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July 2016 Workers' Compensation Law Update

I Know What You Did Last Summit

From Robert Wilson, President & CEO of WorkersCompensation.com, comes word that the final report has been released from the 2016 Workers' Compensation Summit held in Dallas on May 11 & 12, 2016. SLS partner Jane Stone was among those in attendance as a representative of the National Workers' Compensation Defense Network. With the goals of increased efficiency, lower costs, and greater fairness to workers and employers, the report identifies and prioritizes the "imperative issues" affecting workers' compensation systems nationally. Three problem areas emerged as most important following a survey of participants. First, benefit adequacy. Some states currently face constitutional challenges to their work comp systems after significantly reducing benefits. Next, regulatory complexity, which raises overall costs via increased litigation. Finally, delayed treatment while a claim that will eventually be compensable is investigated and appealed.

On the problem of delayed treatment, Paul Sighinolfi, Chairman of the Maine Workers' Compensation Board, apprised attendees of Maine's legislative solution, which mandates that treatment for those covered by general health or disability policies cannot be denied merely because a workers' compensation claim has been filed. Rather than delay treatment while investigating the claim and determining whether it is a compensable work comp injury, which might only serve to worsen the underlying condition and add to medical costs, treatment proceeds first under one's own health insurance or disability policy, and liability & reimbursement issues are addressed later in subrogation.

Hey, Speaking of Subrogation...

A contractor hired a sub-contractor to perform work at one of its refineries. The contract between them established that the sub-contractor would acquire insurance coverage and a waiver of the insurer's subrogation rights. It also contained an indemnity provision in which each agreed to indemnify the other for injuries arising out of its own negligence.

The sub-contractor did obtain work comp coverage before two of its employees were severely injured on the job. They received work comp benefits and then filed suit, eventually settling with the contractor. There was no dispute that it was the negligence of the contractor that led to the accident.

Because the Carrier would not acknowledge waiver of subrogation, it was named as a third party defendant. The Carrier argued that the waiver of subrogation applied only to liabilities assumed by the subcontractor, not the contractor.

The contractor sought to convince the court that only the waiver provision, and not the underlying contract, controlled. However, since the insurance policy references the contract, the court determined that the contract must also be considered.

Because the subcontractor was required to indemnify the contractor only for the *sub-contractor's* own negligence, it had not assumed liability for the *contractor's* negligence, and was therefore not contractually obligated to induce the Carrier to waive subrogation against the contractor. The court concluded that the Carrier had not waived its subrogation rights. *The Insurance Company of the State of Pennsylvania v. Kevin Roberts and Exxon Mobil Corporation,* – S.W.3d –, No. 01-15-00453-CV, 2016 (Tex. App.– Houston July 14, 2016).

Hey, Still Speaking of Subrogation...

The injured worker, an employee of a contractor, was fatally electrocuted while using an electric transfer pump on an oil rig owned by the operator. Workers' compensation coverage was supplied through the contractor, and death benefits were paid to the decedent's family, who thereafter brought a wrongful death suit. The Carrier intervened to establish its subrogation rights.

The contract between the operator and the contractor established that the operator would obtain waivers of its insurers' subrogation rights against the operator. The contract also included two indemnity provisions. In one, the contractor agreed to release and indemnify the operator from liability for claims arising out of the death of a contractor employee. However, in another, the contractor would not be liable for any loss or damage resulting from the use of materials furnished by the operator, and the operator would indemnify the contractor from any such liability.

The Carrier argued that the defective electric transfer pump was rightfully classified as a "material" furnished by the operator and therefore permitted subrogation against the operator under the second indemnity provision. Plaintiffs argued that the pump was not a "material," but rather "equipment," which would not activate the second indemnity provision, and no subrogation rights would follow.

The court agreed with the Carrier that, although undefined in the contract, the term "materials" is used throughout the contract interchangeably with other terms such as "equipment." Without a distinction between the two terms, the court determined the contractor had not assumed liability for damage caused by the transfer pump provided by the operator, and was therefore not contractually obligated to cause its insurer to waive its subrogation rights. *New Hampshire Insurance Company v. Mora,* – S.W.3d –, No. 01-15-00406-CV, 2016 (Tex. App.– Houston July 26, 2016).

Opioid Factoid

According to the Centers for Disease Control and the U.S. National Institute on Drug Abuse, in 2014 two and a half million Americans were dependent on or abusing opioids, including routinely prescribed painkillers such as Vicodin, OxyContin, Percocet, and Fentanyl. Such dependencies often lead to full-blown heroin addiction; 45% of heroin users in the U.S. in 2014 were also addicted to prescription opioid painkillers. In order to combat escalating addiction, scientists at Scripps Research Institute in La Jolla, California have developed an anti-heroin vaccine that prompts the immune system to attack heroin. The vaccine stimulates production of antibodies that bind to the drugs and prevent their entry into the brain, thus denying the addict the exponential release of dopamine, a chemical controlling the body's pleasure response, produced by opioid use. The vaccine targets heroin metabolites specifically so that patients in need of pain relief from other opiates will not become immune to it in all forms. Trials have thus far successfully prevented formerly heroin-addicted rats from experiencing a high from the drug while also decreasing their drug-seeking behavior. This breakthrough could have a significant positive impact on injured workers who develop drug dependencies from pain prescriptions. To read the full article by Susan Gaidos published in *Science News*, please follow this link: https://www.sciencenews.org/article/vaccines-could-counter-addictive-opioids

DWC News

On July 5, 2016, the DWC's Deputy Commissioner for Hearings and Appeals Panel Director issued a joint memorandum reminding system participants of the prohibition against improper contact with Division staff or management for the purpose of influencing the outcome of a decision while the case is still pending. Citing 28 Texas Administrative Code 142.3(a), the memo reminds parties that direct or indirect communications with the Hearing Officer on any facts, issues, law, or rules pertaining to an active dispute are verboten until the decision has been issued and appeals remedies have been exhausted. Although the memo omits specific instances of such infractions, the need for the reminder presumably arose by way of some attorneys seeking to alter Hearing Officer decisions through contact with DWC managers or the members of the Appeals Panel instead of through the appeals process itself.

More DWC News

Beginning in June, Commissioner Brannan authorized contested case hearings to be held in the Metro Center Building, a.k.a., "Austin Central," on a temporary basis. Despite its population, Austin has but one official Hearing Officer. The current field office lacks the space needed to accommodate a second hearing room and, by extension, a second Hearing Officer. Due to a recent surge in the number of claims, hearings were often unavoidably set in excess of the statutorily-mandated 60-day deadline for want of space on the docket. Hence, the Division decided to schedule CCH's with attorney-represented claimants in the Tippy Foster Room in the Metro Center Building on Mondays and ombudsman-assisted claimants on Wednesdays. The Division's two traveling

Hearing Officers, both of whom are based in Metro, will preside. This secondary docket is set to last only through September, but if the number of Austin-based workers' comp claims continues unabated, the temporary solution may become permanent.

Even More DWC News

San Antonio Hearing Officer David Northup has announced his retirement from the Division of Workers' Compensation. A decades-long employee of the Division, Judge Northup served as a Judge Advocate General in the United States Army and as a member of the Division's Appeals Panel before becoming a Hearing Officer. His retirement is effective August 13, 2016. We wish him only the best in his future endeavors.

A Lot of Pain

Following a recent decision that a provision authorizing deferral of permanent partial disability payments for workers who eventually return to work is unconstitutional, Oklahoma's Administrative Workers' Compensation Act, which resulted from the state's extensive overhaul of it workers' comp system in 2013, has met with further rebuke from the Oklahoma Supreme Court.

The Act's definition of "course and scope of employment" includes "activities conducted on the premises of an employer," but not "any injury occurring in a parking lot or other common area adjacent to an employer's place of business..." 85A O.S. Supp. 2013 § 2(13). In this instance, the claimant slipped on ice in a parking lot where she was required by her employer to park. The lot was owned by the employer, and thus was on the employer's premises, but was adjacent to the employer's place of business. An administrative law judge determined the claimant had not been in the course and scope of her employment at the time she fell, and the Workers' Compensation Commission affirmed the decision.

On June 28, 2016, the Oklahoma Supreme Court reversed, stating that, "[a] parking lot owned or controlled by the employer alone clearly constitutes the 'premises' of such employer, and is part of the 'employer's place of business." *Legarde-Bober v. Oklahoma State University*, 2016 OK 78, __ P.3d __.

Physical Properties

A job applicant received a conditional offer of employment subject to the results of a medical review. His body mass index exceeded company regulations, which rendered him unqualified for the job due to safety risks related to his obesity. The job offer was revoked, and the applicant filed suit against his would-be employer alleging discrimination under the Americans with Disabilities Act. The Court of Appeals distinguished between a physical impairment and a mere physical characteristic and held that in order to have standing to bring the suit under the ADA the plaintiff

was required to show that his weight was the product of a physiological disorder. Evidence established no physiological disorder caused the plaintiff's obesity, and the court determined that the ADA did not prohibit discrimination based on a mere physical characteristic that may later lead to a physical impairment. In effect, the employer had the right to make hiring decisions based on physical characteristics that may eventually lead to physical impairments. *Morriss v. BNSF Railway Company,* 817 *F*.3d 1104 (8th Cir. 2016).

Docs' Balks

On July 27, 2016, the DWC released its updated list of health care providers in the workers' comp system whose practice has been restricted, who have been removed from the designated doctor list, or who incurred some other form of disciplinary action. The list of disciplinary actions and enforcement orders signifies what appears to be a welcome trend in combating unnecessary functional capacity evaluations, which have emerged recently as something of a ruse for extending disability and MMI dates. Among the noteworthy admonished:

Ray Altamirano, M.D., of San Antonio was fined $1,000.00 and removed from the Texas workers' compensation system as a health care provider for two years for providing improper, unreasonable, or unnecessary medical care, for failing to keep adequate medical records, and for failing to document aberrant drug test results.

Tuan Anh Trinh, D.O., of Dallas was fined $4,800.00 for improperly ordering a functional capacity evaluation that was not reasonable or medically necessary.

Scott Neuberger, D.C., of Houston was fined $5,600.00 for failing to document or incorporate results of a functional capacity evaluation in medical records and for failing to document any reasonable medical necessity requiring said FCE.

James Galbraith, M.D., of Dallas was fined $4,800.00 for improperly ordering functional capacity evaluations that were not reasonable or necessary.

Stephen Esses, M.D., of Houston, was fined $35,000.00 for failure to maintain efficient utilization of health care and ordering tests that were improper, unreasonable, or unnecessary.

In Passing

Founder, president, and CEO of WorkCompCentral, David DePaolo, passed away on July 17, 2016 following a motorcycle crash in the Santa Monica Mountains in California. DePaolo earned his B.A. in English in 1981from San Diego State University and his J.D. from Pepperdine University School of Law in 1984, then obtained his M.B.A. from California Lutheran University in 1997. Before launching WorkCompCentral in 1999, DePaolo practiced as a workers' comp defense attorney. He was 56 years old.