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The Compass Navigating Workers' Compensation

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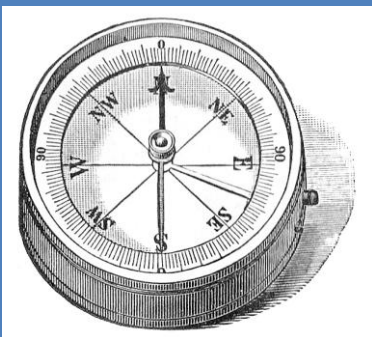
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Welcome to our first edition of FHKA's *The Compass*! In addition to our Firm's quarterly newsletter which addresses more general legal issues relevant to management, *The Compass* is our Firm's quarterly newsletter devoted to specific legal issues for management in Workers' Compensation. Articles range from introductory level for employers wanting to start to understand the complex workers' compensation system to advanced level for employers looking for tips to fine tune their existing workers' compensation practice. Readers are encouraged to contact us to follow-up on issues raised by these articles and to suggest topics they would like to see addressed in future editions of *The Compass*.

IS THE STRESS OF WORK HAZARDOUS TO YOUR WORKERS' COMP EXPERIENCE RATINGS?

Of course the stress of work can be hazardous to one's health. For those concerned about workers' compensation claims, the question is whether stress-related conditions or the stress-induced exacerbation of existing conditions is something that an employee could be compensated for under the Ohio Workers' Compensation system.

It is still the case that claims for mental stress, without some sort of physical manifestation, is almost never compensable in Ohio Workers' Compensation law. (But mental diseases that arise out of a physical injury are compensable.) However, few employers may be aware of the possibility that employees claiming to shoulder a substantial amount of work-related stress could successfully argue that an aggravation of a non-work-related pre-existing physical condition should be compensated under the Workers' Compensation system. However, this type of claim is not new.

The Supreme Court first recognized that physical injuries and conditions arising out of emotional stress are compensable under the Workers' Compensation system. *Ryan v. Connor*, 28 Ohio St.3d 406 (1986). In order to prevail on these kinds of claims, (1) the injury/condition must have resulted from greater emotional strain or tension than that to which all other workers are occasionally subjected to, and (2) the stress must be the medical cause of the injury /condition.

Continued on Pg. 2...Stress

Nationally, stress-related workers' compensation claims have been on the rise. One can guess that this is attributed to long-lasting expectations that employees do more with less, combined with a greater public awareness of what stress can do to the body and less public stigma attached to stress-related conditions.

In dealing with this, employers need to do what is necessary to rebut a claim that the injury resulted in stress that was greater than what the average person in the workforce would be expected to endure (not the average person in that employee's position). For example:

- Have clearly defined, realistic (documented) job expectations. Employees should not be able to claim that they did not know what they were suppose to do or that unreasonable expectations were placed on them.
- If an employee is displaying difficulties with work responsibilities or work relationships, document any conversations with or accommodations provided to that employee, including efforts to address negative job evaluations. Such documentation not only assists in defending against an employee's attempt to receive compensation in workers' compensation, it supports discipline or an employer's defense against the employee's claim for harassment, failure to accommodate, etc.
- Ensure that employees are given proper training on all aspects of the job. This includes not only training on how to perform specific job functions, but training on reporting harassment/discrimination and dealing with internal complaints (grievance processes).
- Make available Employee Assistance Programs and make sure employees know of their existence.

Please contact any of our workers' compensation attorneys if you would like to discuss this issue as it relates to your workplace.

IN THE COURTS

The Supreme Court provided insight as to what constitutes a complete medical report upon which the Industrial Commission can rely. A doctor performing an IME who was unable to complete the exam due to the Injured Worker's alleged pain in performing the exam, still provides a complete enough report to be reliable when it lists the allowed conditions, lists the medical records reviewed, notes an acceptance of the objective findings in those records, describes observations of the Injured Worker, and identifies facts that support the doctors conclusion. *Coleman v. Schwartz, et al.*, 2013-Ohio-1702 (April 30, 2013)

In furthering the Supreme Court's decision in *Gross II* (former employees are not precluded from receiving TTD when they are terminated for a policy violation that caused their workplace injury), the Supreme Court held that a truck driver who was terminated because he lost the ability to be covered by the employer's insurance due to his third accident, an accident which caused his workplace injury for which he was seeking TTD, was not precluded from receiving TTD. *Haddox v. Industrial Commission of Ohio*, 135 Ohio.St.3d 307 (March 12, 2013)

In order for the BWC to transfer the experience rating from a predecessor employer to a successor employer, there must be a transfer of business operations or labor, either in whole or in part, and the successor employer must be the successor in interest. Companies looking to merge or purchase the assets of another company should take note of the Supreme Court's analysis in: *K & D Group, Inc. v. Buehrer*, 135 Ohio St.3d 257 (March 6, 2013)

OFFER AN EMPLOYEE ON WORKERS' COMP LIGHT DUTY – THE RIGHT WAY

Employees who are injured at work can be off work for a long period, or even permanently, depending on the severity of the injury. During the period the employee is off work due to the injury, he or she is entitled to not only reimbursement for medical expenses, but also compensation for the lost wages or compensation he or she would have received if not precluded from working due to the injury, such as temporary total disability compensation (TTD).

When the employer decides that an offer of light duty should be made, that offer must conform to specific requirements, or it will be deemed invalid to preclude TTD for injured worker. The offer must be written; verbal offers will not suffice unless followed by a written offer.

The offer must: 1) identify the position being offered, and, 2) describe the duties required of the position including the physical demands. The duties must be particularly spelled-out so that the injured worker, his or her physician, and/or the Industrial Commission can determine whether the required duties are consistent with medical restrictions.

Courts are picky about what constitutes a sufficient offer of light duty. A written offer lacking the specificity required cannot be cured by the employer's verbal assurance that restrictions will be honored. Courts required everything to be in writing. It has been held that it is insufficient to simply offer a "left-handed position" to an employee with an injured right hand. The employer must identify the specific position and duties required of that position. There may also be issues if an employer offers light duty on a different shift. In one case, the Supreme Court found an issue of fact as to whether the employer offered the different shift in good faith.

While light duty positions can be beneficial to help an employee heal while working in the short-term, employers should be careful not to inadvertently establish a permanent light-duty position if such a position would be unduly disruptive to the employer's operations. Such a permanent position may be argued to be a "reasonable accommodation" within the meaning of the Americans with Disabilities Act even though the employer does not consider the accommodation to be reasonable on a permanent basis. Employers should consult with an attorney prior to establishing a long-term or permanent light duty positions.

WC 101: WAGE CONTINUATION

Wage continuation, also referred to as salary continuation, is a mechanism for employers to mitigate against increased workers' compensation premiums when an injured worker files a claim for lost wages. Wage continuation allows an employer, at the onset of a lost time claim (8 or more lost work days), to elect to continue paying an injured worker regular wages after the workplace injury or illness. Otherwise, the injured worker can apply to the BWC for temporary total disability compensation.

Employers must notify the BWC that an injured worker will receive full, regular wages during the disability within 7 days of the First Report of Injury filing or within 7 days of the onset of the disability causing the lost wages. Salary continuation agreements are identified as C-55 forms and are available on the BWC website.

Not all injured workers with lost wage claims are good candidates to receive wage continuation. Employers considering wage continuation need to evaluate the employee's likelihood of returning to work after the period of disability. Wage continuation is most effective as a cost-containment tool for injuries that have definitive return-to-work dates (typically less than 90 days). Employers are not required to offer wage continuation, and can offer it on a case-by-case basis in a non-discriminatory fashion. Employers should evaluate the impact on premiums prior to offering wage continuation.

Want to learn more? Check out the BWC's Salary Continuation Policy [here](#)

OUR WORKERS' COMP TEAM



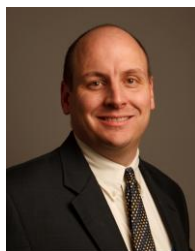
David Riepenhoff

David takes pride in making Workers' Compensation "workable" for employers. For the last decade, he has advocated for employers in workers' compensation cases before the Industrial Commission and in Court. He has also assisted employers in conducting investigations regarding workplace injuries and in drafting policies and procedures in order to minimize workers' comp exposure. David has presented to a variety of Safety Councils throughout the State and has presented to attorneys and Hearing Officers at continuing legal education courses. Understanding workers' compensation heavily impacts the bottom line for employers. David works to find the least costly and most effective resolution of workers' compensation cases. David manages the FHKA workers' compensation practice group. You can reach David at dripenhoff@fishelhass.com or follow him on twitter @d_riep.



Stacy Pollock

Stacy enjoys assisting employers through the Workers' Compensation system because she has seen first-hand the impact legal representation can have on employers' bottom lines. Stacy is available to talk through whether an employer needs to defend against a particular claim. When a defense is necessary, her assistance in the investigation of and the defense against requests for initial allowances and additional allowances have saved a number of employers significant increased Workers' Comp premiums and sent a message to employees that their employers evaluate Workers' Comp claims seriously. You can reach Stacy at spollock@fishelhass.com



Frank Hatfield

Frank appreciates the opportunity to represent employers in Workers' Compensation matters because it requires an advocate be proactive, broadminded, and knowledgeable of many areas of the law and an employer's day-to-day operation. Frank represents employers in administrative proceedings, litigation, investigations and other matters related to Workers' Compensation claims. Because such matters potentially impair an employer's operation and bottom line for years to come, Frank believes individual claims should be vigorously defended while taking care to protect an employer's broader interests. You can reach Frank at fhathfield@fishelhass.com



Anne McNab

Anne joined FHKA in January 2012. She advises employers regarding workers compensation policies, investigations and administrative appeals. Anne recently presented to a Chamber of Commerce Safety Council about avoidance of Workers' Compensation liability. You can reach Anne at amcnab@fishelhass.com



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