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I S S U E 3 4

Published Second Quarter 2005

what's

[inside]

Workers' Compensation:

Senate Bill 7 Proposes Sweeping Changes For Workers' Compensation..... 1,2

A New Standard For Pre-Existing Injuries.....2

New Law Seeks To Stop "Double Dipping" From Workers' Compensation.3

Labor:

Neutrality Agreements and Card Checks3,5

Upcoming Seminars:4

Employment:

Hiring Teens This Summer....5, back

WORKERS' COMPENSATION: SENATE BILL 7 PROPOSES SWEEPING CHANGES FOR WORKERS' COMPENSATION

By Jennifer A. Bennett

Ohio Senate Bill 7, which was recently introduced in the Senate on January 24, 2005, proposes numerous workers' compensation reforms. While testifying before the Senate Insurance, Commerce, and Labor Committee on March 1, 2005, James Conrad, Administrator and CEO of the Bureau of Workers' Compensation, described the bill as encompassing "a balanced package of workers' compensation law changes designed to provide further stability, clarity and accountability within the system." He further stated, "the Administration's proposal as outlined in SB 7... if enacted in its current form, these statutes would conservatively save businesses nearly \$180 million annually without interrupting benefits for deserving injured workers."

If passed, the Bill would:

1. Eliminate the 40-week waiting period for the filing of permanent partial disability where the claimant has reached a level of maximum medical improvement. The Bill also would change the term "permanent partial disability" to read "permanent partial impairment."

2. Allow a district hearing office to terminate compensation for temporary total disability (TTD) as of a date *prior* to the hearing, if the hearing officer determines the claimant has reached maximum medical improvement (MMI). The Bill would thus require the hearing officer to declare any payment made after that date as an overpayment to be recovered.

Currently, the earliest an employer seeking to terminate TTD benefits based upon a finding of MMI is the date of the actual hearing. The proposed change would allow a district hearing officer to terminate TTD based upon the date of a physician's report completed prior to the hearing.

3. Preclude a claimant from dismissing, without the employer's consent, a court complaint appealing a decision of an Industrial Commission, if the employer is the party that filed the initial appeal. Presently, it is a common practice for claimants to dismiss the complaint and re-file it within one year from the date of the voluntary dismissal, where the complaint was filed in response to an employer's notice of appeal. This proposal would eliminate a claimant's ability to do so.

4. Reduce the number of weeks a claimant may receive nonworking wage loss benefits from 200 weeks to 26 weeks or, alternatively, to 52 weeks, if at any time, while the employee is receiving nonworking wage loss, the benefit period for unemployment compensation is in extension. (Under certain circumstances, the Director of Job and Family Services may extend the statewide

continued on page 2

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This publication is intended to inform clients and friends about labor and employment matters of current interest. The matters included were not given exhaustive treatments due to space limitations. This abridged information should not be construed as legal advice and is not a substitute for legal counsel. This publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

Senate Bill 7 Proposes Sweeping Changes continued from page 1

benefit period for regular unemployment compensation, if the state is experiencing excessive unemployment).

5. Modify the continuing jurisdiction of the Industrial Commission from the current six years in the absence of the payment of medical benefits, and ten years in the absence of payment of compensation, to a four-year limit in both of these cases.

6. Expand the definition of workers' compensation fraud to include altering workers' compensation certificates to show correct coverage; soliciting, offering, or receiving kick-backs for the referral of goods or services for which reimbursement may be made; providing false information needed to determine an employer's actual premium or assessment; and failing to secure or maintain workers' compensation coverage. The Bill would also

prohibit health care providers, managed care organizations (MCOs), and their owners from obtaining payments under the workers' compensation law to which they are not entitled. Monetary penalties and debarment for health care providers, MCOs and their owners are also included.

7. Require the Administrator, for self-insured (SI) employers, to adopt rules assessing a flat \$45.00 fine for failing to timely report paid compensation. Also, the Administrator, rather than the Self-Insuring Employers Evaluation Board, would be permitted to assess an amount against self-insuring employers who misrepresent the amount of paid compensation.

8. Increase the penalty for overdue premium payments.

9. Permit an employee receiving permanent total disability (PTD) benefits due to a traumatic brain injury to continue to receive PTD

benefits, regardless of subsequent employment.

As previously mentioned, this list only highlights some of the Bill's provisions. To date, the Senate Insurance, Commerce, and Labor Committee has held five hearings to discuss the Bill. Unfortunately, it is uncertain when the Bill will be scheduled for a vote before the full Senate, and what modifications will be made, if any. A similar companion Bill was also introduced in the House of Representatives on February 17, 2005. House Bill 72 is pending before the State Government Committee but no hearings have been held to discuss its provisions.

As further updates become available, we will keep you apprised. If you have any questions concerning the potential ramifications of the Bills' provisions, please feel free to contact Jennifer or any of the workers' compensation attorneys at RB&S.

WORKERS' COMPENSATION: A NEW STANDARD FOR PRE-EXISTING INJURIES

By Meredith L. Ullman

The Ohio Legislature has recently submitted House Bill 72/Senate Bill 7 proposing expansive changes throughout the Ohio Workers' Compensation arena. Of significant importance to employers is a portion of the bill which *appears* to expand the definition of "injury," but in actual effect will limit the scope of the definition. The new Bill has the potential to eliminate claims where an employee is suffering from a pre-existing condition that is merely aggravated by an industrial incident.

The Bill expands the definition of "injury" to include a condition or disease that pre-existed an injury, if that pre-existing condition is *substantially worsened* (or the disease process is *substantially accelerated*) by the injury, and is documented by diagnostic findings and test results. As the statute stands now, an "injury" is generically defined to include, "any injury . . . received in the course of and arising out of the injured employee's employment." The statute then contains a limiting clause stating that injuries or dis-

abilities caused by the natural deterioration of tissue, an organ, or part of the body is not considered an injury for purposes of a compensable workers' compensation claim.

This limiting clause has been interpreted differently by the Ohio courts, but has remained effectively meaningless since 1990 for pre-existing injuries that are made worse in any degree due to an injury occurring while at work. Prior to 1990, the courts held that in order to be recoverable, a claimant must provide evidence establishing that a pre-existing condition was substantially aggravated by a work-related injury. Unfortunately for employers, this case was overturned in 1990 by the Ohio Supreme Court when it ruled that if an injured worker can show a pre-existing condition was aggravated by a work-related incident, the aggravation need not be of any particular magnitude in order to entitle him to benefits.

For example, if an employer hired an employee suffering from degenerative arthritis in the knees after 1990, and the employee then suffered a minor fall, the chances for his recovery for aggravation of pre-existing

arthritis were very good. Under the existing standard, for all practical purposes, if the employee alleges complaints different from those prior to the incident, he can recover for an aggravation claim. Even with diagnostic tests confirming he was suffering from severe arthritis prior to the accident, if the employee alleged new and different symptoms, the balance was stacked in his favor to recover for an aggravation claim.

If these Bills are passed into law, employers will no longer be held responsible for the costs of employees who are suffering from clear, pre-existing conditions who suffered only minor aggravations. With the passage of these laws, the balance will return, and an employee will have to prove the pre-existing condition was substantially aggravated with objective diagnostic evidence, rather than with mere allegations and complaints.

Make sure to read all the other legislative updates our attorneys have prepared in this edition. We are always vigilant for changes that may affect your company.

WORKERS' COMPENSATION: NEW LAW SEEKS TO STOP "DOUBLE DIPPING" FROM WORKERS' COMPENSATION

By Meredith L. Ullman

Prior to 1999, the law in Ohio mandated that an employee could only recover for an intentional tort against his employer if the employee could prove by clear and convincing evidence that the employer deliberately committed all of the elements of an intentional tort.

That law, enacted in 1995, was soon deemed unconstitutional by the Ohio Supreme Court. In 1999, the Court held that the statute provided excessive immunity for employers from civil liability. The Court argued that in order for an employee to satisfy the requirements of the law as it was then worded, the employee would have to prove an action tantamount to criminal assault. The Court went even further, noting that an employer could conceivably be found guilty of criminal assault and not civil liability under the law. Based on this rationale, the Court declared the law to be flatly unconstitutional.

The standard for employment intentional torts had been in a relative stasis since that decision, relying purely on common law principles. The practical effect of this was that employees were able to claim rewards under both workers' compensation and civil liability

for certain employer acts, effectively double-dipping from the system.

On January 6, 2005, however, Governor Taft signed House Bill 498 into law. The new bill is intended to stop double recovery by removing "intentional acts" from the scope of employment, thereby precluding employees from recovering under both the Workers' Compensation System and intentional tort theories. House Bill 498 states that an employer is not liable in an action brought against the employer by an employee (or survivors of a deceased employee) for damages resulting from an intentional tort committed by the employer during the course of the employment, unless the employee proves that the employer committed the tortuous act with either the intent to injure, or with the belief that the injury was substantially certain to occur. The new law also creates a rebuttable presumption, holding that the removal of safety guards can be presumed, if not disproved, to have been committed with the intent to injure an employee.

While facially appearing to be a victory for employees and employers alike, the new amendment may have farther-reaching rami-

fications than those considered by the House of Representatives. It appears the legislature did not consider the wording of the bill in conjunction with insurance policies. Many employers' liability coverage policies use wording that may be negated by the bill's language and remove liability coverage for certain actions. For example, the majority of commercial general liability policies contain exclusionary clauses eliminating coverage for employer's intentional torts. The wording in House Bill 498 has left open the possibility that certain actions not recoverable under the employer intention tort statute, may now not only be viable tort actions, but also no longer covered by the employer's liability insurance. This in effect makes the employer vulnerable to civil liability damages that the employer will have to incur out of pocket.

Needless to say, the last word on this contentious issue has yet to be written. At least in the short term, we can be sure the courts will be kept busy grappling with the changing law.

Meredith and our premier workers' compensation group are always keeping up with the changing law! Contact them today to see how your company can save on rising premium costs.

LABOR: NEUTRALITY AGREEMENTS AND CARD CHECKS

By David "the screwdriver" Farkas

It is no secret that union membership has been in a steady decline for decades. Less than 10% of private industry employees are unionized today, an all-time low. Overall, unions represent only 12.9% of workers in both the public and private sectors, down from 36% in the 1950s. An executive of the largest union, the Service Employees International Union (SEIU), was recently quoted in the *Washington Post* as saying, "We have a labor movement dangerously close to being too small to matter."

Faced with (for them) such distressing statistics, the unions have responded with greater efforts toward unionizing more companies, often referred to as "organizing campaigns." The problem for the unions is that they keep losing elections. In hopes of turning things around, they have increasingly

been turning to "neutrality agreements" and "card check recognitions," often at one and the same time. Neutrality agreements are commonly entered into between a union and a company with whom the union already has a pre-existing relationship. The agreement essentially restricts the employer from campaigning against the union's organizing campaign, by requiring the signing company to refrain from voicing opposition to unionization efforts. In that regard, the term "neutrality agreement" is somewhat of a misnomer, because the absence of company statements regarding the union can easily be construed as support for a union. Moreover, the "neutrality" is entirely one-sided — the signing employer can only watch from the sidelines while the union itself vigorously sells itself to the employees. Despite these problems, some employers have gone along

with such neutrality agreements in the hopes of avoiding labor strife, or sometimes even to obtain union support on initiatives entirely unrelated to the company being organized.

Somewhat more problematic are card check agreements, which, as mentioned, are generally made part and parcel of neutrality agreements. In this scenario, the company pledges in advance to recognize the union voluntarily if the union obtains authorization cards from a majority of employees in the requested bargaining unit. The procedure bypasses the NLRB's secret ballot election, in that it allows the employer to voluntarily recognize the union without an election. The exact number of authorization cards needed for recognition, under these agreements, are, of course, negotiable — in one agreement signed with the Communication Workers of America, Verizon

continued on page 5

EMPLOYMENT LAW BREAKFAST BRIEFINGS

Presented by Lynn Schonberg & David Andrews, in conjunction with Jane Plank of HR Department Unlimited

Location: 6000 Freedom Square Drive, Independence
In the Ground Floor Amphitheatre

Time: 8:30 a.m. to 10:30 a.m.

Registration: Please contact Melody at (216) 447-1551 for information, or register online at www.rbslaw.com
(No cost to RB&S clients and HRDU Members)

June 16, 2005 – Privacy in the Workplace

“You have no right to listen to my voicemail messages!” – or do you? One of the most misunderstood areas of employment law, by both employers and employees, is workplace privacy. Many of the laws have not kept up with new technologies, from internet tracking to GPS systems and high-tech surveillance. This session will help you sort through the various laws and technologies to strike the balance of protecting your company without violating your employees’ privacy rights.

September 22, 2005 – Working with the Disabled Employee

“I need the company to buy an expensive machine to help me do my job.” “I need to work from home three days a week so that I can deal with my disability.” These dreaded requests leave many companies wondering how far they must go to comply with an employee’s accommodation request. This session will cover the entire accommodation process, including which employees must be accommodated, to what extent a request for an accommodation must be granted and the employers’ rights in the accommodation process.

December 1, 2005 – HR Legal Update – What’s Next for Employers?

The only certainty in the laws governing employees is that there will be change. This annual year-end review will bring you up to date on all the employment law related developments of 2005.

RB&S ATTORNEY SPEAKING ENGAGEMENTS

Lynn Schonberg and David Andrews will be featured speakers at a one-day seminar called “Payroll Basics in Ohio,” presented by Lorman Education Services. The event will take place in Cleveland on July 14, 2005, and is designed for payroll professionals, CPAs, accountants, human resource managers, bookkeepers, controllers and CFOs. Please call Melody at (216) 447-1551 for more information.

ABC, NORTHERN OHIO CHAPTER SEMINARS

ABC conducts an ongoing series of safety training for employers, including the popular OSHA 10-Hour and OSHA 30-Hour classes. All training participants must register one week in advance with Jennifer at (440) 717-0389.

Location: All training will be held at the NOC-ABC Training Center, 9255 Market Place West, Broadview Heights, Ohio 44147.

ABC also offers seminars, apprenticeship, and training for a variety of crafts. Cleveland-area courses offered for 2005 include the following:

- April 7 – Tax Benefits Seminar, presented by Brian Davis of Davis Wealth Management. Mr. Davis will present a variety of useful and seldom used tax benefits. The Class is approved for Continuing Business Education credits.
- April 9 - Electrical 10-hour Code (Approved by OCILB for ten hours of Continuing Education credits.) 7:00 a.m. to 5:30 p.m.

Many of these programs and more are offered at a special discounted rate for ABC members.

Please call Jennifer for more information.

SAFETY COURSES ARE NOW AVAILABLE ONLINE THROUGH ABC!!!

Employees can take the course from any computer – at work, home, or the library.
This can result in significant savings to companies, in both time and travel costs!

Neutrality Agreements and Card Checks continued from page 3

mandated that at least 55% of the employees sign authorization cards before it would recognize the union.

The potential problems with such agreements are immediately apparent, with the most obvious being the possibility of intimidation. For example, consider that while the law requires a union to get at least 30% of its employees' authorization cards before it may file for an election, unions typically do not file petitions until they have at least 50% or more. The reason is that unions know very well that a signed authorization card cannot be equated with a vote by secret ballot. Many employees are simply too intimidated to refuse an in-person request to sign a card. Larry Fox, an official of the SEIU, has brushed aside such concerns, saying "workers know how to say no if they don't want a union." But others are not quite as sanguine. Imagine how you would respond if you were approached at home by three burly members of the United Steel Workers, and were asked, very politely, to sign a card authorizing their union to be your representative. Would you say no?

The Board has signaled its concern for these types of neutrality and card check

agreements. In one case decided in the waning weeks of 2004, the Board granted review to an election featuring a neutrality card check agreement. It stated, "We have some policy concerns as to whether an employer can waive the employees' fundamental right to vote in a Board election." The Board also noted, in another case, that in a Board conducted election "employees cast a secret vote under laboratory conditions and under the supervision of a Board agent. By contrast a card signing guarantees none of these protections." At a conference in Washington D.C. at around the time the 2004 decision was released, a Board Member told me these cases would be a priority upon the full reconstitution of the Board.

There is no indication that the Board's mere review will mean an end to neutrality and card check agreements. However, it serves to reaffirm the Board's commitment that employees make a free and clear decision in their choice to be represented or not. In a time of shifting labor conditions, it's nice to see this commitment remains a fixed point.

Labor questions or concerns? Alan Ross and David Farkas are standing by!

EMPLOYMENT: HIRING TEENS THIS SUMMER

By Jerry P. Cline

With the school year coming to an end, teenagers may seek summer employment with your company. As such, employers should be keenly aware of the various federal and state child labor laws that regulate the employment of those under the age of 18.

Generally, and with some limited exceptions, federal and Ohio law prohibit the employment of persons under the age of 14. Persons age 14 and 15 may work, but Ohio law restricts their summer employment to 8 hours per day, and a total of 40 hours per week. Fourteen- and 15-year-olds may not start work before 7 a.m., and their work day must end by 9 p.m.

For the summer employment of 16- and 17-year-olds, there is no limitation as to the starting and ending time and no limitation in hours per day or week. However, no minor

may work more than five consecutive hours without a rest period of at least 30 minutes.

During the school year, 14- and 15-year-olds may not work before 7:00 a.m. or after 7:00 p.m. They also may not work more than three hours on any school day and cannot work more than 18 hours in a school week. Work during school hours is prohibited unless the employment is in conjunction with a bona fide vocational training program.

The employment of 16- and 17-year-olds during the school year is a bit more complicated. 16- and 17-year-olds cannot be employed before 7:00 a.m. However, they may be employed as early as 6:00 a.m. if they were not employed after 8:00 p.m. the previous night. They are also prohibited from working after 11:00 p.m. Sunday through Thursday

continued on back page

self-insured [corner]

The Workers' Compensation Resource Network is an association for self-insured employers in Ohio. The purpose of the association is to provide a unique forum, opportunity and resource for the educational benefit of self-insured employers.

The Resource Network dialogues ideas, resources and information with member peers by identifying and addressing issues which self-insured employers face. This includes engaging in dialogue focused on outcomes that enhance self-insured administration. Some topics thus far covered include the development and maintenance of a transitional work program, ergonomics, the importance of written job descriptions, the economic impact of business failures on self-insured employers, and medically managing claims for self-insured employers.

If you are a self-insured company, consider becoming a member of the Workers' Compensation Resource Network. Members pay no additional cost for two representatives from your company to attend regularly scheduled seminars and meetings.

Call Megan Geist at (216) 447-1551 x165 for additional information and membership details.

***Hiring Teens This Summer
continued from page 5***

but there is no limitation as to the number of hours per day or per week.

The law also prohibits the employment of minors in any occupations found to be hazardous or detrimental to their health and well-being. While the list below is not exhaustive, under Ohio law, and with some limited exceptions, some jobs are prohibited

to ALL minors. These include slaughtering, mining, logging, roofing, excavating, and a host of other jobs deemed dangerous or risky.

Additional prohibitions apply only to 14- and 15-year-olds. Federal law provides for other restrictions and exemptions, including certain exemptions for drivers. The bottom line is, make sure you learn the law when hiring teens.

And make sure you know their ages as well! Contact Lynn, David or Jerry if you have questions regarding employing minors during the summer, or any other questions relating to employment law.

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