

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 rgreenlaw@slsaustin.com

March 2016 Workers' Compensation Law Update

“Opt-out plans a pathway to poverty”

In an interview with NPR, United States Department of Labor Secretary Thomas Perez called laws in Texas and Oklahoma that allow employers to opt out of providing traditional workers' compensation insurance a “pathway to poverty” for people who get injured on the job.

Mr. Perez said the Labor Department is commissioning a report about the opt-out trend and cutbacks in workers' comp benefits “to document the precise nature of this problem across the country.” It's also been reported that the Labor Department is currently investigating a large provider of opt-out plans in Texas to determine “whether the company's plans or models contain provisions that interfere with or prevent the exercise of ERISA rights by covered employees.”

On March 18th, Stanford law professor Alison Morantz released her study of the impact of non-subscription on 15 large companies that provided their Texas employees with a workers' compensation alternative. She found that the costs per worker fell by about 44 percent.

Ms. Morantz did not examine whether workers were better off with the alternative plans or whether the savings came at their expense. However, she concluded her “findings suggest an urgent need for policymakers to examine the economic and distributional effects of converting workers' compensation from a cornerstone of the social welfare state into an optional program that exists alongside privately-provided forms of occupational injury insurance.”

Last month, we reported that the Oklahoma Workers' Compensation Commission declared unconstitutional the recently enacted state law allowing employers to opt-out of the state-regulated workers' compensation system, *i.e.*, become non-subscribers, as they are referred to in Texas.

On a related note

The Division is providing a grace period through April 30, 2016 for employers without workers' compensation insurance coverage to report their non-coverage status to the Division without administrative penalty. Employers that do not have workers' compensation coverage must notify the Division annually of their non-subscriber status. Non-subscribers are also required to report on-the-job injuries. The failure to do so is likewise an administrative violation.

New CDC Guideline for Prescribing Opioids for Chronic Pain

On March 15, 2016, the Centers for Disease Control and Prevention published its guidelines for prescribing opioids for chronic pain to address the country's prescription drug abuse epidemic.

Among the recommendations are that opioids should not be first-line therapy for chronic pain. The recommendations states, "Nonpharmacologic therapy and nonopioid pharmacologic therapy are preferred for chronic pain. Clinicians should consider opioid therapy only if expected benefits for both pain and function are anticipated to outweigh risks to the patient."

The recommendations also recommend a low starting dosage: "When opioids are started, clinicians should prescribe the lowest effective dosage. Clinicians should use caution when prescribing opioids at any dosage, should carefully reassess evidence of individual benefits and risks when considering increasing dosage to =50 morphine milligram equivalents (MME)/day, and should avoid increasing dosage to =90 MME/day or carefully justify a decision to titrate dosage to =90 MME/day."

In a related development, the FDA has announced plans to add a boxed warning - its most serious type - to all immediate-release opioid painkillers. The label will specify that the drugs should only be used when other medications alternative therapies cannot control patients' pain.

The Division announces two new forms.

The revised **DWC Form-042** Claim for Workers' Compensation Death Benefits restructures the form to increase readability, highlight additional required documentation, and revise the title to Claim for Workers' Compensation Death Benefits.

The all-new **DWC Form-154** Workers' Compensation Complaint form provides a simple, standardized form for filing workers' compensation complaints. The Division notes that a person does not have to use the form and a complaint may also be submitted through its website, email, fax, written correspondence, or even in person.

The form defines a complaint as a "written allegation that a system participant has violated Title 5, Subtitle A, of the Texas Labor Code or Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) rules."

New death benefits rules for remarriage and first responders.

The Division adopted amendments to rule 132.7, regarding duration of death benefits for eligible spouses, and rule 132.13, regarding burial benefits, to conform the rules to 2015 legislative changes. The changes allow spouses of first responders to remarry and continue to receive death benefits. The changes do not apply to non-first responder spouses so they should not remarry if they want to continue to receive death benefits. The changes also increase the maximum burial benefit from \$6,000 to \$10,000 for injuries occurring on or after September 1, 2015.

“Sunlight is said to be the best of disinfectants.” - Justice Louis D. Brandeis.

The Division is seeking input on the development of a new Compound Medications Plan-Based Audit for physicians that prescribe compound drugs.

Many of you are probably familiar with the recent increase in the number of compound drugs being prescribed by some physicians. By far, the most common type of compound drug being prescribed is topical creams. These are usually pain creams or scar creams. These creams are often billed at astronomical sums, sometimes over \$10,000.00 for a one month supply. These creams often contain common, inexpensive ingredients and have no proven efficacy over FDA approved drugs.

CBS News ran a national story last year on insurance companies receiving outrageous billing for unwanted prescription creams. The story reported on a Dallas compounding pharmacy under federal investigation for its practices.

The *ODG Treatment Guidelines* do not recommend compound drugs as a first line therapy. Rather, commercially available, FDA-approved drugs should be given an adequate trial. The *ODG* also notes,

Recently, some pharmacies have been making and marketing stock compound drugs for the WC patient population. Among the FDA “Red Flags” for Enforcement Action on Compounded Drugs is: "Compounding drugs in anticipation of receiving prescriptions, except in very limited quantities in relation to amounts compounded after receiving valid prescriptions."

One has to wonder whether the physicians prescribing these compound creams have some motivation for doing so other than the patient’s best interests. These physicians should keep in mind that if they have a compensation arrangement with or financial interest in the pharmacy, they are required to disclose it in accordance with DWC Rule 180.24.

Commissioner Ryan Brannan announces the following organizational changes.

Marisa Lopez-Wagley has been named Deputy Commissioner of Enforcement. The Division’s enforcement section which was managed by TDI will once again be managed by the Division.

Nick Canaday has been hired as the Division’s General Counsel to replace Dirk Johnson. Mr. Canaday represented the Division while at the Office of the Attorney General and has many years of workers’ compensation experience in private practice. He also has the rare distinction of having successfully argued a case to the United States Supreme Court.

The Corpus Christi Court of Appeals holds arbitration agreements must not deter employees from pursuing arbitration in order to be enforceable.

Ronald Santorsola signed an employment agreement which required arbitration of claims alleging workers' compensation retaliation. He reported an injury two months after he was hired and filed a workers' compensation claim. A month later, he was terminated. He sued his former employer under section 451.001 of the Texas Labor Code, alleging that he was terminated for filing a workers' compensation claim. His employer sought to enforce the arbitration agreement. Mr. Santorsola argued the agreement was unconscionable and unenforceable because it contained an agreement requiring him to split the arbitrator's fee with his former employer that would deter him from arbitrating his claim because he would not be able to afford it. The trial court agreed with Mr. Santorsola ruling that the agreement was unconscionable and unenforceable. The Corpus Christi Court of Appeals held that the trial court did not abuse its discretion in so ruling because the fee-splitting agreement contained no cap on the amount the employee would be required to pay and no provision allowing the arbitrator to modify the terms of payment.

AOF Services, LLC, v. Santorsola, No. 13–14–00641–CV, 2016 WL 1165829 (Tex. App.--Corpus Christi Mar. 24, 2016, no pet. h.).

A trial court abused its discretion by denying Texas Mutual's motion to dismiss bad faith claims brought against it by workers' compensation beneficiaries.

The widow and son of a deceased employee receiving workers' compensation death benefits from Texas Mutual recovered a settlement from a third-party. Texas Mutual asserted its statutory subrogation rights and suspended benefits based on its future credit. The widow and son brought bad faith claims against Texas Mutual. Texas Mutual filed a motion to dismiss on the grounds that the plaintiffs' claims fall within the exclusive jurisdiction of the Division of Workers' Compensation. The trial court denied Texas Mutual's motion to dismiss. Texas Mutual filed a petition for writ of mandamus against the trial court judge which the El Paso Court of Appeals conditionally granted. Citing the Texas Supreme Court cases of *Ruttiger, Morris*, and most recently, *In re Crawford*, the court of appeals stated that the Division has exclusive jurisdiction over any cause of action or claim which arises from the investigation, handling, or settlement of a workers' compensation claim. The court noted that in deciding whether a cause of action falls within the exclusive jurisdiction of the Division, it must look at the substance of the claim rather than the label assigned to it by the plaintiffs. Here, plaintiffs' claims, no matter how artfully pled, arose from Texas Mutual's assertion of its subrogation interest and suspension of benefits, issues over which the Division has exclusive jurisdiction.

In re Texas Mutual Insurance Co., No. 08–15–00343–CV, 2016 WL 921317 (Tex. App.--El Paso Mar. 9, 2016, no pet. h.).

A lesson in workers' compensation from *Spongebob Squarepants*.

"The Splinter" from season six, which aired on June 2, 2008:

SpongeBob: What's worker's compensation?

Mr. Krabs: You know, when you get paid for sitting at home.

Squidward: [his eyes shoot open. He gets up] You mean I can get paid while I'm at home?

Mr. Krabs: Yeah, what do ya think "compersation" stands for?

Squidward: [gets the cash register out of the boat counter and slowly smashes it onto his head two times] Ow!

Mr. Krabs: Uh, Squidward?

Squidward: [smashes the cash register on his head another two times then throws the cash register up into the air and gets crushed by it] Can I get my "compersation" now?

Mr. Krabs: No. Sorry, Squidward, your shift ended over two minutes ago.

Did Squidward sustain a compensable injury? The best answer wins this month's gift card.