



COMPNOTES

Recent Development in Ohio Workers' Compensation Law: Cooling Off *Coolidge*

By Jennifer A. Welfley, Millisor & Nobil Co., L.P.A.

In all its wisdom, in 2003 the Ohio Supreme Court decided the case of *Coolidge v. Riverdale Local School District*. In that decision, the Court ruled that employers were prohibited from terminating an employee based on a neutral absenteeism policy when the employee is receiving temporary total disability (TTD) compensation at the time of discharge. Since that time, Ohio courts have been inconsistent in the interpretation of that case. Two significant uncertainties that have resulted are whether 1) a new wrongful termination in violation of public policy claim was created; and 2) an injured worker receiving TTD compensation is simply immune from termination.

Prior to *Coolidge*, Ohio courts held that at-will employees (i.e., those who are not subject to an employment contract or collective bargaining agreement, or whose jobs are protected by statute) could bring a lawsuit in court if they are terminated for a reason that violated the "public policy" of the State. For example, employees who worked for small employers that were not subject to Ohio anti-discrimination laws due their size but who alleged that they were terminated due to their protected class (age, race or gender, etc.) could sue under this theory. In *Coolidge*, the case involved a contract employee so some Ohio courts interpreted that case to expand the scope of public policy claims and permit employees who were not at-will to file such claims. Others Ohio courts disagreed with this interpretation and limited the decision of *Coolidge* to the facts of that case. Regardless, after *Coolidge*, most Ohio employers were skittish to terminate an employee receiving TTD compensation for any reason.

In 2006, the Ohio Supreme Court finally addressed some of these uncertainties. In a victory for Ohio employers, the Court held in *State ex rel. Gross v. Indus. Comm.* that employees can be terminated for violating a written work rule even if they are receiving TTD compensation at the time. In that case, the employee received a copy of the employer's handbook, which stated in writing that a violation of a certain cleaning process rule was grounds for immediate termination. The employee injured himself while violating the rule and began receiving TTD benefits. The employer subsequently conducted an investigation of the matter and determined as a result of the investigation that the employee had violated the rule, and terminated him. Pursuant to certain Ohio case law, the infraction and resulting termination was deemed to be a voluntary quit (under the "voluntary abandonment" doctrine) and the TTD benefits were terminated. On appeal that decision was overturned.

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Specifically for Self-Insureds

Each year, Sedgwick CMS sends out surveys to all self-insured clients in an effort to measure our clients' level of satisfaction with the services provided. Our operations managers review each survey response and personally discuss any noted concerns with client representatives. As a part of this process, an action plan is developed and followed by both operations and program management to ensure appropriate resolution.

The Self-Insured departments in our Columbus, Dublin, and Cleveland offices are pleased to report that overall feedback received from these surveys in 2007 indicate that our clients are very satisfied with our TPA services. Responses were overwhelmingly favorable regarding the efforts of our dedicated claims colleagues. Of course, we know there are always opportunities to improve, and we look forward to utilizing the information provided to develop new methods in meeting our customers' ever-changing needs.

We thank all of our clients for providing us with candid feedback and ideas for improvement, and we appreciate our continued partnership.

Recent Development continued...

However, the Ohio Supreme Court upheld the termination of TTD benefits in *Gross*. In that case, the Court stated that *Coolidge* was not intended to be read as interpreting workers' compensation law but rather the circumstances under which a public employee (whose job is protected by statute and a collective bargaining agreement) can be terminated. As a result of this ruling, Ohio employers can fire employees receiving TTD benefits for violating written work rules that are clearly written and state that a violation may result in termination. Further, TTD benefits can be terminated pursuant to the voluntary abandonment doctrine. While the Court did not put to rest whether the *Coolidge* decision created a new claim for wrongful termination in violation of public policy, given its leanings in the *Gross* case, it is expected that the Court will settle that issue in its decision of another case currently on appeal regarding that issue.

Practical Pointer: Based on *Gross*, Ohio employers may terminate an employee for the violation of a work rule even if he or she is receiving TTD compensation. However, it is essential that the work rule be clearly articulated in writing. Further, the rule must state that violation of the rule is grounds for immediate termination. The employee also must have received notice of the work rule for the termination to be lawful. Thus, employers are advised to obtain a written acknowledgement from the employee that he or she received and understood the rule (or the handbook in which it is distributed).

The information contained in this article is for general information purposes only and legal counsel should be consulted for specific application.



Sedgwick CMS

RHS Solutions, a Sedgwick CMS Company

Managing risk is critical to the success and profitability of any employer, regardless of its size. RHS Solutions, a Sedgwick CMS company, is a national risk management firm specializing in risk management and loss control services. Such services include:

- Implementation and maintenance of a Drug-Free Workplace program
- Safety program implementation and training, including ergonomics
- Return to work programs
- Site surveys and/or audits
- Injury and illness trending and OSHA recordkeeping assistance
- Many other services

For more information, contact RHS Solutions at 888-264-2635 ext. 2422 or ext. 2468 to discuss how RHS Solutions can partner with your organization in its risk and safety management efforts.

2007 Self-Insured Employer Seminar



Our 2007 Self-Insured Employer Seminar will be held in the Cleveland area on October 4 and in the Columbus area on October 5, with specific locations to be determined.

We have invited feedback from our **self-insured** clients regarding our seminar; if you have not already done so, please visit the website listed below to complete the survey.

<http://www.surveymonkey.coms.aspx?sm=Tx5FayZZcoma1E8gvctfcUcSZT6wVJSEqGfIMfLbFyY%3d>

Out of State Coverage

Many Ohio employers find themselves occasionally doing business outside the borders of Ohio. Workers' compensation coverage can be a major concern for these employers, as there is always a question as to which state's coverage applies. Recently, BWC Legal Operations issued a memorandum in an attempt to clarify the guidelines for some of the more common situations involving interstate coverage.

This memorandum is available online at <http://www.ohiobwc.com/basics/infostation/InfoStationContent.asp?Item=3.1.1.12.1.1>. Below are some of the highlights:

As outlined in the memorandum, the general guideline that determines whether or not an employee is covered under the Ohio workers' compensation system has to do with the degree to which the job is "localized" in Ohio or has "sufficient contacts" to Ohio. In determining this, the BWC will look at all the circumstances surrounding the employment arrangement. Some of the factors used to determine whether or not there are "sufficient contacts" to Ohio are: "where the contract of employment was entered, where the injury occurred, where the employee performed the work, the location from which the employee was supervised and controlled, the state where the employee's payroll was processed, the availability of workers' compensation in other states, whether the work was to be performed solely in another state, and whether the work was to be performed exclusively in interstate commerce."

Essentially, if an Ohio employee is traveling outside of Ohio temporarily (generally for a period of less than 90 days), BWC will almost always extend coverage while this employee is out of the state. If an employee regularly works in both Ohio and another state, BWC will examine the individual circumstances to determine coverage, but in most cases will require that Ohio coverage be in force for this employee.

One very common situation that many employers encounter is with truck drivers who may travel to many different states in the course of their employment. Coverage jurisdiction for these drivers is generally determined by where they are "domiciled;" that is, the location of their home terminal from which they receive their driving assignments. However, BWC will still look all the circumstances surrounding the employment arrangement to determine if the drivers meet the criteria for having "sufficient contacts" with Ohio, so the home terminal rule of thumb does not automatically determine jurisdiction.

One thing you must consider is that even if BWC finds "sufficient contacts" with Ohio to extend coverage, it does not guarantee that other states will recognize this and may require that employers obtain additional coverage in their states. For this reason, if you think there is a potential for conflict with another state, it is recommended that you consult an insurance carrier in that other state to determine coverage requirements.

Obviously, there are many different interstate situations that can develop, and this article covers only the very basics of this complicated issue. For more information on this topic, you may consult BWC's online memorandum or call CompManagement's Rate and Underwriting Department at (800) 825-6755 or BWC Legal Operations at (614) 466-6600.

Important dates to remember!

June 20-22	Ohio Self-Insurers Assoc. 33rd Annual Conference; Hilton Cincinnati Netherland Plaza, Cincinnati, OH
June 30	BWC survey date for public employers for 2008 rate determination
June 30	Premium Discount Program (PDP) Plus application deadline for participation beginning 7/1 for Private Employers (special extension where employer can file application with 35 days after BWC releases EMR)
June 30	Drug Free Workplace Program (DFWP) application deadline for participation beginning 7/1 for Private Employers
July	BWC sends payroll reports to Private Employers (for 1/1/07-6/30/07 payroll)
August 31	Payroll reports for 1/1/07-6/30/07 due for Private Employers
September 1	Public Employers must pay remaining 55% of premium
September 30	Premium Discount Program (PDP) Plus "plan of action" due to the BWC for Public Employers (schools have until 11/15)
September 30	Drug Free Workplace Program (DFWP) "progress report" and renewal deadline for Private Employers with a 1/1 effective date
September 30	Drug Free Workplace Program (DFWP) "progress report" and renewal deadline for Public Employers with a 1/1 effective date



Sedgwick CMS News

Sedgwick CMS is pleased to announce the following promotions within our Ohio Specialty Operations division.

Kevin Lowry, Senior Vice President, Deputy Director of Operations, will assume responsibility for Specialty Ohio State Fund, Hearing Administration, State of Ohio (DAS) dedicated team and Unemployment Compensation claim services. Kevin graduated from Franciscan University with BS in Accounting and is a CPA in Ohio. Kevin received his MBA from Franklin University. Kevin has been with the Company since 2003. Prior to joining CMI, he spent over thirteen years in public accounting and industry positions, most recently as a Senior Manager for a large regional CPA firm.

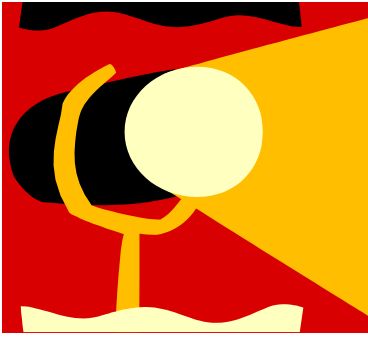
Randy Jones, Senior Vice President, Specialty Operations, will continue to lead our customer development effort and will also assume additional responsibilities, including overall customer service, that will significantly expand his role within Ohio. Randy received his BS from Bowling Green State University in 1981 in Business Administration/Marketing. He has over 25 years' experience in workers' compensation and healthcare marketing and operations. Randy joined CompManagement (CMI) in 1996 after several years with a competing firm. He has served as a senior executive and an officer within CMI since 1996. Randy was initially a part of the development team that created CompManagement Health Systems (CHS) when Ohio moved to mandatory managed care for workers' compensation. He served as President of CHS from 1998 to 2003. During his tenure at CHS, Randy worked closely with his CMI counterparts in developing the coordination between managed care services and TPA group rating programs for clients and sponsoring insurance agents. In addition, Randy was instrumental in CMI's successful national expansion effort and continues his role as a business development executive with Sedgwick CMS.

Heather Vogus, Vice President, Actuarial Services, will assume self-insured operational responsibility for the Ohio market, in addition to her current duties for Rate and Underwriting, Settlements and Washington State association programs. Heather received her bachelor's degree in mathematics / actuarial science from The Ohio State University in 1990 and her master's in business administration from The Ohio State University in 2007. Heather has sixteen years of experience in the area of workers' compensation third party administration. She joined CompManagement, Inc. in 1990 as a rate analyst. She was promoted to Director of Actuarial Services in 1993, to Vice President of Actuarial Services in 2004, and to Vice President/ Operations Manager in 2007.

Tara Heath has been named Hearing Administration Manager. Tara received her bachelor's degree in Organizational Communication and Human Resource Management from Miami University in 1993. Tara has 14 years experience in the area of worker's compensation and began her career with positions as an in-house employer representative for both a self-insured retail organization and for a large retrospectively rated manufacturing organization. She joined CompManagement, Inc. in 1997 as a Claims Account Manager in the State Fund department. She was promoted to Senior Account Manager in 1998 and State Fund Manager in early 1999. In this role, she has led our State Fund seminars, developed strong client relationships, overseen the growth of the department's systems and capabilities, and been a major contributor to the success of the Ohio TPA. Her dedication, loyalty and technical expertise will be a great asset to the Hearing Administration department.

Joe Miller has become Manager of the State Fund Department. Joe holds a B.S. in Communications from Ohio University. Joe joined the staff of CMI in 1994 as a hearing representative and account manager. He was promoted to Regional Customer Service Director in 1998 and to Hearing Administration Manager in April 2002. During his tenure as Hearing Administration Manager, Joe was heavily involved in the issues surrounding, and the favorable outcome of, the unauthorized practice of law suit by the Cleveland Bar Association against CompManagement. Sedgwick CMS/CompManagement is grateful for his hard work, dedication and leadership through these difficulties.





Client Spotlight

Thomas & Marker Construction World Class Safety

When you think of safety in the workplace, you can think of CMI client Thomas & Marker Construction, located in Marysville and Bellefontaine, Ohio. Since 1956, they've put safety first. The company promotes safe practices for all associates and anyone else who may come in contact with one of the many company projects. This corporate emphasis is not limited to the hours of operation — T&M urges their associates to follow safe practices at all times.

President Randy Marker and Vice President Pat Ellis feel that associate input gives an infusion of fresh ideas to the Safety Program and a sense of ownership and pride in what the program achieves. Senior Management's commitment to ensure work place safety at every level helps to develop this culture of safety.

The safety program is headed by Safety Director Brooke Smith and Safety Manager Kyle Koschalk. Not only are T&M's management and employees committed to safety, there is **zero tolerance** of any unsafe practices. Associates receive praise and positive reinforcement for following safe work practices. One example of this is the company's Traveling Safety Trophy, which is awarded to projects showing exceptional safety practices.

T&M's Safety Department includes OSHA-authorized on-staff instructors who develop, maintain and deliver pertinent seminars and training sessions. The company recently completed the final step in OSHA's Challenge Pilot program. They are very proud to be part of a dedicated group of companies that have completed this rigorous program. The completion of the Challenge Pilot program enabled them to apply for OSHA's Voluntary Protection Program status. VPP status has multifaceted benefits, including exclusive rights to bid on projects requiring VPP certification.

CompManagement, Inc. has represented T&M since 2004. Kyle Koschalk commends CMI on their financial and injury analysis, which has helped to lower their rates from an 11% credit in 2003 to a 29% credit in 2007. Instead of letting claims fall through the cracks, CMI helped him identify fraudulent and potentially costly claims which led to denials and dismissals. Their account is managed by CMI Account Executive Kelly Lowry and the CMI claims team of Scott Galloway, Jennifer Klier and Carly Long.

T&M received the BWC's Achievement Award for lowering their workers' compensation rates by more than 25% from 2006 to 2007.

Excellence in Construction

When you think of excellence in construction, you think of Thomas & Marker, described by their clients as "refreshing" and "a breath of fresh air." High performance/high standards is the company "brand" and represents the work ethic and energy level displayed throughout the company. *"We believe the building process can and should be a fun and exciting realization of our client's vision."*

This past Fall, Thomas & Marker received the regional Award of Excellence in Construction for the Asia Quest Project at the Columbus Zoo. They were recently notified that this same project has won the National Associated Builder and Contractors Award of Excellence, which they will receive in June 2007 in Washington, D.C.

They focus on the importance of seeing a project through their clients' eyes. By living this philosophy, Thomas & Marker has built a strong and loyal client base.

CMI congratulates Thomas & Marker on their record of excellence!

New Legislation Overhauls BWC Administration and Oversight

By James B. Yates, Esq. and Sarah E. Pawlicki, Esq., Eastman & Smith Ltd.

On May 23, 2007, the Ohio General Assembly passed a bill approving appropriations for the fiscal year 2008-2009 biennium for both the BWC and the Industrial Commission. The legislation, referred to as House Bill 100, also contains a major overhaul to the BWC governance structure as well as substantive changes which could have a major impact on Ohio employees.

Governance Changes

HB 100 abolishes the Workers' Compensation Oversight Commission, the Services Committee of the Workers' Compensation System and the Internal Security Committee, and replaces the duties performed by those structures with the Bureau of Workers' Compensation Board of Directors and three working committees: the Workers' Compensation Audit Committee, the Workers' Compensation Actuarial Committee and the Workers' Compensation Investment Committee. The new Board of Directors, consisting of eleven (11) members appointed by the Governor from a list of nominations, with the advice and consent of the Senate, is responsible for establishing the overall policy of the BWC. A newly created Workers' Compensation Council will review, study and report to the General Assembly on changes to workers' compensation statutes, review BWC financial and actuarial data, and contract with an independent actuary to perform various valuations of BWC assets and liabilities. The restructuring is a direct response to the much publicized "Coingate" and other investment scandals involving the BWC. The changes will provide the new Board with increased fiduciary and oversight responsibility over the BWC. Additionally, an independent office within the Inspector General's Office was created to investigate the conduct of BWC and Industrial Commission officers and employees.

MIRA Revisited?

In addition to the restructuring, the contents of the legislation could have a major impact on the way state fund employers manage their workers' compensation costs. HB 100 requires the Administrator to switch from the Micro Insurance Reserves Analysis System ("MIRA") to a "different system or a different version of that system to determine the reserves for use in establishing premium rates." The new system is to be "transparent;" it must be able to be generally understood by employers and the type of data used in the reserve analysis must be explained to employers. Currently, the BWC takes the position that the formula for calculating MIRA reserves is proprietary information which will not be disclosed to employers. A "transparent" reserving system will permit employers to allocate resources (i.e. safety training, transitional work, medical management) which provide the most impact in terms of premium savings.

Claims Hit Experience Sooner

HB 100 provides that once an employer exhausts its administrative remedies, the Administrator must charge the employer's experience for the allowed medical and compensation costs. A 2004 Ohio Supreme Court decision provided that the BWC could not charge medical costs to the claim until the issue was "finally adjudicated" which was after all of the administrative and court appeals were exhausted. Whether compensation costs could be charged against an employer's premiums prior to final court adjudication is a matter of some dispute between the BWC and state fund employers. The legislation will permit the BWC to charge claim costs to an employer's experience (and, therefore, premiums will potentially be increased) much earlier in the life of the claim.

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Unemployment Update

Ohio Social Security Offset

The State of Ohio is expected to pass new legislation, to take effect on July 1, 2007, that will reduce the Social Security offset to 50% of the claimant's benefit. Ohio currently deducts Social Security payments dollar for dollar, which can be a significant savings to employers. However, due to fewer true retirements and an aging workforce, an increased number of workers were unable to collect due to their SS payments. This change was expected in 2006, but was delayed due to a number of factors.

Pennsylvania UPL Update

The Commonwealth of Pennsylvania has been considering the question of third party administrators and the unauthorized practice of law since 2005, which included two lawsuits and a legislative change. The Pennsylvania Supreme Court issued a decision in April 2007 that allows third parties to represent the employer in Unemployment administrative hearings. Since the Commonwealth had always allowed union representatives to appear, this final decision evens the playing field for both parties.

Unemployment Hints during Economic Recovery

Many employers consider layoffs when looking to reduce labor costs due to the stalled economy or reduced business. Because the layoff is considered the employer's fault and unemployment is paid when employees are separated through no fault of their own, the employer's account is charged for benefits.

Employers may be charged less if they try the following options:

- Reduce the number of hours employees work. Partial benefits may be paid if the hours reduced are significant, but if only eight hours in a forty hour week are cut, typically no benefits will be paid.
- Allocate vacation to periods of layoff, if company policy allows the option. Vacation allocated to a period after the last day of work will be deducted from unemployment benefits. Most policies do allow for this option.
- When a job is abolished and severance is paid, the severance should be allocated to the period after the last day of work. Ohio deducts severance dollar for dollar for as long as it is paid, so if an employee receives 90 days of severance, they will not be paid unemployment for 90 days. If both vacation and severance are paid, we would recommend allocating the two payments consecutively versus concurrently. Doing so allows benefits to be delayed for several additional weeks, depending on the weeks of vacation that are paid.

Questions regarding these or other unemployment issues should be directed to Mary Lloyd-Marucco, Director of Unemployment Services, at 614-760-8181.

2007 Unemployment Compensation Seminars

Sedgwick CMS' Ohio region 2007 Unemployment Compensation seminars will be held in four locations around the state in October:

Dublin - October 22

Toledo - October 23

Cleveland (Beachwood area) - October 24

Cincinnati - October 25

Watch for more information coming soon!

New Legislation Overhauls BWC Administration and Oversight continued....

Increase In Medical-Only Payments

Ohio state fund employers did obtain a benefit from HB 100 in the form of an increase in the “Medical Only Claim Program.” Before HB 100, Ohio employers could enroll in the \$5K program (previously the \$1K program) which permits state fund employers to pay out of pocket medical bills for a claim up to \$5,000. HB 100 increases that threshold to \$15,000. Once an employer enrolls in the Medical Only Claim Program, it is responsible for paying all medical bills for every claim filed up to \$15,000 per claim, unless the employer notifies the BWC that it does not want to participate in the Medical Only Claim Program for a particular claim within 14 days of receipt of the notice of the claim being filed. This provision should be of particular benefit to small employers.

HB 100 also requires the BWC to provide a copy of a group rated employer’s premium invoice to the employer’s third party administrator should the employer’s premiums change, notifying the third party administrator of that change.

Increased Employer Penalties

HB 100 also gives the Administrator increased powers to discontinue an employer’s coverage if the employer fails to pay certain amount due to the BWC. HB 100 provides that if, after a final adjudication, it is found that an employer has failed to pay an obligation of greater than \$1,000, the employer’s workers’ compensation coverage may be cancelled.

Ohio employers need to be aware of these most recent changes in their increasingly more difficult efforts to control rising workers’ compensation costs. Although the legislation passed quietly, the impact of HB 100 will likely be widespread and employers should contact their legal counsel and third party administrator regarding the possible impact in their workers’ compensation costs.

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