COMPNEWS

A Publication of the South Carolina Self-Insurers Association, Inc. | Fall 2015

WCRI study

Healthcare providers gaming workers' comp

Healthcare providers who are paid a fixed sum per insured employee are more likely to call an injury work-related so they can shift costs to workers' compensation programs, which reimburse them on a fee-for-service basis.

A recent study by the Workers Compensation Research Institute asserts a back injury was as much as 30% more likely to be called "work-related" (and paid by workers' compensation) if the patient's group health insurance was capitated rather than fee-for-service. Based in Cambridge, Massachusetts, WCRI is widely known for its research reports on the workers' compensation industry

WCRI explains that when a patient covered by a capitated health insurance plan seeks treatment for, say, back care, the physician and his healthcare facility are well-aware they will not earn incremental revenue for their services since they were paid a fixed amount for that patient at the outset of the policy year. But if the condition is deemed work-related, the providers know they will be paid for each service they provide.

The opportunity arises when the cause of injury is not certain, as is the case with a soft-tissue condition or non-specific back pain or strain/sprain of knee or shoulder. WCRI notes it is notoriously difficult to pinpoint the cause of back pain; some cases of back pain are said to be caused by a specific event, others are said to be caused by repetitive motion, and still other cases of back pain are attributed to the aging process.

A lot hinges on the professional judgment of the physician, and given the choice between receiving additional revenue and not receiving additional revenue, many prefer the former. WCRI says providers are more likely to shift cases to workers' compensation in states where capitated group health plans are more common and, therefore, providers are more aware of the rewards of classifying an injury "work-related."

WCRI adds its findings are reinforced by the fact case-shifting is not common in states where capitation is not common, and there is no case-shifting for patients with conditions where the causation is more certain (for e.g. fractures, lacerations, contusions). WCRI is not the first to find evidence of case-shifting; nearly a dozen studies in the 1980s and 1990s documented a similar phenomenon under health maintenance organizations, which paid healthcare providers on a capitated basis.

Since the U.S. healthcare system is moving away from fee-for-service in favor of capitated or lump-sum payments, workers' compensation is an inviting target. An earlier WCRI study found that in almost all states, workers' compensation programs were charged higher prices for common surgeries than paid by group health insurance plans. In some states, prices paid by workers' compensation were two to four times higher.

Although capitated arrangements are more common in the western states and in the northeast, WCRI says it is likely case-shifting will spread to the Midwest and the south as capitation becomes more common in these regions. The group says employers should be aware how case-shifting adds to their costs, and workers' compensation commissioners should also be aware physicians are more likely to classify an injury as work-related if it means they will get paid on a fee-for-service basis.

INSIDE THIS ISSUE

Judicial Notes

You be the Commissioner

In the aftermath of *Nicholson v. SCDSS*, 769 S.E.2d 1 (2015) and *Barnes v. Charter 1 Realty*, 768 S.E.2d 651 (2015) South Carolina employers and practitioners are beginning to sort out the impact of these decisions handed down by the South Carolina Supreme Court. A strict interpretation of both opinions leaves the reader questioning to what extent a claimant must prove, if at all, that the injury arose out of the employment in order to be deemed compensable under the South Carolina Workers' Compensation Act.

To that end, it may be of benefit to play a game of "You be the Commissioner". The case presented below only went to the Full Commission level, therefore, it does not serve as direct precedent. Nevertheless, the decision is still illustrative of how the Commission may analyze idiopathic and unexplained injuries post *Nicholson* and *Barnes*.

In *Ware v. Carolina Band Saw, Inc.*, 2014 SC Wrk. Comp. LEXIS 211 the claimant, a 50 year old male employee, and a co-worker were finishing work on a band saw. Ware testified on direct that he was kneeling to fasten a cable onto the saw, stood up, and then turned to walk to another grinder when he felt a pop in his leg followed by a burning sensation. The shop floor was a level concrete surface.

On continued direct examination, Ware denied any previous issues with his right leg other than "every day wear and tear and getting older" prior to the alleged incident. He added that the pain of growing older was nothing in comparison to the pain he experienced as a result of the incident on the job.

On the other hand, on cross examination Ware conceded (only after being confronted with his deposition testimony) that he had experienced some prior problems with his right leg for several years before the incident. At his deposition he testified that he had every day discomfort in his right knee and that he took ibuprofen for the problem.

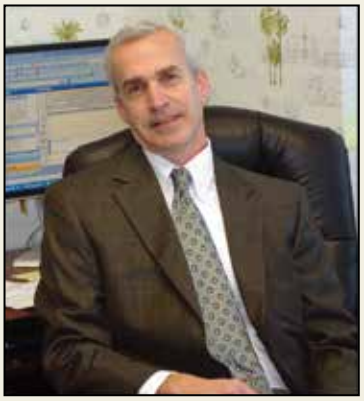
Ware also conceded that at the time of the incident he was not holding any tools or carrying anything when he stood up and turned to walk across the shop floor. He agreed that he had just taken his hand off of the saw cable, was standing upright, and was turning to walk across to a grinder on the other side of the shop when he felt the pop in his leg.

Ware argued to the Commission that the rulings in *Nicholson* and *Barnes* have overturned the case law on idiopathic injuries in South Carolina. He asserted that whether he was standing from a crouched position, lifting anything, or holding anything when the pop occurred is not dispositive any longer under these recently decided cases. He argued that instead, his injury is compensable as a matter of law where he was performing his job when he sustained an injury.

He pointed to the fact that he stood up and turned in order to walk across the shop to another grinder which was running (sharpening a saw blade) and needed his attention. He explained that operating the grinders and walking between them were required activities and as such were part of his normal job. Therefore, he contended that a causal connection was established between his injury and his job because he was working when his injury occurred.

How would you rule as the Commissioner? Is the claim compensable under *Nicholson* and *Barnes*? This case was initially denied by Commissioner Taylor on November 24, 2014. An Appellate Panel of the Full Commission (Commissioners Beck, Barden, and Wilkerson), affirmed the denial in a unanimous decision filed May 27, 2015.

continued on page 4



Mike Chase
Legal Advisor, SCSIA

President's note

Brian Teusink
President

New venue for 2016 conference

I'd like to start this issue's column with a thank you to Val Rosser for her service as president of the association. Her contributions are greatly appreciated and I look forward to serving as president, following Val's resignation earlier this fall.

Our 2016 Members-Only Forum will be held on April 6-8 at Hilton Myrtle Beach Hotel (part of the Kingston Plantation complex). Our traditional meeting place, Litchfield Beach & Golf Resort, is expected to be under construction next spring, and Litchfield says there's no telling what impact that would have on meeting facilities in the near and foreseeable future.

It took bulldozers to relocate us, but we are pleased to be moving to the Kingston Plantation. A new venue is one of several changes we have in mind to help the association respond to dwindling interest among self-insured employers, which is perhaps due to the stagnation in self-insurance amid an exceptionally long soft market.

In almost all states, employers are a smaller and smaller part of self-insurers' associations. Employers are conspicuously absent at annual conferences which, in turn, discourages vendors and exhibitors, and none of that bodes well for the future of state associations. We are taking steps to make sure your association remains relevant, strong, and valuable.

One step we continue to take is to put on a substantive conference each year. Our program planning committee is working diligently on next year's program, and I am sure once again our members will be pleased at the timeliness and usefulness of the topics. The big challenge before us is to persuade more employers to see the educational and networking benefits of our Members-Only Forum.

Until next time,

Brian

Comp's slow embrace of ICD-10

The U.S. healthcare system adopted ICD-10 on October 1, but workers' compensation agencies in nearly half the states are mum about their plans or are not switching over, according to the Workgroup for Electronic Data Interchange (WEDI), a group that advises the U.S. department of Health and Human Services.

The federal mandate that requires hospitals, physician practices, and other healthcare providers to use ICD-10 does not apply to property and casualty carriers, including workers' compensation, because these entities are governed by state law. As a result, WEDI and the Centers for Medicare and Medicaid Services have been persuading reluctant state governments to make the update so healthcare providers don't have to maintain two billing and coding systems.

South Carolina and North Carolina are among the states who've adopted ICD-10. The S.C. Workers' Compensation Commission announced its decision on August 27, while the North Carolina Industrial Commission had announced earlier in the year that all medical services provided on or after October 1, 2015, must be billed with ICD-10 diagnosis and procedure codes.

Healthcare providers have known of the impending change since 2009. But physician groups, who've long protested the update from ICD-9 to ICD-10 would be too massive, too expensive, and too cumbersome, succeeded in delaying the deadline three times. Even then, while hospitals say they are ready for the big change, surveys indicate many physician practices are not prepared, and in little hurry to make the necessary changes.

A recent survey by the Texas Medical Association found only 10% of physicians responding to the survey were ready to make the transition, and nearly 75% of physicians said they had not started or had only made partial progress towards adopting the new system. A separate nationwide survey by the Workgroup for Electronic Data Interchange (WEDI) found nearly 90% of hospitals were ready, but fewer than 50% of physician practices nationwide expected to be ready by October 1.

Calendar

Mar. 30–Apr.1, 2016	NC Association of Self-Insurers' Annual Conference. Holiday Inn Resort, Wrightsville Beach.
April 6-8, 2016	Members-Only Forum of the SC Self-Insurers Association. Hilton Myrtle Beach Resort.

COMPNEWS

COMP NEWS
is published quarterly by the
SC Self-Insurers Association, Inc.

www.scselfinsurers.com

EDITOR AND WRITER

Moby Salahuddin
215 Holly Ridge Lane
West Columbia, SC 29169
E-mail: msalahuddin@sc.rr.com
Telephone: 803-794-2080

You Be The Commissioner *continued from page 2*

Of interest for future cases are the findings and conclusions of law rendered by the Full Commission. They include that while *Sigmon* v. *Dayco* is still good law (injury in and of itself can be an accident), this case is distinguishable. They found that the injury instead was idiopathic in nature. It occurred while Ware was walking across a level concrete floor at his employer's shop. He was not in the process of standing from a crouched position, lifting anything or holding anything when the pop occurred. Thus, there was no causal connection between the claimant's employment and the injury.

The Full Commission included their view of claimant's argument that all he need prove under *Nicholson* and *Barnes* is that he was at work doing his job when he suffered an injury: "...rather than supplant the law governing idiopathic injuries as Claimant argues, the South Carolina Supreme Court in recent cases has clarified that it is improper to classify a fall or injury as idiopathic simply because the Claimant cannot point to any causal link to the injury.

These cases simply reiterate the black letter rule that an idiopathic fall arises from an internal breakdown personal to the employee, thus negating any causal connection". They added that in both *Nicholson* and *Barnes*, the claimants sustained falls, whereas in the instant case Ware was simply walking on a level surface when he felt a pop in his knee.

Unfortunately, the claimant did not follow through on an appeal beyond the Full Commission level which may have resulted in some clarification of *Nicholson* and *Barnes*, and served as direct precedent in future cases.

In any event, the Full Commission order in *Ware* does offer some guidance. Whether you agree with it or not, the Supreme Court found (in two very confusing opinions) in *Nicholson* and *Barnes* that there was enough of a causative factor in regards to the mechanism of the injuries in both cases to deem that the alleged injuries arose out of and in the course of employment. In other words, they appear to have found that scuffing a shoe on the employer's carpet and stumbling while hurrying down a hall to answer a supervisor's e-mail were enough "causation" between the injuries and the employment. All would agree that the language in the orders doesn't offer much explanation, and even appears to overlook the arising out of employment prong altogether, as pointed out in the dissent.

Therefore, as confirmed by the ruling in *Ware*, it will be highly important for employers and defense practitioners to focus on the specific mechanism of the injury when defending claims under the arising out of the employment prong. A close look at the alleged causative factors should be of the upmost concern. If there is merit to such a defense, it should be presented to the Commission from the standpoint that unlike *Nicholson* and *Barnes* (scuffing shoe on carpet and stumbling while rushing to answer e-mail), there was no causative event. All should be mindful that under the SC Workers' Compensation Act, the claimant has the burden of proof.

Comments: This does not constitute legal advice. You should seek the counsel of your attorney concerning the application of the information in this article to your particular situation. If you have comments please contact Mike at mchase@turnerpadget.com.