MANIER & HEROD

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TENNESSEE WORKERS' COMPENSATION UPDATE

Appellate Courts Declare RFA Process Constitutional

TDOL orders upheld; Reimbursement provision in Second Injury Fund deemed constitutional

In a series of three decisions, the Tennessee appellate courts have rejected attempts to obtain judicial review of the Tennessee Department of Labor (TDOL) orders and challenges to the RFA process as a whole, thereby affirming TDOL's role with respect to ordering benefits. All three courts concluded that the reimbursement provision in the Second Injury Fund statute adequately protects employers and insurers from errant TDOL decisions.

Decision #1: Liberty Mutual denied refund of benefits

The first case involved Liberty Mutual's attempt to obtain a reimbursement from the Second Injury Fund after paying benefits pursuant to the TDOL order stemming from an RFA.

Liberty Mutual Ins. Co. v. Warnock, No. E2010–01453–WC–R3–WC, 2011 WL 2739450 (Tenn. W.C. Panel July 14, 2011). In Warnock, the TDOL ordered benefits following an RFA and thereafter Liberty Mutual settled the disputed claim in Pennsylvania in order to avoid Tennessee's statutory limits on closing medical benefits. After settling the claim, Liberty Mutual attempted to obtain a refund of the benefits it paid pursuant to the TDOL order by filing a petition for review in Tennessee against the TDOL and the employee pursuant to the Administrative Procedures Act.

The trial court dismissed the petition and the appeals panel affirmed the dismissal on the grounds that the court did not have the authority to order the Second Injury Fund to reimburse the insurer. The Panel reasoned that, "the proper forum for reviewing an order to pay temporary disability benefits or provide medical care issued by the Department of Labor is a de novo trial on the merits of the claim between an employer and an employee. Accordingly, the employer seeking reimbursement must obtain a court judgment following a de novo trial finding that the employee was not entitled to benefits to receive a refund from the Second Injury Fund."

Decision #2: Tyson Foods denied judicial review of TDOL order

The second case involved Tyson Foods' attempt to obtain judicial review of a TDOL order via a common law writ of certiorari, which provides for limited judicial review of agency decisions outside the Administrative Procedures Act.

Tyson Foods v. TDOL, No. M2010–02277–COA–R3–CV, 2011 WL 4790980 (Tenn. Ct. App. Oct. 10, 2011). For a court to have the authority to review an agency decision via a writ, there must be no other adequate means of judicial review. The Court of Appeals held that the TDOL order was not subject to review under a writ because, as observed in Warnock, an aggrieved employer may obtain review through a de novo trial. The Court noted,

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MANIER & HEROD TENNESSEE WOR

SD1 Form Completion Essential

SD1 completion necessary to exhaust the Benefit Review Process in mediated settlements

Parties to a claim often question the necessity and usefulness of the Department of Labor's requirement that a SD1 form be filed with the Department of Labor or the court upon the settlement of a claim. The form has historically been used to track trends in workers' compensation claims. The Special Workers' Compensation Appeals Panel recently opined that the completion of this form is a pre-requisite to exhausting the Benefit Review Process by means of a mediated settlement.

In Furlough v. Spherion Atlantic Workforce, LLC, Employee was allegedly injured in the course and scope of his employment. Employee was represented by an attorney, who he met for the first time at the Benefit Review Conference in June 2006. The claim settled at the Benefit Review Conference, and the settlement was approved by the Department of Labor. Employee subsequently filed a petition to set aside the settlement. The trial court ruled in favor of Employee, finding that he was not adequately represented by his attorney at the BRC. Employer appealed. The Special Workers' Compensation Appeals Panel determined that the parties failed to exhaust the administrative process and Employee's suit to set the settlement aside was premature. In doing so, the Panel explained that when a settlement is approved by the Department of Labor, the settlement is not final until the SD1 is "fully completed." In this case, several boxes were left blank on the SD1 and the Panel held that the statutory requirement was not met and the settlement was not final. The Panel dismissed the appeal, vacated the trial court judgment and remanded the case to the Department of Labor for further proceedings.*

In light of this case, it is critical that the parties make certain the SD1 form is complete. In the alternative, parties should have a settlement approved by the court when possible, as the Court's ruling is currently only applicable to Department of Labor settlements.

**See "Hot Topics" on back page for update on this case.*

Centers for Medicare & Medicaid Services Update

Beneficiaries can now obtain Medicare's conditional payment amount prior to settlement

On December 16, 2011, the Medicare Secondary Payer Recovery Contractor (MSPRC) announced that CMS will be implementing an option that will allow certain Medicare beneficiaries to obtain Medicare's final conditional payment amount prior to settlement. This option is set to be available in February 2012 for certain liability settlements involving claimants who have completed treatment for traumatic physical injuries.

In order to use this option, ALL of the following criteria must be met:

1. The liability insurance (including self-insurance) settlement will be for a physical trauma-based injury (the settlement does not relate to ingestion, exposure or medical implant).

2. The total liability settlement, judgment, award or other payment will be $25,000 or less.

3. The Date of Incident occurred at least 6 months before the beneficiary or his representative submits his proposed conditional payment amount to Medicare.

4. The beneficiary demonstrates that treatment has been completed and no further treatment is expected; either through a written physician attestation or by certifying in writing that no medical treatment related to the case has occurred for at least 90 days prior to submitting the proposed conditional payment amount to Medicare.

Once the beneficiary or representative submits the proposed reimbursement calculation, the MSPRC will review the proposed payoff amount to determine whether the amount is accurate. The beneficiary or representative will then receive a response with Medicare's final conditional payment amount within 60 days. The beneficiary must settle the case within 60 days after the date of Medicare's response.

MSPRC indicated on its website, "This is an initial step to provide beneficiaries and their representatives with Medicare's conditional payment amount prior to settlement, and it has plans to expand this option as it gains experience with this process."

MSPRC previously announced a simple fixed percentage option (available to beneficiaries who receive certain types of liability insurance, including self-insurance, settlements of $5,000 or less) and a $300 threshold liability for certain liability insurance cases. The December 2011 announcement seems to further MSPRC's goals of resolving issues more simply and efficiently with set-asides and conditional payments.

Workforce Reduction Plans Impact Cap Cases Inconsistently

Courts consider issues on a case-to-case basis

During the recent recession, employers utilized workforce reduction, including extended layoffs and voluntary buyout programs. As the courts review each situation on a case-by-case basis, the impact workforce reduction plans have on cap and reconsideration cases vary. The following cases, which were decided six weeks apart, illustrate this point.

Laid-off employee who rejects job offer subject to the 1.5 cap

In Bean v. Tepro, Inc., M2010-00264-WC-R3-WC (Tenn. 2011), the employee returned to work on light duty following a work injury. After four months of sporadic work, the employer placed her and several other workers on an indefinite layoff due to economic conditions ,without any indication of an end date. During the layoff, the employee was not paid wages, but the employer continued to provide health insurance. The employee applied for and received an award of Social Security disability benefits based on non-work related medical conditions. Shortly thereafter, the employer offered the employee a job, which the employee refused because of the SSD award.

The trial court and Appeals Panel concluded that the employee's permanent disability award was subject to the 1.5 cap because she had a meaningful return to work, which was determined by the reasonableness of the offer to return to work and the failure to accept the offer. The Panel considered the following: 1) whether the layoff at issue is customary or an anomaly; 2) the employee's expectations of being returned to work; and 3) whether the employee received pay or other benefits during the layoff. Based on these factors, the Panel held that the employee was subject to the 1.5 cap even though she did not actually return to work, because the employee's rejection of the job offer was motivated by the SSD award rather than the injury itself.

Employee who accepted voluntary buyout not subject to the 1.5 cap

In Massey v. Nissan North America, Inc., M2010-00151-WC-R3-WC (Tenn. 2011), the employee returned to work following a back injury. Although the job was within the restrictions, the employee complained that the work caused pain. He also alleged that he was performing his job with difficulty and had been "written up" for inadequate work. The employer offered a voluntary buyout package to all of its employees in an attempt to reduce its workforce due to the economy. After working for several months, the employee accepted the buyout package.

Observing the reasonableness inquiry in cap cases, the Panel concluded that the employee was not subject to the 1.5 cap. The Panel stated that the employee's decision was reasonable in light of his ongoing pain, the medical restrictions and his demonstrated inability to work at the required pace.

Continued from page 1

"it is evident that the General Assembly intended to defer the employer's or insurer's right to judicial review until the Benefit Review Process had been exhausted." The Court summarily found that the reimbursement provision in the Second Injury Fund statute was adequate and that due process rights were safeguarded. The Court did not specifically address several arguments concerning the adequacy of the reimbursement statute.

Decision #3: Randstad North America denied refund of benefits

In the third case, the Davidson County Chancery Court declared the statute authorizing the TDOL to order temporary disability benefits unconstitutional.

Randstad North America, L.P. v. Tenn. Dept. of Labor & Workforce Devel., No. M2011-00070-COA-R3-CV (Tenn. Ct. App, Nov. 1, 2011). The basis of the Chancery Court's decision was that the reimbursement provision in the Second Injury Fund statute did not sufficiently protect the due process rights of employers and insurers that were erroneously ordered to pay benefits.

Although the arguments and issues presented in Tyson differed from those in Randstad, the Tennessee Court of Appeals reversed the Chancery Court. As in Tyson, the Court of Appeals concluded that, "the post-deprivation remedy of a de novo judicial hearing and the prospect of a full refund from the Second Injury Fund for benefits paid in compliance with an erroneous order by a workers' compensation specialist satisfies the employer's right to procedural due process." Again, the Court did not address specific arguments concerning the insufficiency of the reimbursement statute.*

The decisions in Warnock, Tyson Foods, and Randstad essentially foreclose the ability to seek judicial review of TDOL orders until after exhaustion of the Benefit Review Conference process. The exclusive means of review remains a de novo trial. However, the cases do not impact the ability to obtain judicial review of a TDOL order following a post-judgment RFA for medical benefits under Tenn. Code Ann. § 50-6-204(g)(2). Employers and insurers may also indirectly seek judicial review of a TDOL order via an appeal of a penalty issued for failure to comply with an order for benefits.

**See "Hot Topics" on back page for update on this case.*

MANIER & HEROD TENNESSEE WORKERS' COMPENSATION UPDATE

Hot Topics

These issues are on our radar. Please check our website at www.manierherod.com for updates as they become available.

Case Law

Randstad North America, L.P. v. Tenn. Dept. of Labor & Workforce Devel.: Randstad recently petitioned the Tennessee Supreme Court for full court review in an attempt to seek reversal of the Panel's decision declaring the RFA statute constitutional. The petition is currently pending.

Furlough v. Spherion Atlantic Workforce, LLC: On December 14, 2011, the Supreme Court granted permission for full review of this case, which involves the requirement of a fully completed SD1 form prior to a Department of Labor settlement's becoming final.

Legislation

A bill addressing various issues involving pain management has been drafted and should be submitted to the legislature for approval during the current legislative session.

Department of Labor

The TDOL has prepared a certification course for TN adjusters. The course is currently in a test phase and is not yet available. The TDOL plans to make the course available online at no charge.

The TDOL is overhauling the rules for its Benefit Review Conference and Request for Assistance processes. The revised rules are set to be implemented in the coming months. Look for the new rules and guidelines in future newsletters.

Workers' Comp Department Directory

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Benefit Rate Table

Dates	Minimum Rate	Max Rate for Temporary Benefits	Max Rate for Permanent Benefits
7/1/02 – 6/30/03	$89.85	$599.00	$599.00
7/1/03 – 6/30/04	$92.70	$618.00	$618.00
7/1/04 - 6/30/05	$95.70	$670.00	$638.00
7/1/05 - 6/30/06	$99.45	$729.00	$663.00
7/1/06 - 6/30/07	$102.30	$750.00	$682.00
7/1/07 - 6/30/08	$106.95	$784.00	$713.00
7/1/08 - 6/30/09	$112.80	$827.00	$752.00
7/1/09 - 6/30/10	$114.15	$837.00	$761.00
7/1/10 - 6/30/11	$114.75	$841.50	$765.00
7/1/11 - 6/30/12	$118.35	$867.90	$789.00