ROSS, BRITTAIN & SCHONBERG CO., L.P.A.

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WORKERS' COMPENSATION: TPA PRACTICE & THE UNAUTHORIZED PRACTICE OF LAW

By Brian Brittain

In an 18-page report that could have far-reaching implications in the workers' compensation arena, the Ohio Supreme Court's Board of Commissioners on the Unauthorized Practice of Law issued a final report on Tuesday, May 18, 2004 recommending to the full Supreme Court that third party administration firms (TPA's) be significantly restricted in their abilities to represent employers before the Ohio Bureau of Workers' Compensation (BWC) and its sister agency, the Industrial Commission of Ohio (IC). Before discussing the report further, it is important to note that while the decision will likely impact many employers in Ohio for the reasons listed below, it should have no adverse effect on clients of Ross, Brittain & Schonberg.

By way of history, on April 15, 2002, the Cleveland Bar Association filed suit against CompManagement, Inc., or CMI, a traditional workers' compensation third party administration firm located in Dublin, Ohio, asking the Ohio Supreme Court to issue an order finding that CompManagement (and certain of its employees) had engaged in the unauthorized practice of law in representing its employer clients before the BWC and the IC.

The Bar Association also requested that CompManagement and similar TPA's be barred from further representing employers in various proceedings before the BWC and/or IC. Therefore, while the specific case was brought against CompManagement, its result will apply to all third party administration firms in Ohio that actively represent employer clients before the BWC and/or IC.

Following discovery, a three-day hearing on the unauthorized practice of law by CompManagement was conducted by the Board on May 21, May 22 and August 22, 2003. As mentioned, on May 18, the Board at last issued its Final Report to the Supreme Court concluding that certain activities engaged in by CompManagement amounted to the unauthorized practice of law. The Board further requested that the Supreme Court issue a Show Cause Order barring CompManagement from engaging in those activities.

Specifically, the Board concluded the following:

(a) That CompManagement's representation of employers' interests in handling claims before the IC amounted to the unauthorized practice of law;

(b) That this unauthorized practice of law included not only representation of employers at IC hearings, but also in the preparation, signing, and filing of documents for employ-

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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.

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ers (including appeals, motions, and other letters/pleadings) with the BWC and/or IC;

(c) That CompManagement's involvement in the negotiation/settlement of claims before both the IC and the BWC amounted to the unauthorized practice of law;

(d) That CompManagement's recommendations to employer clients regarding the filing of appeals with the BWC/IC and/or recommendations regarding allowance or denial of claims amounted to the unauthorized practice of law; and

(e) That CompManagement's recommendations to employer clients on whether to secure separate legal counsel on certain contested matters likewise amounted to the unauthorized practice of law.

In specifically reviewing the IC hearing process, the Board concluded that CompManagement's cross-examination of witnesses, direct or indirect; presentation of employer concerns, and/or submittal of employer evidence at hearing were clear examples of the unauthorized practice of law. It is important to note that the Board concluded that such actions before the IC by CompManagement constituted the unauthorized practice of law regardless of whether the individual hearing representative employed by CompManagement was a licensed practicing attorney. In other words, even if they were an attorney, the CompManagement claims representative could not practice law before the IC because that claims rep was employed by a non-legal entity.

The Board's Final Report was presented to the Supreme Court of Ohio for confirmation on May 18, 2004. Pursuant to its rule, the Supreme Court will now issue a "Show Cause Order" either adopting and/or modifying the Board's Final Report. Once that Show Cause Order has been published, CompManagement will have 20 days to file objections and should that occur, a formal briefing schedule will be established and ultimately a hearing before the full Court could take place. As of this writing, it is unknown how long it will take the Supreme Court to issue its Show Cause Order, though based upon the potential ramifications of the Board's Final Report, it is anticipated that the full Court will act quickly.

Immediately following the Board's Final Report, the 15 Industrial Commission offices throughout Ohio, which annually conduct more than 200,000 hearings, were in a state of flux regarding whether to permit TPA's (and their hearing representatives) to continue to attend hearings. On May 21, the IC issued a statement indicating that until final notification by the Supreme Court through its Show Case Order, the IC would continue to permit TPA representatives, on a limited basis, to attend hearings on behalf of their employer clients, consistent with its policy on TPA representation incorporated in the IC Hearing Officers Manual.

In that regard, the policy permits TPA's to attend hearings but constricts them in cross-examining witnesses, presenting evidence, and arguing any case law and/or statutory precedent. However, the District Hearing and Staff Hearing Officers who adjudicate the vast majority of these 200,000 hearings annually are essentially all licensed attorneys. As a result, these attorneys could be subject to charges of assisting in the unauthorized practice of law by permitting TPA reps to continue to engage in certain suspect activities. It is therefore anticipated that until the Supreme Court issues its final Show Cause Order, TPA reps will still be greatly restricted in their IC hearing room activities. Indeed, on June 2, a new resolution was issued by the IC restating the limited TPA involvement in the hearing process, pending the Supreme Court's final Show Cause Order.

RB&S will keep its clients posted as to all further developments in this matter, which again will likely have a major impact on how business is conducted, from the employer's perspective, before the BWC and the IC into the future. Should you have any immediate questions or concerns, please feel free to contact Brian Brittain at Ross, Brittain & Schonberg.

WORKERS' COMPENSATION: AMENDED POST-ACCIDENT DRUG TESTING LAW TO HELP EMPLOYERS IN WORKERS' COMPENSATION CLAIMS

By Jerry P. Cline

The Ohio Legislature has recently amended a law that assists employers with work accidents involving alcohol or illegal drugs. The new law, which currently awaits Governor Taft's signature, says that an injured worker who either (1) tests positive for a post-accident alcohol and/or controlled substance test or (2) refuses to be tested, creates a rebuttable presumption that an employee's injury was the result of being under the influence. Under these circumstances, the claim is not compensable and the burden shifts to the employee to prove that he was either not under the influence at the time of the injury, or that being under the influence did not cause the injury.

There are some important changes to note. First, Ohio employers must post a written notice indicating that the results of a post-accident drug/alcohol test, or the refusal to submit to such a test, might affect the employee's eligibility for compensation and benefits under the workers' compensation statutes. This is a significant departure from the old law, a rather vague requirement which provided only that the employee be given some "notice" of the consequences of a positive drug/alcohol test or refusal to submit to such a test. The type of notice required was never specified or formalized in writing.

The new provision also indicates that only a "qualifying" chemical test may be used to create a rebuttable presumption. Generally speaking, a chemical test is "qualifying" if the employer had *reasonable cause* to suspect alcohol and/or controlled substance involvement in the work-related injury. "Reasonable cause" is described in the Ohio Revised Code in some detail and is at the heart of the new amendment. Specifically, reasonable cause means, but is not limited to, "evidence that an employee is or was using alcohol or a controlled substance drawn from specific, objective facts and reasonable inferences drawn from these facts in light of experience and training."

If the Governor does sign the bill as anticipated, it will go into effect 90 days following the signing.

RB&S attorneys keep on top of all developing legislation in the workers' compensation arena. If you have any questions or concerns, please do not hesitate to contact Jerry Cline or the rest of the group for more information.

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)

September 9, 2004 – Strategies in Severing the Employment Relationship

As hard as you may try, there are times when an employee just does not work out. Ensuring the employee has an adequate opportunity to address performance problems, knowing when to end the employment relationship, communicating that decision to the employee and managing workforce reaction are critical to your company's productivity. This session will prepare you for these most difficult workplace decisions.

December 16, 2004 – HR Legal Update – What's Next for Employers?

What will the Courts, Congress and the General Assembly come up with next? We don't know for sure, but we can guarantee there will be significant changes and new issues to confront employers. This year-end review will bring you up to date on all the employment law related changes of 2004.

RB&S ATTORNEY SPEAKING ENGAGEMENTS

Lynn Schonberg has been engaged for the following seminars and/or conferences in Cleveland:

Fundamental Issues in Ohio Human Resources Law on July 8 for National Business Institute.

Please contact Lynn Schonberg 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.

These programs and more are offered at a special discounted rate for ABC members.
Please call Jennifer for more information.

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

NEW!!! – 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!

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HUMAN RESOURCES

Presented by 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 Jane at (330) 414-2220 for more information, or email her at HRDU@aol.com.
(No cost to RB&S clients and HRDU Members)

July 8, 2004 – Employee Relations

This session covers strategies like Alternate Dispute Resolution, employee participation and empowerment, attitude surveys, improving morale, suggestion programs, and recognition.

August 12, 2004 – Orientation, Training, and Mentoring Employees Effectively

An overview of the process of involving employees in the decision-making process, so as to improve office morale and employee cooperation.

October 14, 2004 – Overview of Front Line Supervision

This class covers what front line supervisors need to know and do including a brief review of the legal components, employee relations, joining the management team and performing supervisory duties.

November 11, 2004 – Effective Communication Systems

Turnover data shows that ineffective communication often causes employees to leave their jobs and to be unhappy at work. This class will be a discussion on a variety of systems and techniques for improving communication at work.

WORKERS' COMPENSATION RESOURCE NETWORK

WCRN, our self-insured group, will be hosting a meeting on
Tuesday, September 21 at 10:00 a.m. to 2:00 p.m. at the Embassy Suites in Independence, Ohio.
Please contact Rick Walters or Megan Geist at (216) 447-1551 for more information.

EMPLOYMENT: COURT EXPANDS DISCRIMINATION LAWS – TRANSSEXUALS NOW COVERED

By David T. Andrews

The courts continue to expand employer's obligations under the anti-discrimination laws. Most recently, the Federal Court of Appeals that covers Ohio decided that Title VII of the Civil Rights Act prohibits discrimination against "transsexual" persons.

A fireman in the Salem, Ohio Fire Department sued his employer claiming gender discrimination under Title VII of the Civil Rights Act. Soon after the male employee began "expressing more feminine appearance on a full-time basis" he was discharged from his employment for alleged violation of a work rule. The District Court in Youngstown dismissed the case, finding that Title VII does not prohibit discrimination based on an individual's "transsexualism."

The Court of Appeals disagreed and instructed the District Court to hear the case. In making its finding, the Court of Appeals relied on a fifteen-year-old United States Supreme Court case that prohibited "gender stereotyping." In that case, the United States Supreme Court allowed a claim brought by a female employee that she had been discriminatorily denied opportunities because she did not act like a "stereotypical woman." The Court of Appeals found that the same rationale applies to transsexuals. The court wrote, "An employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminated against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination." The court went on to find that whatever label is applied to such a person, whether it be transsexual, transgender or transvestite does not matter. Discriminating against someone who does not conform to the social norms for men or women is unlawful.

Whatever one may think about the rationale of this decision, it represents a significant expansion of Title VII and highlights the importance of careful review of each employment decision.

Discrimination law continues to evolve. To keep track of the laws governing your company, keep in regular contact with Lynn Schonberg or David Andrews.

EMPLOYMENT: NEW OVERTIME RULES TO GO INTO EFFECT SOON

By Lynn Schonberg

The new regulations changing the overtime rules will become effective on August 23, 2004, barring some last minute legislation. These new regulations update the three tests that determine whether an employee meets an exemption from the requirement to pay overtime—the salary level test, the salary basis test and the duties test (also commonly known as the executive, professional or administrative test). The minimum salary level was last updated in 1975 and the duties test was last updated in 1949. Obviously, these new regulations are long overdue and will finally provide updated and hopefully better guidance for jobs of the 21st century.

There are many other changes and modifications to the existing overtime rules. Every business must take this opportunity to review their existing exempt positions and ensure that they remain exempt under the new rules. Conversely, a review should also be conducted to determine whether other positions that were previously not exempt may very well now be exempt.

If you are interested in learning more about these new changes in the law, our firm will be holding at least one seminar on this subject. Please contact Lynn Schonberg or David Andrews if you are interested in attending.

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 with which self-insured employers are faced. 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.

LABOR: FAVORABLE RULINGS FOR MERIT SHOP EMPLOYERS

By David S Farkas

While the second quarter of 2004 passed through the labor law arena without the more significant decisions detailed in our sections of employment and workers' compensation law, the National Labor Relations Board did decide two cases that represent a positive development for merit shop employers.

In the first case, *Manhattan Crowne Plaza Town Park Hotel*, the Board considered an election which the security guards' union lost by a tally of 13 votes to 5. The union objected to the conduct of the employer because of a memorandum the employer distributed about one week before the election. The memorandum informed the voting employees that, very recently, another hotel had failed to reach an agreement with the very same union seeking to represent its own employees, and that the members had lost their existing benefits. The Regional Director who initially handled the case held that the memorandum implied that the union was responsible for the loss of jobs and benefits, and that the memo predicted similar losses if the employees voted for the union in the pending election. Upon review, however, the Board held that the memo did not exceed the bound of permissible campaign statements.

The Board noted that the employer had simply provided a recent concrete example of a negative outcome for employees who selected the petitioning union as their representative. Moreover, the Board noted that the memorandum did not state that these incidents were bound to happen if the employees would vote in favor of union representation. On the contrary, the memo stated explicitly that each set of negotiations is different. Accordingly, the Board overturned the petitioner's objections and certified the results of the election.

The next case, *JS Mechanical Inc.*, involved a scenario familiar to many of our readers, where union organizers, otherwise known as "salts," attempted to apply for jobs in a merit shop business. The employer asked the salts, "why would you want to [apply for work]; we're an open shop . . . I can see from the gentleman's hat, he's a union worker." The union seized upon these comments as an opportunity to file a charge, alleging that the employer was discriminating against the union by refusing to consider union members for jobs.

In the 2 to 1 decision, Chairman Battista and Member Schaumber said that the employer's question merely reflected surprise that the organizers would wish to work for a merit shop company. The Board held that the question and the following statements were not coercive, noting that the employer asked this question in the context of explaining its application procedure to the organizers, not while discouraging them. In addition, the Board found it significant that the employer also stated explicitly that no applicants would be discriminated against because of their union or non-union status.

As mentioned above, the two cases highlighted herein are but samples of a constant stream of decisions that cross our desks daily. As part of our practice, RB&S reviews these decisions to learn how they can be of service to our clients. Based upon these decisions, employers might have more limited freedom in certain instances.

Labor questions or concerns? Give Alan Ross or David Farkas a call, at any time.

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