

Calfee Update

CALFEE

A Bulletin Prepared by Calfee, Halter & Griswold LLP

Workers' Compensation - June 18, 2009

What's New in Ohio

- > [Ohio BWC rate reform](#)
- > [Ohio's High Court to decide if the state's current employer intentional tort statute is "substantially certain" to pass constitutional muster](#)
- > [Ohio public employees willing to bend but not break](#)
- > [New BWC deductible program getting a lot of attention](#)
- > [Changes at the Industrial Commission of Ohio](#)

Recent Court Decisions of Note

- > [Effective date of employer consent to voluntary dismissal](#)
- > [Termination/preemption of temporary total disability benefits](#)
- > [Injured Workers' Rights to Compensation](#)
- > [Average weekly wage and the special circumstances provision](#)
- > [Subrogation](#)
- > [Traveling Employee Doctrine Goes to the Gym](#)

Ohio BWC rate reform

In response to public debate and the pending class action lawsuit challenging Ohio's group-rating system, more change has occurred in the Spring of 2009 with respect to workers' compensation ratings for Ohio employers than has occurred in the past two decades. With a goal of achieving greater rate equity between group/non-group rated employers, the following are the most notable changes put into effect:

- > Base rates reduced by an average of 25% across the board
- > Average expected loss rates reduced
- > Introduction of a Group Rating adjustment factor, which is designed to increase experience modifier rates by 31%, effectively diluting the savings on premiums for group rated employers vs. non-group rated employers. This change eliminates lower-tier groups with discount savings of around 30% or below.
- > Experience Modifier Rate Capped at 100%. This means that no employer that previously had been group-rated will experience an increase to more than 100%--even if it should have a penalty rate (greater than 100%).
- > BWC Deductible Program introduced for all employers--group rated and non-group rated alike. Allows an employer to choose a deductible between \$500 and \$10,000, but no more than 25% of the previous year's premium. All claims costs, including the deductible, are to be included in the

employer's experience. Excludes participation in \$15K medical only or wage continuation programs.

- > Effective July 1, 2009, the Drug Free Workplace and Safety Council Programs are only available to non-group rated employers.

Ohio's high court to decide if the state's current employer intentional tort statute is "substantially certain" to pass constitutional muster or if it's strike three for the legislature

Ohio's highest court has recently heard arguments on a trio of cases which should ultimately decide the constitutionality of the state's current law governing the alleged tortious conduct of an employer against its employees. The current statute governing intentional torts, Ohio Revised Code 2745.01, is the third attempt by state lawmakers to legislate the standard by which employers are subject to suit as a result of injuries sustained in the workplace.

"(A) In an action brought against an employer by an employee...for damages resulting for the intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortuous act with the intent to injure another with the belief that the injury was substantially certain to occur.

(B) As used in this section 'substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or a death."

All three cases being considered by the court involve injuries to workers and the ultimate definition of "substantial certainty." In *Kaminski v. Metal & Wire Prods. Co.*, 175 Ohio App. 3d. 227, the Plaintiff was a press operator at a manufacturing facility who was seriously injured when an 800 pound metal coil fell onto her legs and feet. The Ohio Seventh District Court of Appeals held that under R.C. 2745.01, the only way an employee could recover in tort from work place injuries was if the employer acted with the intent to cause injury. According to the Seventh District Court of Appeals, previous Ohio Supreme Court rulings had found such a type of action to be illusory in rendering previous legislation unconstitutional, (see *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St. 3d 298).

In *Klaus vs. United Equity, Inc.* 2008 WL 755298, Jonathon Klaus, a grain mill operator, lost a hand when a co-worker began operating a piece of equipment while Klaus was performing maintenance. Klaus sued United claiming that the company's failure to enforce safety measures created a "substantial certainty" of injury. The Third District Court of Appeals determined that the trial court's ruling of summary judgment in favor of the employer was inappropriate. The Court of Appeals found that, while the fact that no United employee may have been injured in the last twenty three years when performing this type of maintenance may suggest that an injury was not substantially certain to occur, the lack of prior incidents was not necessarily fatal to the Plaintiff's case. Moreover the court also found that United had a history of failing to follow safety protocols and had not provided the Plaintiff with safety training. The court stated that these facts, if believed, could convince a jury that an injury was substantially certain to occur.

Finally, in *Stetter v. R.J. Corman Derailment Services, Stetter v. R.J. Corman Derailment Servs., L.L.C.*, Certified Question of State Law, United States District Court, Northern District of Ohio, Western Division, No. 3:07 CV 866, the Plaintiff sustained multiple broken bones and other serious injuries while inflating a large tire truck. Stetter claimed that the company was grossly negligent in failing to provide safety training and install safety equipment.

Although the Ohio Supreme Court is expected to rule in the next several months, the following reported exchange between Justice Paul E. Pfeifer and an attorney for *R.J. Corman Derailment Services*, may provide some insight with respect to the Court's ultimate decision. The Corman attorney acknowledged that R.C. 2745.01 virtually blocks all employees from suing their employers for injury or sickness. Justice Pfeifer asked, "So you can expose people to toxic materials knowing that some of them are going to get

desperately sick and may die but unless 100 percent of them are going to die, no tort?" The attorney responded: "I think that under the statute that's the conclusion you have to reach." Pfeifer: "Well that's a fine piece of work, isn't it?" (As reported by James Nash of the *Columbus Dispatch* on February 19, 2009).

In the swirling winds of economic unrest Ohio public employees willing to bend but not break

In the wake of the current nationwide economic crisis, Ohio's state employees are being asked to tighten their belts. Union employees are being asked to make unprecedented concessions that would also be applied to the thousands of the state's non-union employees, including the governor himself. State employees are being asked to accept a 10-day furlough without pay, a move that is roughly equal to a pay cut of slightly less than 4%. Employees in prisons and other safety-service positions, however, who work around the clock and cannot be furloughed for 10 days without jeopardizing institutional security, would lose 10 paid holidays. If an employee works a holiday, he or she would get straight pay instead of the usual time-and-a-half.

Additionally, employee wages would be frozen for three years, and personal leave (4 days per year) and step pay increases will be frozen for two years. As far as health care benefits are concerned, employees won't be asked to pay more in premiums, but there would be "small increases" in co-pays for services and drugs. Part-time state employees would be added to the bargaining unit, pay union dues, and get only 4 hours of holiday pay. All cuts, however, would be restored in the third year of the contract, with employees receiving a 32-hour cash bonus and 32 additional hours of sick leave.

At the present time, though, there appears to be one large caveat in the negotiations between the union and the administration. If state negotiators don't work out the same concession with its other unions, the big union says the deal is off. While Governor Strickland's Administration has vowed that the concessions package agreed to by the union will apply to thousands of non-union employees, only time will tell whether the administration can successfully obtain the same concessions from the rest of the state's unionized employees.

New BWC deductible program getting a lot of attention

The BWC has implemented a new Deductible Program designed to help employers lower their premiums by offering an upfront premium discount in the form of a per claim deductible. The new plan is also designed to encourage employers to focus on workplace health and safety to reduce injuries and illness. Employers who effectively manage their workers' compensation claims and related costs will see a benefit. However, for those who are ineffective in managing claim costs, the deductible can exceed premium savings.

Here's how it works. When applying for this new program, the employer may choose a deductible level which they consider to be appropriate for their business. Deductible levels range from \$500 to \$10,000 per claim, but cannot exceed 25 percent of the employer's premium in a policy year. The employer is then responsible for claim costs up to the deductible level for any claim that occurs in the policy year of enrollment.

The BWC will pay claims costs in full. The employer will then reimburse the BWC for any claim costs up to the deductible level chosen by the employer. The employer will receive monthly billings for the claim costs for all claims that occur during the policy year of participation. The BWC will then continue to bill the employer until they have reached their selected deductible level.

Changes at the Industrial Commission of Ohio

Jodie M. Taylor Sits as New Employer-Member of the Ohio Industrial Commission

In June 2009, Jodie M. Taylor was selected to take the seat formerly held by William E. Thompson, as the employer-member of the three-membered Industrial Commission. Taylor, a graduate of the University of Akron School of Law, served under Patrick Gannon, a former member of the Industrial Commission. Taylor has devoted her legal practice to employer advocacy in workers' compensation matters, and leaves the Columbus, Ohio law firm of Scott, Scriven & Wahoff LLP to take her new position.

Redrawing Jurisdictional Lines / Office Closings

Effective June 29, 2009, the Industrial Commission of Ohio will be consolidating its Akron and Canton office locations. The Canton office will be relocated to the Akron office's current location. It is reported that the consolidation will save more than \$460,000 per year based on the reduced office lease expense and reduced payroll and security expenses.

The Zanesville and Bridgeport Industrial Commission offices are also rumored to be consolidating into a new office in Cambridge, Ohio.

Technology

The Commission introduced the "revamped" version of its Industrial Commission Online Network (ICON) at www.ohioic.com. The new website is touted as featuring "streamlined navigation" and a new "Quick Links" feature for easier use, improved accessibility, and the latest Industrial Commission news posted on its homepage. These changes appear to be largely cosmetic in nature.

RECENT COURT DECISIONS OF NOTE

Effective Date of Employer Consent to Voluntary Dismissal

Thornton v. Montville Plastics & Rubber, Inc., et al., (February 5, 2009), 121 Ohio St. 3d 124

Employer appealed from order of Bureau of Workers' Compensation (BWC) recognizing employee's claim for temporary total disability compensation. A Staff Hearing Officer of the Industrial Commission affirmed, and the Industrial Commission refused a further appeal. Employer appealed to the Court of Common Pleas. The Court of Common Pleas, Geauga County, No. 06 W 000219, endorsed employee's notice of voluntary dismissal without prejudice. The Court of Appeals, 2007 WL 1965432, dismissed the appeal as untimely. Employer appealed. The issue before the Supreme Court was to determine whether the provisions of 2006 Am. Sub. S. B. No. 7, which amended R. C. § 4123.512 in 2006, were retrospective or prospective. The Supreme Court held that the 2006 amendments to the workers' compensation statute addressing appeals to courts of common pleas from decisions of the Industrial Commission, including an amendment to one subsection which ends an employee's unilateral ability to voluntarily dismiss the complaint in an appeal brought by an employer, apply prospectively. Amendments to another subsection, which provide that compensation and medical benefits shall continue while the appeal is pending, apply retroactively, as stated in an uncodified provision of the bill amending the statute. R. C. § 4123.512(D, H).

Marrero v. Blaze Construction, et al., No. 91660 (8th Dist.Ct.App., Cuyahoga Cty., 03/05/09).

BACKGROUND: Senate Bill 7 had changed Ohio Law by preventing a Plaintiff-Claimant from voluntarily dismissing a complaint without prejudice subject to refiling within one year according to the Civil Rules without the Defendant-Employer's consent when the Employer had initiated the court appeal. The governor had signed the bill on March 28, 2006 and ordinarily it would have become effective on June 30, 2006. A petition had been filed to place a referendum on the ballot preventing certain provisions including this one from becoming law. On August 25, 2006 the Secretary of State determined the petitions did not contain enough valid signatures. This determination was upheld in court on October 11, 2006, the date most observers concluded was the effective date for the challenged provisions.

Marrero's date of injury was August 30, 2006. Blaze Construction filed its court appeal in July, 2007 and Marrero filed his Complaint on August 8, 2007. Blaze Construction subsequently filed its Answer. In January 2008 Marrero filed a notice of voluntary dismissal pursuant to Civil Rule 41(A)(1)(a). Blaze Construction moved to strike the dismissal but the motion was denied by the trial court. Blaze appealed to the Court of Appeals arguing that the date Marrero filed his claim in February, 2007 was *after* the October 11, 2006 effective date of the statute. *Thornton v. Montville Plastics & Rubber, Inc.*, Slip Opinion No. 2009-Ohio-360, held that the effective date of the statute was August 25, 2006, the date of the Secretary of State's determination. The Court of Appeals determined that Marrero's claim arose on August 30, 2006, the date of the alleged injury. Therefore Marrero could not voluntarily dismiss his complaint. Calfee represented Blaze Construction.

Termination/Preemption of Temporary Total Disability Benefits

State ex rel. Daimler Chrysler Corp. v. Industrial Commission, et al., (March 24, 2009), 121 Ohio St. 3d 341.

Employer brought mandamus action seeking an order compelling the Industrial Commission to vacate its order denying employer's motion to terminate claimant's temporary total disability (TTD) compensation and to enter an order granting the motion. Claimant/Appellee was receiving temporary total disability compensation. The medical evidence indicated that Claimant had not reached maximum medical improvement (MMI). However, Claimant's treating physician stated that Claimant could never return to her former position of employment. Employer claimed that this declaration justified termination of Claimant's temporary total disability compensation. The Court of Appeals, Franklin County, 2007 WL 2702890, denied the request for a writ of mandamus. Employer appealed. The Supreme Court held that:

- > An attending physician's declaration that claimant could never return to her former position of employment did not justify termination of claimant's TTD compensation when claimant's allowed conditions had not reached maximum medical improvement
- > Maximum medical improvement is the only standard by which temporary total disability compensation can be terminated on a basis of permanency.

State ex rel. Tracy v. Industrial Commission of Ohio; AutoZone, Inc., (April 2, 2009), 121 Ohio St. 3d 477.

Workers' compensation claimant filed mandamus complaint after Industrial Commission denied temporary total disability (TTD) compensation based on a conclusion that present disability following a non-industrial incident was a new injury unrelated to previous industrial injury. Claimant's industrial injury occurred on January 30, 2004 and her claim was allowed for left shoulder strain, C6-7 herniated nucleus pulposus; and C5-6 disc protrusion. In late 2005, she was declared to be at maximum medical improvement. On February 6, 2006, Claimant visited her treating physician with complaints of persistent and chronic neck pain after "reinjuring" her neck while repositioning her neck against the headrest of her car. Claimant had surgery and sought temporary total disability benefits. Prior to Claimant's exacerbation, she manifested no neurologic symptoms that would have required surgical intervention. The Court of Appeals, Franklin County, 2007-Ohio-5792, 2007 WL 3149102, granted Claimant's writ of mandamus. Employer appealed. The Supreme Court held that a one-time reference by attending physician to worker's re-injured neck did not permit the inference that present injury was a new, intervening injury. The severe worsening of a condition after a non-industrial incident did not necessarily make that incident a new injury.

State ex rel Pierron v. Indus. Comm. (Franklin County, October 15, 2008), Slip Opinion No. 2008-Ohio-5245.

The employee was given a light duty job after an industrial injury. When he was told that the light duty job was being eliminated he was given a choice between being laid off or retiring. He chose to retire. The Supreme Court held he was not eligible for temporary total disability compensation. The Industrial Commission determined that his inaction in the months and years after his separation from employment

showed an intent to leave the work force. While the employee did not initiate his departure from employment, there was no causal relationship between his industrial injury and his voluntary decision to no longer be actively employed. Once his separation from employment occurred, he had the choice to seek other employment or work no further. When he chose the latter, he could not credibly claim his lack of income was due to the industrial injury.

Injured Workers' Rights to Compensation

State ex rel. Jordan v. Indus. Comm. (December 3, 2008), 120 Ohio St.3d 412.

Claimant suffered a work-related injury in 1984. As the result of her injury, Claimant had been prescribed many different medications. She had always taken name-brand medication, which was paid in full by the Industrial Commission until the effective date of O.A.C. § 4123-6-21(I). This new administrative code section eliminated the provision allowing prescribing physicians to authorize BWC's payment of name-brand drugs which cost more than the "maximum allowable cost"-- a value corresponding to the cost of the generic equivalent to the drug, if one existed. Claimant argued that the new regulation was being applied retroactively, and was depriving her of a "vested right" of full payment for name-brand prescription medication. The Industrial Commission found that application of the new regulation was proper. Claimant filed for a writ of mandamus. The Tenth District Court of Appeals and the Supreme Court of Ohio found that O.R.C. § 4123.54, which authorizes compensation for occupational injuries, had never given claimants the right to dictate the terms of their treatment or the conditions of such payment. Therefore, the Claimant had no vested right to full payment for name-brand medication.

Average Weekly Wage (AWW) and the Special Circumstances Provision

State of Ohio ex rel. Fedex Ground Package System, Inc. v. Industrial Commission, et al., (April 2, 2009), 2009 WL 962267 (Ohio App. 10 Dist.)

Employer brought original action for writ of mandamus ordering Industrial Commission (IC) to vacate order setting claimant's average weekly wage (AWW) and full weekly wage (FWW). In December 2004, Claimant began working part-time for employer, FedEx Ground (FedEx) as a package handler. In April 2006, Claimant began concurrent employment for a different employer. In October 2006, Claimant sustained an injury in the course of his employment with FedEx. In calculating Claimant's AWW, FedEx only took into account Claimant's earnings at FedEx. The Court of appeals, Franklin County, held that:

- > Industrial Commission's conclusory finding of special circumstances warranting adjustment of claimant's AWW and FWW, based only on claimant's being employed at two part-time jobs (declaring part-time employment to be a special circumstance per se), was abuse of discretion
- > Inclusion of both of claimant's part-time employments in calculating AWW was contemplated within standard statutory formula for AWW.

Subrogation

Bureau of Workers' Compensation v. Williams, No. 08AP-657 (10th Dist.Ct.App., Franklin Cty., 12-18-08).

Motorist Mutual and an injured worker settled a case in which a workers' compensation claim also was pending from the same accident. The BWC filed a complaint asserting its statutory subrogation interest pursuant to RC. § 4123.931. Motorist asserted it was not liable because the injured worker had never made it aware of the statutory lien. The Court of Appeals upheld summary judgment for the BWC. The injured worker and Motorist were jointly and severally liable to BWC for its full subrogation interest because they had failed to put it on notice prior to the settlement.

Traveling Employee Doctrine Goes to the Gym

Griffith v. City of Miamisburg, No. 08AP-557 (10th Dist.Ct.App., Franklin Cty., 12-16-08).

A police officer was sent to a two week motor vehicle accident investigation training course at the Ohio Highway Patrol training academy in Columbus. The employer had approved the training, given him a car to use, and paid his normal salary. The employer strongly suggested that the officer stay at the academy by refusing to pay for his board and lodging anywhere else. While playing basketball in the academy's gym (which had been utilized earlier in the day for training activities), he stepped on a jacket from a discarded taser cartridge and was injured. The Court of Appeals overturned summary judgment for the employer. The Court of Appeals emphasized that the officer had remained on the premises of his training. In addition, the recreational activity did not constitute a personal errand under these circumstances.

For additional information and discussion on these topics, please get in touch with the following Workers' Compensation attorneys, or your regular Calfee contact:

William L.S. Ross
216.622.8221 **Direct**
wross@calfee.com

Donald E. Lampert
216.622.8467 **Direct**
dlampert@calfee.com

William B. McKinley
216.622.8550 **Direct**
wmckinley@calfee.com

Jennifer L. Whitt
216.622.8390 **Direct**
jwhitt@calfee.com

Calfee, Halter & Griswold LLP

1400 KeyBank Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
216.622.8200 Phone
216.241.0816 Fax

1100 Fifth Third Center
21 East State Street
Columbus, Ohio 43215-4243
614.621.1500 Phone
614.621.0010 Fax

If you would like to be removed from receiving future First Alerts, please email news@calfee.com indicating your preference. This alert is provided by Calfee, Halter & Griswold LLP for education and information purposes only. This e-mail is not intended to provide legal advice on specific subjects. The resolution of legal issues depends upon the specific facts of a particular situation and the laws involved. This email may be considered advertising under applicable laws.

To ensure delivery of First Alerts, please add newsfromcalfee@calfee.com to your list of approved senders.