COMPNEWS

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General Membership Meeting

Program set for November 7

Updates on Medicare's Section 111 reporting and on recently adopted mediation requirements in South Carolina will be the focus of our November 7 meeting at Seawell's in Columbia. The program is open only to members of the South Carolina Self-Insurers Association.

Ben Pugh of Franco Signor will cover changes initiated by the recently enacted SMART Act and its impact on Medicare compliance. He will also provide an update on the new recovery audit contractor, and on penalties associated with reporting errors.

Separately, the Centers for Medicare and Medicaid Services has put Responsible Reporting Entities on alert "in general" they will be required to submit ICD-10-CM diagnosis codes on claim reports with a CMS Date of Incident on or after April 1, 2015. The agency, and the healthcare industry, will adopt ICD-10 beginning October 1, 2014.

Although workers' compensation is not required to make the switch from the current ICD-9 to ICD-10, CMS says on its website it would be in the industry's "best interest" to use the new coding system. The agency adds it will "work with non-covered entities to encourage their use" of ICD-10.

Also on the agenda for the November 7 meeting, a report from Chairman Scott Beck on the mediation initiative and other developments at the SC Workers' Compensation Commission. In addition, the program will include case law update and a presentation on the use of social media to investigate workers' comp claims.

Courts have ruled social media evidence admissible can include photographs, status updates, people's location at a certain time, and direct communications to a defendant's social media accounts, among others.

More claims reported during recession

Claim frequency for workers' compensation injuries increased 3.8% in accident year 2010, marking the first increase since 1997, according to the National Council on Compensation Insurance.

NCCI reports prior to the 2010 uptick, claim frequency had been declining since 1990 at an average rate of more than 4% per year. Following the 2010 increase, claim frequency declined in 2011, albeit by a modest 0.9%, and declined by 5% in 2012.

- Over the five complete policy years ending with policy year expiring 2011:
- Frequency per payroll declined by 16% (4.3% per year) but has leveled off over the latest two years.
- Frequency per payroll declined for all industry groups, most notably in contracting and manufacturing.
- Frequency per payroll declined for all employer sizes, with the largest declines for employers having more than $100 million in payroll.
- Frequency declines were relatively consistent by NCCI type of injury.

Payroll volume increased by double digits in the oil & gas and healthcare sectors, while declining nearly 2% for all industries combined. NCCI notes in the oil & gas sector, claim frequency is notably high in the emerging hydraulic fracturing industry.

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Judicial Notes by Mike Chase

No TTD if fired for cause

A recent South Carolina Supreme Court decision is a significant win for employers. The court held in ***Pollack v. Southern Wine & Spirits of America***, 2013 LEXIS 168 (2013) that employers cannot be held to pay Temporary Total Disability (TTD) benefits to employees terminated for cause for reasons completely unrelated to their injury.

The decision clarifies Cranford v. Hutchinson Construction, 399 S.C. 65, 731 S.E.2d 303 (S.C. Ct. App. 2012), which held a terminated employee was entitled to temporary disability benefits until he achieved maximum medical improvement and was authorized to return to work without restriction. Notably, the court in Cranford failed to distinguish between employees terminated with cause and those terminated without cause. The court in Pollack makes this distinction.

In Pollack, the employee, a drivers' supervisor, suffered an admitted injury to his back while picking up a case of alcohol. After treatment by a physician, Pollack returned to work on light duty in the same position with the same salary as before. Several months later, while responding to an automobile accident involving a company vehicle, Pollack accidentally ran his company vehicle into the vehicle of a subordinate. Importantly, company policy demanded that "[a]ll accidents and incidents with a vehicle must be reported," and that "[f]ailure to report an accident will result in immediate termination." (Emphasis added).

However, Pollack concluded that the accident caused no actual damage to either vehicle, and was not worthy of reporting to the company. The company immediately suspended Pollack for failure to report the accident, and began an investigation. Pollack was briefly reinstated by his local superiors, but the corporate office ultimately terminated him for failure to report the accident.

Pollack filed for TTD compensation from the date of his termination. Benefits were denied by the single commissioner, and the ruling was affirmed by an appellant panel and by the Supreme Court. The court reasoned since the company terminated Pollack for cause, and the cause was totally unrelated to the injury, the employer should not be held liable for paying TTD benefits.

The court discussed several interesting facts in reaching its conclusion. First, the cause for the termination was a violation of a stated company policy. Second, Pollack admittedly knew of the policy, and he chose to disregard it anyway. Third, there was testimony that other employees had previously been terminated for this same violation. Lastly, Pollack's supervisor testified that but for his violation of company policy, Pollack would still be working in the light duty capacity provided by the employer.

While this decision should be seen as a victory for employers, the court noted the "critically important task" of "thoughtfully consider[ing] the evidence, remaining sensitive to an employer's possible motivation to 'look for' a reason to fire an injured worker." This strong language should be taken seriously by South Carolina employers. An employer's decision to deny benefits will still be "scrutinized carefully" by the fact-finder on a case-by-case basis.

MIKE CHASE
Legal Advisor, SCSIA

In evaluating their options, employers should consider the specific circumstances and ask themselves operative questions based on the court's opinion in Pollack. Has there been a violation of a clear company policy? Did the employee know of the policy and violate it anyway? Have other employees been terminated for similar violations? But for the violation, would the employee still be employed? If the answer to these questions is "yes," then an employer will likely avoid the perception of targeting injured workers. However, if some of these questions result in "no" or "maybe," the employer should proceed with caution.

Comments: This does not constitute legal advice. You should seek the counsel of your attorney concerning the application of case law to your particular situation. Please e-mail any comments to Mike at mchase@turnerpadget.com.

President's note

Tosca Walls
President

Comp gets swept along

Workers' compensation was conspicuously absent in the protracted debate about healthcare reform. Two recent developments suggest comp can't stay isolated from forces affecting the broader healthcare industry.

As we report below, the FDA is taking steps to curb opioid abuse, which is responsible for as many as 17,000 deaths annually. The restrictions are expected to have a marked effect in workers' compensation as hydrocodone-acetaminophen is among the top-five drugs (ranked according to dollars paid).

Critics contend the move will restrict patients' access to much-needed relief. It will be interesting to see if the restrictions influence prescribing patterns.

The other development is Medicare's insistence workers' comp also must move towards adopting ICD-10 classification codes. The healthcare industry is required to make the transition on October 1, 2014, despite vehement protests from the American Medical Association which says the transition is too complex and too expensive and won an extension of the original deadline.

Workers' comp groups have largely ignored the ICD-10 transition because comp is supposedly exempt from the requirement. In a curiously worded statement on its website, the Centers for Medicare & Medicaid Services says it is a "myth" that workers' comp does not have to make the transition. Under "fact," CMS says it will encourage the industry to make the transition.

Until next time,

Tosca

FDA imposes tighter controls on hydrocodone

The Food and Drug Administration has recommended limiting patients to a 90-day supply of pills that contain hydrocodone along with painkillers such as acetaminophen or aspirin. To get a refill, patients would have to visit a doctor and physically take the prescription to a pharmacy, instead of having a doctor call it in.

The new regulations, expected to take effect in 2014, would also impose tight storage and record-keeping requirements on pharmacies. The drugs in question are used in workers' compensation and elsewhere and sold as generics or under brand names like Vicodin or Lortab.

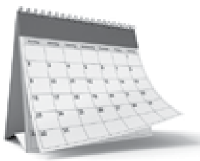
Currently, patients can refill a prescription for such drugs five times over a six-month period before they need a new prescription. FDA's recommendation is expected to be approved by the Department of Health and Human Services and the Drug Enforcement Administration, which has long pushed for the measure.

"The FDA recommendation is likely to have a significant impact on the availability of the drugs, as well as on how pharmacies operate and even the types of medical professionals who can prescribe the medications," notes the New York Times. It adds in 2011 about 131 million prescriptions for hydrocodone-containing medications were written for about 47 million patients, totaling to nearly five billion pills.

The newspaper reports the change involves the reclassification of hydrocodone-containing painkillers as Schedule II medications from their current classification as Schedule III drugs. Dr. Janet Woodcock, director of FDA's Center for Drug Evaluation and Research, says requiring patients with chronic pain to see a physician after three months, instead of six, could benefit them.

"If you are needing chronic therapy of this magnitude, you should be seeing your prescriber," she commented to the **New York Times.**

Groups opposing FDA's recommendation said it would limit patient's access to much-needed relief. These critics include patient groups, drug makers, pharmacy chains like Walgreens and CVS, local drugstores, and physicians groups like the American Medical Association.



Calendar

November 7 — General Membership Meeting, SC Self-Insurers Association. Seawell's, Columbia

March 26-28, 2014 — NC Association of Self-Insurers' Annual Conference. Holiday Inn Resort, Wrightsville Beach

April 2-4, 2014 — Members-Only Forum, SC Self-Insurers' Association. Litchfield Beach & Golf Resort

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Commission to amend lump-sum regulation

The South Carolina Workers' Compensation Commission proposes to amend Regulation 67-1605, to include several provisions relating to lump-sum payments. The amendment must be approved by the General Assembly.

The commission says the amendment would make fair the methodology used to compute the net present value of lump-sum payments. As of October 25, the agency had received a total of one comment on the proposed changes, and it came via email from the spouse of a claimant.

The purpose of the regulation is to establish procedures for an employer or employer's representative to make a lump-sum payment. The commission is proposing the following provisions:

- Installments yet to accrue of one-hundred one through five hundred weeks shall be discounted at the yield-to-maturity rate of the Five Year U.S. Treasury Note as published by the United States Treasury Department on the first business day after January 1st each year, but in no case shall the discount rate exceed six percent or be less than two percent;
- The Commission shall publish a present value table showing the conversion factors for weeks one-hundred and one through five-hundred on the first business day following January 1st of each year;
- The present value table for weeks one-hundred and one through five-hundred published on the first business day following January 1st shall apply to all awards made during the year until a new present value table is published the following year;
- The present value of the commutable weeks shall be determined based on the present value tables in effect on the date of the award or settlement.
- In the event the Commission makes an award of a partial lump sum in excess of five-hundred weeks in accordance with § 42-9-10(C) and § 42-9-10(D), the discount rate shall be determined on a case by case basis.