THE LEGAL BUZZ

WCF INSURANCE

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The WCF Legal Department is delighted to introduce the first edition of its legal newsletter: The Legal Buzz. We intend to release a new issue at the end of each quarter. Workers' compensation and other relevant areas of law are constantly changing. Every year, the Commission and our state's appellate courts review many cases and our legislature considers and passes new statutes. These cases and statutes effect the environment in which WCF operates. By being informed of these changes, our hope is that WCF can adapt to even slight changes to continue to provide excellent service to our policyholders and injured workers.

RECENT CASELAW

Injured Workers Association of Utah v. State

UTAH SUPREME COURT
May 18, 2016

The Utah Supreme Court decided that because the state constitution grants the Utah Supreme Court with authority to govern the practice of law, it was improper for the legislature to pass § 34A-1-309, which delegated the authority to regulate attorney's fees to the Labor Commission. This meant that the attorney's fees rules enacted by the Commission, Utah Administrative Code R602-2-4(C)(3), were also improper. The Court therefore struck down the legislature's statute and the Commission's rule as being unconstitutional. This eliminated the familiar sliding-scale fee schedule for disability compensation, add-on attorney's fees for medical expenses, and overall cap on the maximum amount of attorney's fees. So how will the fees of attorneys representing injured workers be determined in the absence of a fee schedule? The Court left it up to injured workers and their attorneys to negotiate whatever arrangement they find to be fair.

IMPACT ON WCF - This decision effects many aspects of how we handle claims at WCF. For example, it has done away with the add-on attorney's fees that WCF was required to pay attorneys when WCF was ordered to pay for medical expenses, although some claimant attorneys believe the add-on fee is not effected by the court's decision. It also eliminates the cap on attorney's fees that limited the total amount an attorney could receive for representing an injured worker. It is difficult to predict what other effects the decision will have, but it will probably require the Claims and Legal departments to be flexible until the new questions this case created are answered. The Labor Commission has so far reacted by proposing an emergency rule intended to annul Rule 602-2-4, Utah's rule that provides for attorney's fees.

QUESTIONS about one of these cases or one of these new statutes? One of WCF's attorneys would be happy to help you:

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Peterson v. Labor Commission

UTAH COURT OF APPEALS
January 22, 2016

A worker was injured when she reached her right arm to remove a tray of cakes from a rack located directly behind her work table. The tray held four cakes, weighing over sixteen pounds, and was positioned about shoulder-height on the rack. The worker twisted around and lifted the tray by placing her right palm underneath it while stabilizing it with her left hand. As she turned back to place the tray on the table, she suffered a torn rotator cuff in her right shoulder that caused her to drop the tray of cakes. Because a medical panel determined that Petitioner had a preexisting condition, the accident was evaluated under *Allen's* heightened legal causation standard. The court of appeals considered whether the Commission erroneously applied the *Allen* test when it determined that the worker's exertion was not unusual or extraordinary and that therefore the worker had not shown legal causation under *Allen*. While the court acknowledged that the weight, standing alone, was not enough to satisfy *Allen*, the court decided that the awkward manner in which it was lifted raised the accident to a level that met the heightened legal causation requirement.

IMPACT ON WCF - This case highlights the importance of collecting as much relevant detail surrounding an accident as possible when investigating a claim. It is easy to concentrate on just the weight alone, but if an object is being sustained by one arm, all of a sudden the line between unusual and extraordinary is not at 45-50 lbs, but is at 22-25 lbs. From there it does not take much positional awkwardness to push the accident farther and farther into the realm of unusual and extraordinary. Because courts look at the totality of the circumstances, we must collect all available information about the claimed accident and the totality of the circumstances.

Valencia v. Labor Commission

COURT OF APPEALS OF UTAH
February 26, 2015

An injured worker filed an application for hearing related to her partial loss of hearing. The worker claimed that the machinery in her place of employment produced noise (as high as 101 decibels) which was higher than the levels deemed harmful by the Workers' Compensation Act. The ALJ denied benefits because the employer showed that the worker consistently wore hearing protection while she worked, which reduced the noise reaching her ears to levels below that which was deemed harmful by the Workers' Compensation Act. The worker appealed to the court of appeals, claiming that she was still "exposed" to the noise, regardless of how much her hearing protection guarded against the noise. The Court of Appeals held that a person's exposure to harmful industrial noise takes into account the use of hearing protection, and that the worker was only exposed to the noise which actually reached her ears.

IMPACT ON WCF - This case emphasizes the importance of workplace safety and the need to collect information during the investigation phase of a claim regarding what safety equipment may have been used to lessen the effect of an accident or an injurious exposure.

Washington County School District v. Labor Commission

UTAH SUPREME COURT
August 25, 2016

A worker who injured his lower back in a 2003 industrial accident filed an application for hearing following a re-injury in 2007 caused by a child jumping on him at a local festival. The ALJ concluded that because the IME opined that the original accident was "a very minor contributing cause," there was no need for a medical panel since all of the doctors agreed that the industrial accident contributed (to one degree or other) to the re-injury. The Utah Supreme Court held that the Workers' Compensation Act's "arising out of" language does not mean that re-injuries after non-workplace accidents are compensable even when the original industrial accident only had a minor contribution to the re-injury. The court decided an employee must establish that the industrial accident was a significant contributing cause of the subsequent non-workplace injury in order to recover workers' compensation benefits for the subsequent injury.

IMPACT ON WCF - With this standard now clarified, we now have a very specific question of ourselves and our IMEs when there is claim involving a subsequent non-workplace re-injury: something along the lines of "Is the industrial injury a *significant contributing cause* of Petitioner's current medical condition?" Because this is the question an ALJ should send to the medical panel in these types of cases, it will be more persuasive if the panel has the IME's answer and explanation to the same question.

Earnest Health, Inc. v. Labor Commission

COURT OF APPEALS OF UTAH
March 10, 2016

An injured worker filed for permanent total disability benefits. After an evidentiary hearing, the judge made a preliminary determination that the worker was permanently and totally disabled as a result of her industrial accident. About four months after the hearing, the employer asked the Commission to reopen the evidentiary record because it had conducted surveillance of the worker that the employer claimed established that the worker's testimony at the hearing regarding her limitations were untruthful. The court of appeals decided that the Commission did not exceed the bounds of its discretion when it refused to allow the video to be received as evidence. The court said that the employer did not provide a sufficient explanation of why it could not have obtained similar evidence prior to the hearing, and it did not demonstrate even an attempt to do so.

IMPACT ON WCF - After the date of a hearing has come and gone, it is very difficult to have new evidence received and considered by the ALJ. It usually requires the evidence to have been unobtainable before the hearing and requires the party trying to admit the new evidence to have done everything in their power to obtain it sooner. This decision reminds us that we must thoroughly prepare before the hearing to gather all the evidence needed to prosecute our defense.

Right Way Trucking, LLC v. Labor Commission

COURT OF APPEALS OF UTAH
August 20, 2015

A trucker returned home after a multi-day assignment that took him through several states. During the trip he made several stops to deliver heavy bathroom fixtures and was exposed to the outside heat and the even more intense heat of his trailer. On his drive home, he became ill and his wife took him to the hospital where he was diagnosed with acute sepsis with shock and admitted for a month. The worker's doctor attributed his condition to the dehydration he had experienced while working. The IME, a doctor of infectious disease, opined that the illness was caused by a streptococcal infection which was not caused by his work, although his work activities may have made him more susceptible to the infection. The parties agreed to waive the hearing and to send the conflict directly to a medical panel with stipulated facts. The ALJ sent the stipulated facts to the medical panel with instructions to follow those facts. The panel's report included details from their interview with the worker that differed from the stipulated facts. The panel also interviewed and obtained additional information from the worker's wife. The employer objected to the report, claiming that the panel did not follow the judge's orders when it omitted facts from the stipulation and added facts from other sources (the worker's wife) without explaining in its report how those omitted and added facts affected their analysis.

The issue eventually went before the court of appeals. The court decided that the Commission was within its discretion when it allowed the panel to conduct their own investigation, when it admitted the medical panel report despite its deviation from the stipulated facts, and when it refused to hold a hearing to address an opinion that the employer's IME provided in rebuttal to the medical panel's report.

IMPACT ON WCF - This case is one of six cases appealed since 2013 (e.g. Danny's Drywall v. Labor Comm'n, Scott v. Labor Comm'n, etc.) where a medical panel's methodology and opinions were challenged, and where the court of appeals decided not disturb the Commission's dependence on the panels' reports. These cases limit WCF's ability to control what information the panel has access to when forming its opinion. In *Right Way Trucking*, the employer was able to stipulate to very specific facts, yet the Commission allowed the panel to collect information in addition, and in contrast, to those stipulated facts. This case highlights just how unpredictable the outcome of a medical panel can be.

SUMMARY OF RELEVANT STATUTES

Controlled Substance Reporting Bills

There were a series of bills passed during the 2016 legislative session that revamped the reporting requirements for the Controlled Substances Database. The following five bills amended various sections of the Utah Health Code, the Utah Controlled Substances Act, and the Controlled Substances Database Act. The amendments are as follows:

HB 114 – This bill requires hospitals to send a written report to the Division of Occupational and Professional Licensing (DOPL) with information regarding any poisoning or overdose involving a controlled substance. HB 114 also requires courts to report violations of the Controlled Substances Act and to enter information into the database regarding persons convicted of driving under the influence of a prescribed controlled substance.

HB 149 – This bill requires the medical examiner to send a written report to DOPL regarding any death that resulted from poisoning or overdose involving a prescribed controlled substance. The bill then requires DOPL to report the findings of an overdose death to the prescribing physician.

HB 150 – This bill allows a person who is prescribed a controlled substance to designate a third party who will be notified when a controlled substance prescription is dispensed to that person.

HB 239 – This bill requires DOPL to make opioid prescription information in the Controlled Substances Database available to an opioid prescriber and pharmacist via their electronic data system.

HB 375 – This bill requires prescribers and dispensers of opioid medications to consult the Controlled Substances Database to determine whether a patient may be abusing opioids before prescribing or dispensing the drugs.

IMPACT ON WCF - The information available in the Controlled Substances Database will provide a more accurate picture of an individual's opioid drug use and puts safeguards in place to prevent abuse. If there are suspected issues regarding a claimant's opioid drug use we can get the information regarding their drug use contained in the Controlled Substance Database through WCF's medical director or IME physicians.

Franchisor/Franchisee Co-Employer Definition

HB 116 – Amends Utah Code Ann. §34A-2-103 – Definition of Employer – This bill outlines when a franchisee is considered a co-employer with the franchisor for purposes of workers compensation insurance. The amendment states a franchisor should not be considered an employer unless it "exercises the type or degree of control over the franchisee" that is not typically exercised by a franchisor.

IMPACT ON WCF - When an injured worker is employed by a franchise, WCF will need to investigate the franchisor/franchisee relationship to determine the level of control the franchisor had over the franchisee and/or the injured worker. If the degree of control is adequate and differs from the control exercised by a typical franchisor, then it may be considered a co-employer for workers compensation coverage purposes.

"Reasonable" Limitation on Basic Work Activities – PTD Statute

SB 146 – Amends Utah Code Ann. §34A-2-413(1)(c)(ii) – This bill modified the language regarding an employee's burden to establish permanent total disability benefits. It now requires the employee to demonstrate he/she has an impairment that "reasonably" limits the employee's ability to do basic work activities. The word "reasonably" did not exist in the previous statute.

This amendment was passed in response to two recent court of appeals decisions that are currently pending before the Utah Supreme Court – *Quast v. Labor Commission* and *Oliver v. Labor Commission*. In both cases, the court of appeals refused to apply the word "reasonable" to determine whether an injured worker's impairment limits the ability to perform basic work activities because the previous iteration of the statute did not include that term. The real world impact of those decisions is any limitation caused by a permanent impairment on the ability to perform basic work activities, no matter how minute, would meet the employee's burden. The Supreme Court likely will issue a decision on those two cases sometime later this year.

IMPACT ON WCF - The amendment clarifies the legislature's intent that a limitation on basic work activities must be reasonable. The real question moving forward is if the amendment to include the word "reasonably" should have prospective or retroactive effect. An argument could be made that the legislature was merely clarifying its original intent and it should be applied retroactively to all PTD claims, no matter when the injury occurred. However, that is an issue that will need to be sorted out through additional litigation. In the meantime, WCF must assess whether to assert the retroactive argument on a case by case basis until there is some further clarification from the courts.

Workers Compensation Coverage for Volunteers

SB 76 - Enacts Utah Code Ann. §34A-2-104.5. This bill allows a nongovernmental entity to elect to provide workers compensation coverage for volunteers who provide volunteer service to the entity. If coverage is elected, the average weekly wage for volunteers is assumed to be the state average weekly wage on the date of injury. The premium charged for volunteers is based on the Utah minimum wage and the actual service hours the volunteer provides to the entity.

IMPACT ON WCF - If a workers compensation claim is made by a volunteer of a nongovernmental entity, WCF will need to investigate if the entity elected to cover the volunteer on the date of injury and if all appropriate steps were made to procure coverage.

Nurse Practitioner Opioid Prescriptions

SB 58 - This bill also amends various sections of the Utah Health Code, the Controlled Substance Database Act and the Controlled Substances Act. It allows an advanced practice registered nurse to prescribe a Schedule II controlled substance under certain circumstances. The nurse practitioner must meet a minimum threshold of experience, must consult the Controlled Substances Database Act, must follow workers compensation chronic pain guidelines, and is prohibited from establishing an independent pain clinic.

IMPACT ON WCF - This bill creates another avenue through which an injured worker could receive opioid pain medication.

Medical Marijuana Bills

There were two medical marijuana bills introduced in the 2016 legislative session that failed, SB 73 and SB 89. The bills proposed legalizing use of certain parts of the cannabis plant for medicinal purposes. Although these bills failed, the medical marijuana issue is very likely to come up again in the future. If medicinal marijuana is legalized, it could have significant impact on WCF because medicinal marijuana would almost certainly be prescribed to injured workers in Utah.

Reimbursement of Hospital Expenses

SB 216 – Amends Utah Code Ann. §34A-2-407 and §34A-3-108 – Regulation of Healthcare Providers – This bill requires the workers compensation advisory council to study how hospital costs may be reduced in the workers compensation context and report the results by November 30, 2017. The bill also prohibits hospitals from "balance billing" an injured worker. Balance billing means charging the injured worker the difference between what the workers compensation insurance carrier pays to the provider for covered services and what the hospital charges for the services.

Finally, the bill provides that if a workers compensation carrier has not entered into a contract with a hospital, it is only required to reimburse the hospital for covered medical services at 85% of the billed hospital fees from May 10, 2016 to July 1, 2018.

IMPACT ON WCF –The main impact is if WCF does not have a contract with a hospital for covered services, it will only be required to pay 85% of the billed amount from May 10, 2016 to July 1, 2018. The main reason for this temporary provision is to give the advisory council and legislature time to analyze the hospital cost study and potentially implement further statutory changes based on the results.