
67 insurer fails to make timely transfer to the division of surcharges actually collected from
68 policyholders, as required by this section, a penalty of one-half of one percent of the surcharge
69 unpaid, or untransferred, shall be assessed against the liable policyholder, self-insured or insurer.
70 Penalties assessed under this subsection shall be collected in a civil action by a summary
71 proceeding brought by the director of the division of workers' compensation.

72 **7. Once the number of pending cases is reduced to the point where the number of**
73 **staff within the attorney general's office defending the second injury fund can be reduced**
74 **from July 2013 levels, the attorney general shall begin reducing such staff in proportion**
75 **to the number of pending cases which remain.**

 Section B. Because of the need to provide security for injured workers and their
2 employers and protect the solvency of the second injury fund, this act is deemed necessary for
3 the immediate preservation of the public health, welfare, peace and safety, and is hereby declared
4 to be an emergency act within the meaning of the constitution, and this act shall be in full force
5 and effect upon its passage and approval.

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