

COMP NEWS

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Second Injury Fund

Payouts remain stubbornly high

Reports of the demise of the Second Injury Fund appear to be greatly exaggerated as the fund continues to pay out surprisingly high amounts month after month.

As of the end of March 2012, monthly payouts were averaging \$9.1 million. The monthly averages in fiscal 2011 and 2010 were about \$8.5 million. Nine years ago the average monthly payout was \$9.2 million, although the payouts increased sharply in some of the intervening years.

Legislation passed in 2007 contemplates the fund closing on July 1, 2013, when all remaining obligations and residual activity will be transferred to the Budget and Control Board for an orderly winding down. Stephen Elliott, interim director of the Budget and Control Board, says his agency expects to engage an actuary in the next few weeks and foresees a report by September 2012.

The purpose of the actuarial study, expected to cost between \$15,000 and \$25,000, is to determine the fund's liabilities and how best to discharge them. Mr. Elliott says insurers and self-insurers and other stakeholders will have an opportunity to weigh in on the study's findings and recommendations before the Budget and Control Board makes final decisions.

According to the 2007 legislation, December 21, 2010, was the last day to submit notice of a new claim, and December 1, 2011, was the last day for the fund to accept a claim for reimbursement.

Lack of sleep: safety hazard

Nearly one-third of U.S. workers are not getting enough sleep, and that has implications for their personal health and workplace safety, according to a recent report from the Centers for Disease Control and Prevention.

The National Sleep Foundation recommends healthy adults sleep 7-9 hours per day. The CDC survey found as many as 29% of day-shift workers got fewer than six hours' sleep, as did 44% of those who worked the night shift.

"Insufficient sleep can have serious and sometimes fatal consequences for fatigued workers and others around them. For example, an estimated 20% of vehicle crashes are linked to drowsy driving," the agency warned. Insufficient sleep has also been linked to obesity and cardiovascular disease.

Researchers say one way to improve sleep patterns is to rotate workers forward from evening to night shifts, rather than backwards from night to evening shifts. This makes it easier for circadian rhythms to adjust so that workers can get more sleep.

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Judicial Notes by Mike Chase

Cranford v. Hutchinson Construction

Court: South Carolina Court of Appeals

Citation: Op No. 4783, 2011 WL 292167

Lawyers: Stephen B. Samuels, for claimant/appellant; Michael W. Burkett for defendants/respondents.

Question Presented: Whether claimant is entitled to temporary total disability (TTD) benefits following termination while working light duty.

Analysis: In *Cranford v. Hutchinson Construction*, Op. No. 4939, Ct. App. Feb. 8, 2012), claimant sustained injuries to his hands, arms and back after having to jump out of a forklift basket approximately 10 feet above the ground. The Single Commissioner, Avery Wilkerson, awarded 4 weeks for the left arm, 8 weeks for the right arm (both for scarring) and 0% for the back, and held claimant was not entitled to temporary total disability benefits (TTD) or additional medical benefits.

The Full Commission, consisting of Commissioners Beck, Lyndon and Huffstetler, affirmed. The Court of Appeals, consisting of Judges Williams, Short and Geathers, held the Commission was correct in not awarding TTD benefits because claimant received salary while he was out of work because of his injuries, and he was assigned to work within his light duty restrictions when he returned, until he was subsequently terminated for cause for violating the company's safety policy.

The court noted that prior to his termination, Cranford worked "a minimum of

15 days" light duty. The case was remanded to the Commission for other reasons, including a finding of whether claimant had reached maximum medical improvement.

This case sheds light on an important topic for employers: whether an employee working light duty because of a workers' compensation injury can be terminated without triggering the employee's right to temporary total disability benefits.

The South Carolina Workers' Compensation Regulations state "[d]isability benefits are used to compensate the employee for the difference in what he was making before and after an accident *due to the injury sustained*." S.C. Reg. 67-502(B) (1) (emphasis added). Therefore, it appears that where an employee has worked light duty at least 15 days, the employer may not be liable for TTD benefits following termination, as long as the reason for the termination is unrelated to the employee's workers' compensation claim (See also section 42-9-260(B)(1) allowing termination or suspension of temporary benefits after 15 days work completed).

Employers should carefully document all employee performance problems, disciplinary actions, and proceedings both before and after a work injury. They should strive to consistently treat employees the same with regards to discipline up to and including termination regardless of whether they sustained a work injury.

The employer should appear and testify before the hearing commissioner about the

claimant's pre and post injury disciplinary actions, if any, as well as the acts or omissions that lead to termination and whether any employees without workers' compensation claims were similarly disciplined for the same actions. Employers should also testify to their company's policy on allowing and accommodating injured workers to return to work on light duty within the applicable medical restrictions, including the number of employees the company has accommodated in the past, along with examples of light duty assignments made available.

This testimony will bolster Defendant's argument that if claimant had not violated company policy, he or she would still be working for employer. Therefore, claimant's loss of income is not because of the workers' compensation injury, but because of his or her termination for cause.

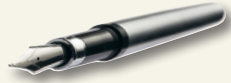


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Comments: Please e-mail any comments to Mike at mchase@turnerpadget.com.

** Disclaimer—This case law summary is not intended as legal advice. Contact your lawyer with questions regarding the potential impact upon your particular claim or situation.*



President's note

DAVID BENENHALEY
President

Let the sun shine in

The South Carolina Second Injury Fund is close to engaging an actuary to determine the fund's liabilities and how best to discharge them, before the agency is closed for good. We hope agency officials will make themselves available to answer queries from stakeholders who, after all, will be the ones paying out for residual claims.

We raise the issue because there is an odd actuarial report on the Second Injury Fund's website, titled 2010 SIF Analysis of Liabilities. As we have noted on earlier occasions, this actuarial report estimated assessments in fiscal 2011 would total \$43.9 million, before dropping to about \$991,000 in 2012.

As it turned out, the 2011 assessment was nearly \$102 million, and indications are the 2012 assessment won't be much less. No doubt there is a simple explanation for the apparent discrepancy. But SIF officials did not conduct the study, and so can't address it, and the actuary who conducted the study can't speak for the agency. We hope there is not a similar Catch-22 this time around. The 2010 study may have been "academic" but now the stakes are higher.

Until next time,

David

Few patients take drugs as prescribed

Drug screens by Quest Diagnostics of 76,000 urine specimens found nearly 65% of those tested were not taking prescribed medications as indicated, in another reflection of the chronic and widespread problem of drug noncompliance.

Individuals were tested for up to 26 commonly prescribed and abused drugs, including pain medications, central nervous system medications, and amphetamines, as well as illicit drugs such as marijuana and cocaine. Urine specimens were screened by immunoassay-based methods and all positive results were confirmed by mass spectrometry, the most sensitive drug testing method, according to Quest Diagnostics.

Among the findings:

- Many patients took or combined additional drugs without physician oversight. Of those patients whose results were inconsistent, more than half (60%) tested positive for drugs not specified by the ordering physician. "This finding demonstrates that a large number of patients are using drugs, potentially in dangerous combinations, without the oversight of a trained healthcare professional," Quest said.
- A large number of patients showed no drug in their specimen. In 40% of inconsistent cases, no drug was detected. Quest said this could mean the individuals were not taking medications because they could not afford it or they may have been selling them to others.
- Anyone is at risk of misuse. "While some groups, such as the very young, were more likely to misuse, our data suggests that women and men of all ages are at risk, regardless of income level and health plan membership," the company reported.

Repeat testing was associated with lower prescription drug misuse. Among patients tested 30 days or more after an initial screen, the number of patients with inconsistent results declined by 10%. Our data supports medical recommendations that physicians perform routine urine testing to monitor prescription drug misuse, Quest added.

Drug noncompliance is an age-old problem, poorly understood by researchers.



Calendar

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|----------------------------|--|
| August 28, 2012 | NCCI's 2012 State Advisory Forum.
Hilton Columbia Center, Columbia. |
| <hr/> | |
| October 14-17, 2012 | 36th Annual Educational Conference on
Workers' Compensation. The Westin
Resort and Spa, Hilton Head. |
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| April 10-12, 2013 | Members-Only Forum, SC Self-Insurers
Association. Litchfield Beach & Golf
Resort. |

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NC Commission said to be lax on uninsured employers

Last month the *Raleigh News & Observer* ripped the North Carolina Industrial Commission for not punishing employers who don't carry workers' compensation insurance.

The newspaper reported in April that tens of thousands of employers in North Carolina don't carry workers' compensation insurance, despite a state law that requires businesses with three or more employees to provide the coverage. "And when workers were hurt, the commission has done little to ensure the uninsured employer paid the workers' medical bills and wages for missed work. Some workers ended up permanently disabled and reliant on Medicaid and welfare to survive," the newspaper reported.

North Carolina governor Bev Perdue has said publicly she is demanding swift action from the Industrial Commission. "I read with the same pain that you did about what might be happening to our workers and what has happened to our workers," Perdue said. "I've sent word, I want it fixed and I want it fixed very quickly," the *News & Observer* reported. The North Carolina Industrial Commission says from now on it will take a tough line against uninsured employers who are doing little or nothing to settle claims with injured workers.

"More than a dozen employers have been ordered to come to a hearing May 22 and settle a claim that has dragged for years. If the business owners don't – and can't settle a portion of the claim – they'll be ordered to jail. Law enforcement will be sent to arrest those who don't show up for the hearing, officials say," the newspaper said.

Lack of sleep: safety hazard

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CDC reports the National Institute for Occupational Safety and Health is developing evidence-based training programs on sleep and working hours tailored for managers and employees in the manufacturing, mining, nursing, retail, and trucking industries.

The *News & Observer* reported the case of one transportation company that decided to drop coverage to reduce costs. Twelve days later, one of its drivers died in a crash. Three years later, another of its driver died on the job, and the company was still without comp insurance.

The *N&O* estimated the number of uninsured employers by looking at the total number of licensed businesses in the state with four or more employees and comparing that with the number of insured employers in the N.C. Rate Bureau's database.

According to the NC Department of Commerce, 170,000 companies with four or more employees operate in the state. Dun & Bradstreet counts about 172,000 businesses headquartered in the state with at least three employees. The newspaper reported it found only 140,000 or so insured employers at the rating bureau.