

STONE LOUGHLIN & SWANSON, LLP

(512) 343-1300

jstone@slsaustin.com jloughlin@slsaustin.com dswanson@slsaustin.com eshanley@slsaustin.com
dprice@slsaustin.com sgatlin@slsaustin.com ecopeland@slsaustin.com
mheagerty@slsaustin.com dwalker@slsaustin.com

July 2015 Workers' Compensation Law Update

Same-sex common law marriage could grant entitlement to DIBs

On June 26, 2015, the U.S. Supreme Court held that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. *Obergefell v. Hodges*, ___ U.S. ___ (No. 14-556, June 26, 2015).

The surviving spouse is entitled to receive death benefits under the Workers' Compensation Act. The surviving spouse must provide a marriage license or satisfactory evidence of common-law marriage. Section 2.401 of the Texas Family Code limits the definition of a common law marriage to a relationship between a man and a woman.

However, Texas courts will likely hold that this statute was modified by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States as interpreted by the Supreme Court in *Obergefell*. Therefore, expect to see same-sex surviving spouses seeking death benefits in the not too distant future.

DWC gives fair warning of a pending crack down on medical records for DD Exams.

The Division recently issued a memo "reminding" insurance carriers and treating doctors that medical records must be provided to designated doctors no later than three business days prior to the exam. The memo also includes a "reminder" that the failure to do so is an administrative violation. The Division has established a new email address DD's can use to ask for help from the Division in obtaining records, presumably when the records are not timely received: DDRecords@tdi.texas.gov. Therefore, carriers and treating doctors who do not get the records to the DD timely should not be surprised if they receive a violation notice.

The transition to ICD-10 codes will be here soon but questions remain.

Beginning October 1, 2015, the Texas workers' compensation system will transition from the use of ICD-9 codes to the ICD-10 codes. Physicians must begin using ICD-10 codes to record diagnoses and inpatient procedures for services provided on or after that date.

The Division has created a new training video on the transition to ICD-10 codes. The video is available on the TDI website at <http://www.tdi.texas.gov/wc/hcprovider/icd10.html>. The video reminds system participants to prepare in advance for the transition.

One still unanswered question for carriers is how they should process bills submitted with ICD-9 codes for dates of service after October 1, 2015. On the one hand, if they return the bills, that could be a potential violation. On the other hand, if they process the bill and electronically report the ICD-9 codes, that could also be a potential violation. Another question is what carriers should do with bills submitted with ICD-10 codes for dates of service before October 1, 2015. ICT has asked the Division for clarification. Hopefully, the Division will provide guidance soon so that system participants can prepare in advance for the transition.

A claimant does not rebut the presumption of intoxication by challenging the validity of the drug test.

In *Denham v. Texas Mutual Ins. Co.*, the deceased employee tested positive for marijuana. 2015 WL 4389286 (Tex. App.—Amarillo, July 15, 2015). The carrier denied the claim based on intoxication. The Appeals Panel upheld the denial and the employee's beneficiary filed suit for judicial review. In the trial court, the carrier filed a no-evidence motion for summary judgment contending that the beneficiary had failed to present any evidence that the employee was not intoxicated. The beneficiary responded with an affidavit from a doctor challenging the validity of the positive test results. The court held that such evidence does not rebut the presumption of intoxication. According to the court, the rebuttable presumption of intoxication was raised by the positive drug test results regardless of whether the results were founded on medically and toxicologically sound theory. Once the presumption of intoxication was raised, evidence was required that the deceased employee was not intoxicated, such as an affidavit from his passenger that he had the normal use of his mental and physical faculties. No such evidence was provided. Therefore, the court of appeals upheld the trial court's judgment in favor of the carrier.

Urine drug testing puts the "p" in "profit."

One by product of the crackdown on pain pill abuse is increased urine drug testing. Many treatment guidelines, the ODG included, recommend urine drug testing. Some doctors and labs have capitalized on this opportunity, turning urine drug testing into a new profit center. Many system participants have witnessed a significant increase in the frequency of drug testing, the number of drugs for which patients are tested, and the use of qualitative drug testing which tests for the amount of a drug as opposed to qualitative testing which just determines the presence or absence of a drug. Five thousand dollar urine drug testing bills are not uncommon with some bills exceeding \$9,000. Now one system participant is fighting back by having every urine drug test retrospectively reviewed for medical necessity. This resulted in savings of \$493,372.97 in one quarter alone. The reason is because in many cases the prescribing doctor was not following the ODG either because the doctor was testing too often, testing too many drug classes, or doing quantitative testing with no evidence of necessity. The ODG states that quantitative urine drug testing is not recommended without evidence of necessity.

Global warming makes everything worse.

A recent workers' compensation blog post warns, "As global warming increases, and changing weather patterns become more pronounced, workers' compensation insurance systems will be stressed to limits never before imagined." According to the post, extreme temperatures and significant storms are already causing increased levels of occupational injuries and illnesses. So far, there has been no word from the Division on how it intends to address global warming.