

# STONE LOUGHLIN & SWANSON, LLP

(512) 343-1300

[jstone@slsaustin.com](mailto:jstone@slsaustin.com) [jloughlin@slsaustin.com](mailto:jloughlin@slsaustin.com) [dswanson@slsaustin.com](mailto:dswanson@slsaustin.com) [eshanley@slsaustin.com](mailto:eshanley@slsaustin.com)  
[dprice@slsaustin.com](mailto:dprice@slsaustin.com) [sgatlin@slsaustin.com](mailto:sgatlin@slsaustin.com) [ecopeland@slsaustin.com](mailto:ecopeland@slsaustin.com)  
[mheagerty@slsaustin.com](mailto:mheagerty@slsaustin.com) [dwalker@slsaustin.com](mailto:dwalker@slsaustin.com) [rgreenlaw@slsaustin.com](mailto:rgreenlaw@slsaustin.com)

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## December 2015 Workers' Compensation Law Update

### Is Opt Out Endangered? National Conference to Investigate Workers' Comp Opt Out, WorkersCompensation.com reports

In an article by EmploymentLawAcademy.com, WorkersCompensation.com reports that the National Conference of Insurance Legislators plans to investigate efforts by several of the country's largest employers to expand the number of states allowing employers to opt out of workers' compensation coverage. The investigation was prompted by media reports from ProPublica and NPR criticizing the opt-out plans in Texas and Oklahoma as providing fewer benefits, more restrictions, and less oversight. The National Conference's endorsement or disapproval of the opt-out plans will likely influence future legislation in many states.

### Check your Grade! PBO Recognizes High, Average, and Poor Provider Performers in Texas Comp

Grades are in. The PBO assessment evaluated the providers in four categories: (1) timely filing of DWC 69s, (2) completeness of DWC 73s, (3) documentation supporting return to work determinations recorded on DWC 73s, and (4) usage of MRIs. In each category, the DWC identified which of the health care providers evaluated were high performers, average performers, and poor performers. A complete list of the PBO Assessment results are available [here](#).

### Consistency is the Key for Employers to Avoid Retaliation Claims

The Texas Supreme Court recently held that an employer did not retaliate against a Claimant for filing a workers' compensation claim when the Claimant was terminated in accordance with the employer's uniformly applied leave policy following the expiration of the Family Medical Leave Act (FMLA) leave period. *Kingsaire, Inc. v. Melendez*, \_\_\_ S.W.3d \_\_\_, 2015 WL 7950716, \* 8 (Tex. 2015).

The Claimant sustained a compensable work injury on 07/02/09. Claimant was notified that he would be placed on unpaid FMLA leave effective 07/03/09, for up to twelve weeks and that he was required to provide status updates on his ability to return to work every two weeks. Claimant provided the work status updates as required by the employer. On 09/24/09, the employer notified Claimant that his FMLA leave expired, that he had not yet been released to return to work by his workers' comp doctors, and that his employment was terminated effective 09/25/09. In October

2009, Claimant sued the employer for wrongful termination in retaliation for his filing a workers' compensation claim. The jury entered a verdict in favor of Claimant.

The Court reviewed the evidence on a legal sufficiency standard and determined that the evidence showed Claimant was terminated in accordance with the employer's consistent and uniform enforcement of its leave policy. The Court held that no evidence supported the jury's verdict on the retaliatory discharge claim.

### **Death Benefit Rules 132.7 and 132.13 to be Revised: First Responder Survivor Benefits to Continue After Remarriage, Burial Benefits Increased**

The DWC is proposing revisions to Rules 132.7 and 132.13 to incorporate changes to death benefits codified in the recent legislative session. In accordance with House Bill 1094, the DWC proposes to add subsection (f) to Rule 132.7 to specify that an eligible spouse who remarries is eligible for death benefits for life if the employee was a first responder who died in the course and scope of employment or while providing services as a volunteer. The proposed revisions to Rule 132.13, as provided by Senate Bill 563, would increase to \$10,000 (from \$6,000) the amount of burial benefits due for a compensable injury that occurs on or after September 1, 2015. The public comment period closes on January 4, 2015, for these proposed rule revisions. The proposed rules may be reviewed [here](#).

### **Still More Bureaucracy DWC Proposes New Forms for Travel Reimbursement, Complaints.**

The DWC is proposing a revision to DWC Form-048, to incorporate the 2014 revisions to Rule 134.11(a), which allows injured workers to request travel reimbursement to attend DD exams, RMEs, or post-DD RMEs. The proposed revision also creates separate Spanish and English forms and includes a section for a plain language explanation for the approval/denial of the travel reimbursement request. The public comment period on the new form closes on December 28, 2015. A draft of the new form is available [here](#) for review.

The DWC also proposes a new form to report administrative violations to the DWC. In accordance with Rule 180.2(a), any person may submit a complaint to the DWC for alleged administrative violations, and TEX. LAB. CODE §402.023(c), directs the DWC to develop a standardized form for the filing of workers' compensation complaints. The proposed Workers' Compensation Complaints Form is the DWC's effort to meet these regulatory requirements. In its current draft, the proposed form may be inadequate because it fails to provide sufficient space for the complainant to identify his, her, or its relationship to the claim. Informal comments on the proposed complaint form are due on or before January 4, 2016. The proposed form is available for review [here](#).

### **Operation Spinal Cap: Fraudulent Claims, Kickbacks, and Bad Actors Star in \$600M Kickback Scheme in Southern California**

The Department of Justice charged five individuals, including two medical doctors and a chiropractor, for their participation and profit in a scheme which provided illegal kickbacks to

dozens of doctors, chiropractors, and other individuals in exchange for the referral of patients to Pacific Hospital in Long Beach, California.

From 2005 through 2013, the DOJ estimates that insurers were billed over \$580 million for spinal surgeries performed on more than 4,400 patients who were referred to the hospital. The participating doctors, chiropractors, and others referred patients in exchange for illegal payments which included up to \$15,000 for a lumbar fusion and \$10,000 for a cervical fusion. The hospital, its owner, and its executives made the payments using a combination of nefarious means, including making rental payments to the referring doctors for use of their offices (the hospital never used the offices), making \$100,000 per month “option payments” to the referring doctors for the right to purchase medical practices (a right that was never exercised), and paying the doctors to help the hospital collect on surgical bills (the doctors did not participate in the collection efforts).

The individuals recently charged in the scheme were: James L. Canedo, former CFO of the hospital; Philip Sobol, an orthopedic surgeon; Alan Ivar, a chiropractor; Paul Richard Ragnall, a health care marketer; and Mitchell Cohen, an orthopedic surgeon. In April 2014, the former CEO and owner of the hospital, Michael Drobot, pleaded guilty to participating in the scheme. Each of these individuals is reportedly cooperating with the DOJ in its investigation.

“Operation Spinal Cap” is ongoing. Stay tuned.