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December 4, 2020

Ms. Petra Mandigo Hulm
Clerk of the Supreme Court
Supreme Court
Judicial Wing, First Fl.
600 E. Boulevard Ave.
Bismarck, ND 58505-0530

**Re: Rule 28(k) N.D.R.App.P. Citation of Missouri Statutes;
State of North Dakota by Workforce Safety & Insurance v. Chris Oden;
North Dakota Supreme Court No. 20200187;**

Dear Ms. Hulm:

The following correspondence is a post-oral argument citation of Missouri statutory authority pursuant to Rule 28(k) of the North Dakota Rules of Appellate Procedure, as mentioned by the undersigned counsel for the appellant during oral argument in this case yesterday. This rule provides as follows:

(k) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the court by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited. (*bold, underlined emphasis added*).

In compliance Rule 28(k), N.D.R.App.P., the “significant authorities” set forth hereafter came to the attention of counsel for Petitioner Chris Oden after the petitioner’s briefing was filed with the Supreme Court and before a decision has been rendered in this case. Pursuant to this rule, the “reasons for the supplemental

citations” are also set forth below, “without argument”. Relative to the point argued by counsel for the petitioner at yesterday’s oral argument to the effect that Missouri statutory law establishes **jurisdiction** and “administrative proceeding party status” over an insurer of an employer whose employee was injured within the State of Missouri and who was entitled, as a matter of statutory right, to compensation from that employer and that employer’s insurer, the following Missouri statutory authorities are hereby presented to the Supreme Court:

Missouri Revised Statutes § 287.300 provides as follows:

If the employer is not insured his liability hereunder shall be primary and direct. If he **is insured** his liability shall be secondary and indirect, and **his insurer shall be primarily and directly liable hereunder to the injured employee, his dependents or other persons entitled to rights hereunder.** On the request of the division or the commission and at every hearing the employer shall produce and furnish it with a copy of his policy of insurance, and on demand the employer shall furnish the injured employee, or his dependents, with the correct name and address of his insurer, and his failure to do so shall be prima facie evidence of his failure to insure, but the presumption shall be conclusively rebutted by an entry of appearance of his insurer. **Both the employer and his insurer shall be parties to all agreements or awards of compensation, but the same shall not be enforceable against the employer, except on motion and proof of default by the insurer. Service on the employer shall be sufficient to give the division or the commission jurisdiction over the person of both the employer and his insurer, and the appearance of the employer in any proceeding shall also constitute the appearance of his insurer, provided that after appearance by an insurer, the insurer shall be entitled to notice of all proceedings hereunder.**

(bold, underlined emphasis added)

In addition:

Missouri Revised Statutes § 287.120 -- with bold, underlined emphasis added -- is attached hereto is attached hereto and incorporated herein by reference;

Missouri Revised Statutes § 287.280 -- with bold, underlined emphasis added -- is attached hereto is attached hereto and incorporated herein by reference;

Missouri Revised Statutes § 287.380 -- with bold, underlined emphasis added -- is attached hereto is attached hereto and incorporated herein by reference;

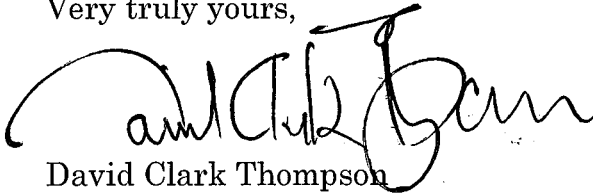
Missouri Revised Statutes § 287.410 -- with bold, underlined emphasis added -- is attached hereto is attached hereto and incorporated herein by reference;

Missouri Revised Statutes § 287.495 -- with bold, underlined emphasis added -- is attached hereto is attached hereto and incorporated herein by reference; and

Missouri Revised Statutes § 287.500 -- with bold, underlined emphasis added -- is attached hereto is attached hereto and incorporated herein by reference.

If the Supreme Court should have any questions with regard to the content of this post-oral-argument submission made by Petitioner Chris Oden pursuant to Rule 28(k) of the North Dakota Rules of Appellate Procedure, the undersigned counsel stands available to respond, as appropriate, at any time.

Very truly yours,

A handwritten signature in dark ink, appearing to read "David Clark Thompson", is written over the typed name.

David Clark Thompson

Attorney at Law

DAVID C. THOMPSON, P.C.

Counsel for Petitioner Chris Oden

§ 287.300. Employer's liability primary or secondary—notice and service, when sufficient

If the employer is not insured his liability hereunder shall be primary and direct. If he is insured his liability shall be secondary and indirect, and his insurer shall be primarily and directly liable hereunder to the injured employee, his dependents or other persons entitled to rights hereunder. On the request of the division or the commission and at every hearing the employer shall produce and furnish it with a copy of his policy of insurance, and on demand the employer shall furnish the injured employee, or his dependents, with the correct name and address of his insurer, and his failure to do so shall be prima facie evidence of his failure to insure, but the presumption shall be conclusively rebutted by an entry of appearance of his insurer. Both the employer and his insurer shall be parties to all agreements or awards of compensation, but the same shall not be enforceable against the employer, except on motion and proof of default by the insurer. Service on the employer shall be sufficient to give the division or the commission jurisdiction over the person of both the employer and his insurer, and the appearance of the employer in any proceeding shall also constitute the appearance of his insurer, provided that after appearance by an insurer, the insurer shall be entitled to notice of all proceedings hereunder.

(bold, underlined emphasis added)

Missouri Revised Statutes § 287.120

§ 287.120. Liability of employer set out — compensation increased or reduced, when — use of alcohol or controlled substances or voluntary recreational activities, injury from — effect on compensation — mental injuries, requirements, firefighter stress not affected

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 or occupational disease arising out of and in the course of the employee's employment. Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. 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, the employee's spouse, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such injury or death by accident or occupational disease, 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 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, the compensation and death benefit provided for herein shall be reduced 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 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, the compensation and death benefit provided for herein shall be reduced fifty

percent if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs.

(2) If, however, the use of alcohol or nonprescribed controlled drugs in violation of the employer's rule or policy is the proximate cause of the injury, then the benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited.

(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, 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.

(4) Any positive test result for a nonprescribed controlled drug or the metabolites of such drug from an employee shall give rise to a rebuttable presumption, which may be rebutted by a preponderance of evidence, that the tested nonprescribed controlled drug was in the employee's system at the time of the accident or injury and that the injury was sustained in conjunction with the use of the tested nonprescribed controlled drug if:

- (a) The initial testing was administered within twenty-four hours of the accident or injury;
- (b) Notice was given to the employee of the test results within fourteen calendar days of the insurer or group self-insurer receiving actual notice of the confirmatory test results;
- (c) The employee was given an opportunity to perform a second test upon the original sample; and
- (d) The initial or any subsequent testing that forms the basis of the presumption was confirmed by mass spectrometry using generally accepted medical or forensic testing procedures.

7. Where the employee's participation in a recreational activity or program is the 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:

- (1) The employee was directly ordered by the employer to participate in such recreational activity or program;
- (2) The employee was paid wages or travel expenses while participating in such recreational activity or program; or
- (3) 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.

(bold, underlined emphasis added).

§ 287.280. Employer's entire liability to be covered, self-insurer or approved carrier — exception — group of employers may qualify as self-insurers — uniform experience rating plan — failure to insure, effect — rules — confidential records

1. Every employer subject to the provisions of this chapter shall, on either an individual or group basis, insure their entire liability under the workers' compensation law; and may insure in whole or in part their employer liability, under a policy of insurance or a self-insurance plan, except as hereafter provided, with some insurance carrier authorized to insure such liability in this state, except that an employer or group of employers may themselves carry the whole or any part of the liability without insurance upon satisfying the division of their ability to do so. If an employer or group of employers have qualified to self-insure their liability under this chapter, the division of workers' compensation may, if it finds after a hearing that the employer or group of employers are willfully and intentionally violating the provisions of this chapter with intent to defraud their employees of their right to compensation, suspend or revoke the right of the employer or group of employers to self-insure their liability. If the employer or group of employers fail to comply with this section, an injured employee or his or her dependents may elect after the injury either to bring an action against such employer or group of employers to recover damages for personal injury or death and it shall not be a defense that the injury or death was caused by the negligence of a fellow servant, or that the employee had assumed the risk of the injury or death, or that the injury or death was caused to any degree by the negligence of the employee; or to recover under this chapter with the compensation payments commuted and immediately payable; or, if the employee elects to do so, he or she may file a request with the division for payment to be made for medical expenses out of the second injury fund as provided in subsection 7 of section 287.220. If the employer or group of employers are carrying their own insurance, on the application of any person entitled to compensation and on proof of default in the payment of any installment, the division shall require the employer or group of employers to furnish security for the payment of the compensation, and if not given, all other compensation shall be commuted and become immediately payable; provided, that employers engaged in the mining business shall be required to insure only their liability hereunder to the extent of the equivalent of the maximum liability under this chapter for ten deaths in any one accident, but the employer or group of employers may carry their own risk for any excess liability. When a group of employers enter into an agreement to pool their liabilities under this chapter, individual members will not be required to qualify as individual self-insurers.

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

3. For every entity qualified to group self-insure their liability pursuant to this chapter or chapter 537, each entity shall not authorize total discounts for any individual member exceeding twenty-

five percent beginning January 1, 1999. All discounts shall be based on objective quantitative factors and applied uniformly to all trust members.

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

5. When considering applications for new trust self-insurers, as described under 8 CSR 50-3.010, the division shall require proof of payment by each member of not less than twenty-five percent of the estimated annual premium; except that, for new members who wish to join an existing trust self-insurer during the policy year rather than at the beginning of the policy year, the division shall require proof of payment of the lesser of the estimated premium of three months or the estimated premium for the balance of the policy year.

6. Self-insured trusts, as described under 8 CSR 50-3.010, may invest surplus moneys from a prior trust year not needed for current obligations. Notwithstanding any provision of law to the contrary, upon approval by the division, a self-insured trust may invest up to one hundred percent of surplus moneys in securities designated by the state treasurer as acceptable collateral to secure state deposits under section 30.270.

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

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

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

(bold, underlined emphasis added).

Missouri Revised Statutes § 287.380

§ 287.380. Employer or insurer to make report to division, requirements — information not to be disclosed—failure to report, penalty

1. Every employer or his insurer in this state, whether he has accepted or rejected the provisions of this chapter, shall within thirty days after knowledge of the injury, file with the division under such rules and regulations and in such form and detail as the division may require, a full and complete report of every injury or death to any employee for which the employer would be liable to furnish medical aid, other than immediate first aid which does not result in further medical treatment or lost time from work, or compensation hereunder had he accepted this chapter, and every employer or insurer shall also furnish the division with such supplemental reports in regard thereto as the division shall require. All reports submitted under this subsection shall include the name, address, date of birth and wages of the deceased or injured employee, the time and cause of the accident, the nature and extent of the injury, the name and address of the employee's and the employer's or insurer's attorney of record, if any, the medical cost incurred in treating the injured employee, the amount of lost work time of the employee as a result of the injury and such other information as the director may reasonably require in order to maintain in the division, accurate and complete data on the impact of work-related injuries on the workers' compensation system. The division shall collect and maintain such data in such a form as to be readily retrieved and available for analysis by the division. Employers shall report all injuries to their insurance carrier, or third-party administrators, if applicable, within five days of the date of the injury or within five days of the date on which the injury was reported to the employer by the employee, whichever is later. Where an employer reports injuries covered pursuant to this chapter to his insurer or third-party administrator, the insurer or third-party administrator shall be responsible for filing the report prescribed in this section.

2. Every employer and his insurer, and every injured employee, his dependents and every person entitled to any rights hereunder, and every other person receiving from the division or the commission any blank reports with direction to fill out the same shall cause the same to be promptly returned to the division or the commission properly filled out and signed so as to answer fully and correctly to the best of his knowledge each question propounded therein, and a good and sufficient reason shall be given for failure to answer any question.

3. No information obtained under the provisions of this section shall be disclosed to persons other than the parties to compensation proceedings and their attorneys, except by order of the division or the commission, or at a hearing of compensation proceeding, but such information may be used by the division or the commission for statistical purposes.

4. Any person, including any employer, insurer or any employee, who violates any of the provisions of this section, including any employer or insurer who knowingly fails to report any accident under the provisions of subsection 1 of this section, or anyone who knowingly makes a false report or statement in writing to the division or the commission, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not

less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than one week nor more than one year, or by both the fine and imprisonment.

(bold underlined emphasis added).

§ 287.410. Powers and functions of the division of workers' compensation

The division shall have and exercise such of the powers and functions of the commission in the administration of the workers' compensation law as the commission may by regulation prescribe; provided, however, that **the power and duty to review any award made under the workers' compensation law**, as authorized by sections 287.470 and 287.480, **may not be delegated, but such power and duty shall be exercised exclusively by the commission**; and provided further, that the commission shall exercise no authority with respect to the selection or tenure of office of any individual appointed or employed by the division in the administration of the workers' compensation law.

§ 287.495. Final award conclusive unless an appeal is taken—grounds for setting aside—disputes governed by this section, claims arising on or after August 13, 1980

1. The final award of the commission shall be conclusive and binding unless either party to the dispute shall, within thirty days from the date of the final award, appeal the award to the appellate court. The appellate court shall have jurisdiction to review all decisions of the commission pursuant to this chapter where the division has original jurisdiction over the case. Venue as established by subsection 2 of section 287.640 shall determine the appellate court which hears the appeal. Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall, under its certificate, return to the court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause. Upon appeal no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the commission within its powers shall be conclusive and binding. The court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:

- (1) That the commission acted without or in excess of its powers;
- (2) That the award was procured by fraud;
- (3) That the facts found by the commission do not support the award;
- (4) That there was not sufficient competent evidence in the record to warrant the making of the award.

2. The provisions of this section shall apply to all disputes based on claims arising on or after August 13, 1980.

(bold, underlined emphasis added)

§ 287.500. Circuit court may act upon memorandum—procedure

Any party in interest may file in the circuit court of the county in which the accident occurred, **a certified copy of a memorandum of agreement approved by the division or by the commission or of an order or decision of the division or the commission**, or of an award of the division or of the commission from which an application for review or from which an appeal has not been taken, **whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though said judgment were a final judgment which had been rendered in a suit duly heard and determined by said court.**

Any such judgment of said circuit court unappealed from or affirmed on appeal or modified in obedience to the mandate of the appellate court, whenever modified on account of a changed condition under section 287.470, shall be modified to conform to any decision of the commission, ending, diminishing or increasing any weekly payment under the provisions of section 287.470 upon the presentation to it of a certified copy of such decision.

In the Supreme Court State Of North Dakota

Supreme Court No. 20200187

State of North Dakota by
Workforce Safety & Insurance,

Petitioner,

v.

Chris Oden,

Respondent.

**DECLARATION OF SERVICE
BY ELECTRONIC MEANS
PURSUANT TO RULE 25 OF THE
NORTH DAKOTA RULES OF
APPELLATE PROCEDURE**

[1] Pursuant to Rule 25(d) of the North Dakota Rules of Appellate Procedure, I hereby certify that I served the documents identified hereafter today by electronic means in compliance with Rule 25(a)(2)(c) of the North Dakota Rules of Appellate Procedure upon the following counsel for Appellee North Dakota Workforce Safety & Insurance: Jacqueline Sue Anderson [janderson@nilleslaw.com]:

**RULE 28(k) CITATION OF SUPPLEMENTAL
POST-ORAL-ARGUMENT LEGAL AUTHORITIES**

Dated this 4th day of December, 2020,

/s/ David Clark Thompson

David C. Thompson (ND No. 03921)

Attorney at Law

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