



COMPNOTES

Recent Development in Ohio Workers' Compensation Law: *Coolidge Hot and Cold*

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

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. Other 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.

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Jon Wagner announces his retirement



Shortly before this issue of *CompNotes* went to press, Jon Wagner, long-time president of CompManagement and more recently executive vice president and director of specialty operations for Sedgwick CMS, announced his decision to take early retirement in order to have more time for family, travel and community interests.

Many of you are familiar with the leadership role that Jon has played in the claims services industry throughout his distinguished twenty-three year career. As one of the original co-founders of CompManagement, Inc., he was instrumental in building our organization to its position of leadership in Ohio. Since last year's merger of CompManagement with Sedgwick CMS, Jon has played a critical role in the successful transition of the CMI family of companies to the Sedgwick CMS organization. He leaves with our thanks for his years of leadership and service and our best wishes for an enjoyable and fulfilling retirement.

Ohio employers can continue to rely on the quality service provided by our experienced team of colleagues led by Deputy Director of Specialty Operations Kevin Lowry, Operations Manager Heather Vogus, Director of Ohio Managed Care Operations Mary Beth Sanford and Director of Sales Randy Jones.

Coolidge continued...

Pursuant to certain Ohio case law, the infraction and resulting termination was deemed to be a voluntary quit (under the "voluntary abandonment" doctrine) and TTD benefits were terminated. On appeal that decision was overturned.

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.

Finally, the Ohio Supreme Court recently limited the voluntary abandonment doctrine in its June 2007 decision of *Omnisource Corp. v. Indus. Comm.* In that case, the employee was a commercial truck driver and off work receiving TTD benefits when his commercial driver's license (CDL) expired and when he later was convicted of drunk driving. When the employer learned of these facts, it demanded that the employee present a valid CDL within two business days and because the employee did not do so, it terminated him. It then refused to pay him any additional TTD benefits. The commission determined that the employee already was temporary and totally disabled when he was fired and thus could not be deemed to have voluntarily relinquished his job position.

On appeal, the Supreme Court agreed. Existing Ohio law states a claimant who is already disabled when terminated is not disqualified from temporary total disability compensation. It then held that the fact that the employee was fired for reasons unrelated to absenteeism (per *Coolidge*) does not disturb the rationale of this existing case law. Thus, under current Ohio law an employee can only abandon a job if he or she is physically able to perform that job at the time of the alleged abandonment.

Practical pointer: The Ohio Supreme Court is busy of late interpreting the relative rights of employers and employees in TTD compensation situations. Ohio employers should tread lightly when taking any adverse action against employees who are receiving, or could potentially receive, TTD benefits. In such cases, employers are advised to always seek legal counsel before doing so.

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

Minimum and Maximum Payroll Reporting

For calendar year 2007, the Ohio Bureau of Workers' Compensation has updated the minimum and maximum reporting limits for sole proprietors, members of partnerships, officers of corporations, individuals incorporated as a corporation with no employees, members of family farm corporations and ordained ministers.

Every year, the minimum reportable payroll for these individuals will be set to 50% of the statewide average weekly wage (AWW). For calendar year 2007, the statewide AWW is \$730, so the minimum reportable payroll is \$365 per week, which is \$9,490 per six months or \$18,980 per year.

The maximum reportable payroll will be set to 150% of the statewide AWW. Therefore, for calendar year 2007, the maximum reportable payroll for these individuals is \$1,095 per week, which is \$28,470 per six months or \$56,940 per year. Any wages for the people listed above greater than these amounts are not reportable to BWC.

The maximum reportable payroll (but not the minimum) also applies to the construction industry. The reporting limit applies only to the payroll of employees reported under a construction classification. Employers in the construction industry must calculate the reporting limit on a *weekly* basis for every employee. It is not an averaged amount over a pay period or over a six-month payroll reporting period. However, bonus payments to employees should be spread over the period in which they are earned and added to the regular wages, subject to the cap. Bonuses paid to officers reportable to a construction industry classification are considered to be part of their aggregate wages for the year and are capped at an aggregate amount of the weekly cap times 52 weeks.

Guidelines for reporting U-3S supplemental coverage

All employers with one or more employees must carry workers' compensation coverage in the State of Ohio. However, coverage is elective for company owners in the following categories:

- Sole proprietors
- Partnerships
- Limited Liability Companies (LLC) acting as sole proprietors
- Limited Liability Companies (LLC) acting as partnerships
- Family farm corporate officers
- Individual incorporated as a corporation with no other employees

Coverage is also elective for ordained ministers of a religious organization. **It must be stressed that BWC coverage is elective only for the actual sole proprietors, partners, corporate officers or ministers – all regular employees must still be covered.**

If you have individuals in the above categories and wish to cover them, you must file a BWC form U-3S (Application for Elective Coverage) and list the names of the individuals being covered. A new application must be filed any time you wish to add a new owner or minister to the coverage. Elective coverage becomes effective the day that BWC receives the U-3S.

Once the application is filed, BWC will add new NCCI manual codes to the policy based on the job duties of the individuals to be covered. These codes are identified by the designation "SN." Regular employee wages are reportable to NCCI codes with the designation "RN." The designation of RN or SN to a manual code does not affect its rate. For example, a clerical code for regular employees (8810 RN) will have the exact same rate as a clerical code for corporate officers with clerical duties (8810 SN). Those electing coverage through U-3S are eligible for the same benefits as any other employee covered by BWC.

Those reporting under SN codes are subject to BWC's minimum and maximum payroll reporting limits. For 2007, the minimum is \$365 per week and the maximum is \$1,095 per week. BWC will cancel elective coverage and send an invoice for additional premium if you fail to report the minimum payroll in any reporting period. Therefore, it is imperative that you are careful when reporting payroll for those who have elected U-3S coverage. Be sure to report at least the minimum reportable amount under the proper SN code.

If you have any questions about supplemental coverage for company owners, please contact the Rate and Underwriting Department at (800) 825-6755.

Unemployment Update

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

10/22/07	Columbus	Crowne Plaza of Dublin
10/23/07	Toledo	Pinnacle
10/24/07	Cleveland	Embassy Suites, Beachwood
10/25/07	Cincinnati	Wingate Inn -West Chester

For more information and to register for a seminar, please visit www.peopleware.net/2451meeting on or after **September 4, 2007.**

Public Employers (PECs) and Drug Testing to Meet Drug-Free Workplace Program Requirements

Provided by Ohio Bureau of Workers' Compensation, June 2007

BWC is aware of an informal opinion of the Ohio Attorney General (OAG) related to public employer taxing districts (PECs) participating or seeking to participate in a BWC drug-free workplace program. One of the program requirements is that participating employers conduct pre-employment and/or new hire drug testing for 100% of job applicants. This requirement does not distinguish between private employers and public employers.

Based on the AG opinion, the county that requested the opinion believed that it could not participate in a BWC drug-free workplace program because the opinion indicates that county agencies cannot legally drug test 100% of applicants for employment (pre-employment testing) or test employees within an established period of time (90 days) from time of hire (new-hire testing). The AG opinion appears to permit, however, drug testing for safety-sensitive positions, and it is possible that counties could justify other positions for testing based on such issues as driving county vehicles or fiduciary responsibilities. Thus, public employers may require a candidate for a safety-sensitive job or other positions for which justification can be produced to submit to a drug test as a condition of employment or for retention of employment if new-hire testing were involved.

At issue is whether any public employer could meet the program's 100% testing requirement. **Until further notice, public employers that participate in a BWC drug-free workplace program (DFWP or Drug-Free EZ) will not be required to perform 100% pre-employment drug testing for other than employees whom the employer determines to be safety sensitive.** Public employers should consult with their legal counsel before testing other than safety-sensitive employees, but BWC will not consider a public employer to be non-compliant with program requirements for failure to require 100% pre-employment drug testing.

BWC defines safety sensitive position or function in rule 4123-17-58 (the DFWP Rule) and rule 4123-17-58.1 (the Drug-Free EZ Program Rule) as applying to "any job position or work-related function or job task designated as such by the employer, which through the nature of the activity could be detrimental or dangerous to the physical well-being of the employee, co-workers, customers or the general public through a lapse in attention or judgment. The safety-sensitive position or function may include positions or functions where national security or the security of employees, co-workers, customers, or the general public may be seriously jeopardized or compromised through a lapse in attention or judgment." Thus, the employer - which shoulders the risk - is allowed to use this definition to determine which positions should be considered "safety sensitive."

This same definition, used previously to identify which positions were subject to random drug testing for Level 2 and Level 3, can be applied to which applicants are drug tested to comply with the 100% testing of safety sensitive employees to be considered as being in compliance. A public employer that ensures 100% pre-employment and/or new hire testing of its safety-sensitive employees will be considered in compliance with BWC drug-free requirements.

BWC will keep public employers posted with additional information when it becomes available. Until then, employers participating in DFWP or DF-EZ must continue to do pre-employment and/or new hire testing of safety-sensitive positions to be considered compliant.

Specifically for Self-Insureds

Self-Insured Assessment Rates for period 7-1-07 through 6-30-08

Guaranty Fund	0.0527	
Safety & Hygiene:	0.0098	Minimum: \$136.11
Admin Cost:	0.1612	Minimum: \$2,238.89
Surplus fund (mandatory):	0.0450	Minimum: \$625
Surplus (Rehab):	0.1300	(optional)
Surplus (HC):	0.2480	(optional)
Surplus (Disallow):	0.0236	(optional)

Total minimum \$3,000

2007 Self-Insured Employer Seminar

Self-insured clients are invited to attend our 2007 self-insured employer seminar, to be held October 4-5 at the following locations:

Cleveland Meeting - The Ritz-Carlton Hotel - October 4, 2007

Columbus Meeting - The Conference Center at North Pointe - October 5, 2007

Seminar topics will include safety, investigation of claims, FMLA, and other issues relevant to your business needs.

Please visit www.SedgwickCMS.com/OhioSeminar to register for one of these valuable informational sessions.

Press Release from the Office of Ohio Governor Ted Strickland

Governor Announces Appointments to New Workers' Compensation Board of Directors

On July 31, 2007 Governor Ted Strickland appointed 11 members to the newly established Workers' Compensation Board of Directors, with William Lhota serving as chair. The independent, external board of directors will serve as the primary fiduciary entity of BWC funds and be held accountable for the bureau's operations.

"The establishment of an independent board of directors brings us a step closer to restoring confidence and accountability in the Ohio Bureau of Workers' Compensation," Strickland said. "The new board will ensure greater professional expertise and strengthened fiscal management of BWC funds."

Strickland selected the 11 non-legislative members of the board from 43 names submitted by the Workers' Compensation Nominating Committee, chaired by Lt. Gov. Lee Fisher.

The non-legislative membership of the board consists of one representative of employees, two representatives of employee organizations, three representatives of employers, two investment and security experts, one certified public accountant, one actuary and one member of the public.

Once convened, the members will form three subcommittees to provide independent advice and verification of BWC financial and operational performance: an audit committee, an investment committee and an actuarial committee.

2007 NCCI manual classification changes

New Classifications

9170 - Janitorial Services by Contractors - Includes Window Cleaning Above Ground Level and Drivers

Since these operations were originally included under 9014 (Buildings - Operation by contractors), NCCI is recommending using the rate values of 9014 until 9170 establishes its own experience.

2709 - Logging or Tree Removal - Mechanized Equipment Operators

Since these operations were originally included under 2702 (Logging or lumbering & drivers), NCCI is recommending using the rate values of 2702 until 2709 establishes its own experience.

2701 - Logging or Tree Removal - Log Hauling and Drivers

These individuals have the same exposure as a trucking operation. NCCI is recommending using the rate value of 7228 (Trucking: local hauling only - all employees and drivers) until 2701 establishes its own experience.

8799 - Mailing or Addressing Company or Letter Service Shop - Clerical

This is for the clerical staff of a letter mailing company now classified to 8800 (Mailing or addressing company and clerical). NCCI doesn't feel that these clerical employees have the same exposure as 8810 (Clerical office employees not otherwise classified) so they are not allowing them to have 8810 for their clerical staff. Since the clerical employees have some duties in the 8800 operations, they are using the rate values of 8800 until 8799 establishes its own experience.

5535 - Sheet Metal Work - Installation and Drivers

This classification will replace 5538 (Sheet metal work - shop and outside - not otherwise classified and drivers). 5538 is going to be two classifications in the future, so it is not a full re-class. What NCCI recommends is using the rate developed for 5538 until 5535 establishes its own experience.

3069 - Sheet Metal Work - Installation and Drivers

This classification will also replace 5538 (Sheet

metal work - shop and outside - not otherwise classified and drivers). What NCCI recommends is using the rate developed for 5538 until 3069 develops its own experience.

7705 - Ambulance Service Companies and EMS and Drivers

These operations are included under 7370 (Taxicab company: all other employees & drivers). NCCI recommends using the rate values of 7370 until 7705 develops its own experience.

7710 - Firefighters and Drivers

This classification will replace 7704 (Firefighters & drivers). 7704 is going to be two classifications in the future, so it is not a full reclass. What NCCI recommends is using the rate developed for 7704 until 7710 establishes its own experience.

7711 - Firefighters and Drivers - Volunteer

The classification will also replace 7704 (Firefighters & drivers). What NCCI recommends is using the rate developed for the 7704 until 7711 establishes its own experience. Using the combines rate information (7704) for 7710 and 7711 will allow an established rate for both codes resulting in no change in a single risk's premiums had the exposures remained under 7704. This methodology will be used until 7710 and 7711 establishes their own rating experience.

Reclass:

3066 Sheet Metal Work will be reclassified into 3076 - Fireproof Equipment Mfg.

Discontinue:

5538 - As stated above the operations anticipated by this classification will be classified as 3069 and 5535. NCCI recommends using the rates developed for 5538 for 3069 and 5535.

7704 - As stated above the operations anticipated by this classification will be classified as 7710 and 7711. NCCI recommends using the rated developed for 7704 for 7710 and 7711.

Welcome, New Clients!

AFL Network Services LLC, *Franklin, TN*
 Alternate Solutions Pd L L C, *Kettering, OH*
 American Weather Seal Company, *Orrville, OH*
 Arch Materials LLC, *Batavia, OH*
 Cameron Mitchell Restaurants, *Columbus, OH*
 Cecorr Inc, *Atlanta, GA*
 Chapman Industrial Constrution Inc, *Dover, OH*
 City Dash Inc, *Cincinnati, OH*
 Corbett R Caudill Chipping Inc, *McArthur, OH*
 Crapsey / Gilles Contractors Inc, *Loveland, OH*
 Damon's Restaurants, *Pittsburg, PA*
 Euclid City Schools, *Euclid, OH*
 Firelands Regional Medical Center, *Sandusky, OH*
 First Community Village, *Columbus, OH*
 Fypon Ltd, *Archbold, OH*
 Georgia Pacific Corporation, *Atlanta, GA*
 Good Samaritan Health Group, *Avon, OH*
 Holland Roofing of Columbus, *Columbus, OH*
 Holland Roofing R M M, *Cincinnati, OH*

K Hovnanian Companies, Inc., *Canton, OH*
 M G Q Inc, *Old Fort, OH*
 Macsteel Atmosphere Annealing Inc, *Canton, OH*
 Metallurg Vanadium Corp., *Cambridge, OH*
 Michelman Inc, *Cincinnati, OH*
 Monsanto Company, *Cleveland, OH*
 Morgan Stanley D W Inc, *Manhattan, NY*
 Nekoosa Packaging Inc, *Atlanta, GA*
 Ohio Department of Transportation, *Columbus, OH*
 Poulson Drilling Corporation, *Wooster, OH*
 Roush Equipment Co, *Westerville, OH*
 Rush Expediting, *Dayton, OH*
 Salem Community Hospital, *Salem, OH*
 Teleperformance USA, *Salt Lake City, UT*
 Tenable Security, Inc, *Cleveland, OH*
 The Buckeye Ranch, *Grove City, OH*
 Trilogy Healthcare of Ohio LLC, *Louisville, KY*
 Triplett Auto Recyclers, *Akron, OH*
 Village at Marymount, *Garfield Heights, OH*
 Waco Common Paymaster, *Cleveland, OH*

Important Dates to Remember

Important Dates to Remember	
August 31	Payroll reports and premium for the 1/1/07 to 6/30/07 payroll period due to the BWC for private employers.
August 31	Group Rating Applications for 2008 due to the BWC for public employers.
August - November	2008 Group Rating reviews being conducted for private employers. Invitations/renewals and preliminary notification letters sent.
September 1	Public employers must pay remaining 55% of premium for the 1/1/06 to 12/31/06 payroll period.
September 30	Premium Discount Program (PDP) Plus "plan of action" due to the BWC for public employers and private employers with a 1/1/07 effective date.
September 30	Drug Free Workplace Program (DFWP) "progress report" and renewal deadline for public employers and private employers with a 1/1/07 effective date.
October 4	CMI Self-Insured Employer Seminar – Cleveland area
October 5	CMI Self-Insured Employer Seminar – Columbus area
October 22	CMI Unemployment Compensation Seminar – Columbus area
October 23	CMI Unemployment Compensation Seminar – Toledo area
October 24	CMI Unemployment Compensation Seminar – Cleveland area
October 25	CMI Unemployment Compensation Seminar – Cincinnati area
November 15	Deadline for filing settlement applications for private employers to impact 2008 rates.
November 30	Retrospective Rating applications for 2008 due for public employers.



Medical Deductible Program Update

In the Spring 2007 issue of *CompNotes*, Attorneys James B. Yates and Sarah E. Pawlicki from Eastman and Smith Ltd. reported on a provision in HB 100 that increased the threshold for payments in the Medical Only Claim Program from \$5,000 to \$15,000, permitting state fund employers to pay medical claims up 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.

The Bureau of Workers' Compensation has now advised that the \$15,000 threshold becomes effective for claims with dates of injury on or after September 10, 2007.

While employers do not receive a premium discount for participating in the program, the payments an employer makes directly to medical providers are not included in the employer's experience rating. This decrease in claim costs charged to the experience can help in decreasing workers' compensation premium rates.

If you are interested in learning more about this program or would be interested in seeing how an increase in deductible may impact your rates, please contact the Rate & Underwriting Services Department at 1-800-825-6755.



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