

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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CONCERNING THE
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CHANGES AT CMS

New Requirements for Medicare Set-Aside Arrangements

As a result of Medicare's much-publicized implementation of prescription drug coverage beginning January 1, all workers' compensation Medicare Set-Aside proposals must now include separate amounts for not only future medical care, but prescription drug treatment as well. If claimant's medical records indicate that his work-related injury is currently being treated with, or will later require, prescription drugs, Medicare can be expected to reject any set-aside proposal which does not include a separate amount for future prescription medications. And, cover letters accompanying Medicare Set-Aside proposals will need to include an explanation of how the parties calculated what claimant's future prescription expenses will be. Options for doing so include using (1) average wholesale price; (2) the workers' compensation reimbursement rate; or (3) the actual amounts being billed.

Given the already high, and ever increasing, cost of prescription drugs, the import of this recent development on workers' compensation settlements cannot be overstated. The National Alliance of Medicare Set-Aside Professionals suggests using a rated age to reduce claimant's life expectancy when appropriate and replacing substantially more expensive brand-name drugs with generic equivalents whenever possible. However, even with careful attention to cost containment, risk managers may now see little, if any, benefit from settling claims which involve significant ongoing prescription drug treatment.

RUMBLINGS AT THE INDUSTRIAL COMMISSION

Effective January 1, the Industrial Commission has increased its travel reimbursement rate to 44.5

cents per mile, an increase of almost forty-five percent over the 31 cents per mile rate which has been in effect for many years. Risk managers are reminded that claimants may request reimbursement for vocational as well as medical travel.

CASE LAW UPDATE

"Most Advanced Specialty" Doctrine Rejected

Mark Armstrong was employed by W.R. Grace for seventeen years in a series of jobs which required him to use his arms frequently, repetitively, and with load-bearing force. He eventually took a medical leave of absence due to pain and loss of range of motion in his elbows and was initially diagnosed with post-traumatic arthritis by Dr. E. O. Marsigli. While he could not determine the cause of Armstrong's elbow complaints, Dr. Marsigli noted that "job related traumatic arthrosis of the elbow has not been described in the literature."

Armstrong went on to see four other doctors over the next year, including Dr. Ralph Coonrad, an orthopaedic surgeon, and Dr. David Caldwell, a rheumatologist. Dr. Coonrad, who diagnosed severe bilateral arthrosis due to rheumatoid arthritis and eventually performed replacement surgery on both of Armstrong's elbows, felt it unlikely that his job with W.R. Grace caused his rapidly progressive arthrosis. However, Dr. Caldwell, who initially indicated that he would defer to Dr. Coonrad's judgment about whether repetitive work had played a role in the development of Armstrong's condition, later testified that his employment placed him at an increased risk of exacerbating his underlying rheumatoid arthritis as compared to members of the general public not so employed and *did* contribute to his advanced arthritis, despite the fact that Armstrong had also developed erosive changes in his feet consistent with rheumatoid arthritis.

After Armstrong filed a Form 18 alleging the contraction of an occupational disease, W.R. Grace asked Dr. George Edwards and Dr. Douglas

Adams to review his medical history and records. Dr. Edwards, an orthopaedic surgeon specializing in the treatment of the upper extremities, testified that, due to its repetitive nature, claimant's job subjected his elbows to microtrauma and could have placed him an increased risk of injury. However, he also testified that Armstrong's job neither caused nor accelerated a permanent deterioration of his elbow joints. And, Dr. Adams, an expert in occupational medicine, testified that although claimant's job required him to use his upper extremities repetitively, he knew of no studies showing an association between work-related force on a joint and the development or progression of rheumatoid arthritis.

After noting that Dr. Caldwell was the only physician who had expressed an opinion that Armstrong's job aggravated his underlying rheumatoid arthritis, both the deputy commissioner and Full Commission denied his claim. Claimant then appealed to the Court of Appeals, arguing that in accepting an orthopedist's testimony over that of a rheumatologist, the Commission had erred. In support for that proposition, he cited a federal court case, *Cosgrove v. Provident Life and Accident Ins. Co.*, arguing that in cases such as his, the Commission should base its opinion on the testimony of "the most advanced specialist" who had treated him.

On January 17, in *Armstrong v. W.R. Grace & Co.*, the Court of Appeals rejected claimant's argument that "the most advanced specialty" doctrine should have been utilized by the Commission to resolve his claim. As a consequence, it affirmed the Commission's denial. In doing so, it stated that not only had the "most advanced specialty doctrine" never been recognized in North Carolina, but the Court was not even able to ascertain whether such a doctrine existed *anywhere*. It also noted that the Full Commission is "the sole judge of the credibility of witnesses and the ultimate factfinder" and that its duty "goes no further than to determine whether the record contains any evidence tending to support" the Commission's findings. With three doctors finding no causal relationship, there was "ample support in the record to affirm the Commission's findings of fact," which in turn supported its denial of Armstrong's claim.

In a separate concurring opinion, Judge Wynn stated that "it is important to note that Plaintiff does not argue that the opinions of the doctors with specialties other than rheumatology would be incompetent Instead, Plaintiff argues that the Full Commission should have afforded the greatest credibility or highest quality of competence to the doctor/expert who has the 'most advanced specialty' in the field of medicine the disease or injury concerns." Since the Full Commission, and not the appellate courts, determines the credibility of witnesses,

"it is the Full Commission's decision whether to afford a higher degree of credibility to the doctor or expert with the 'most advanced specialty.' "

Risk Handling Hint: While there was ample medical evidence to support the Commission's denial of benefits in *Armstrong*, Justice Wynn's concurring opinion serves as a useful reminder to risk managers and their counsel that adverse medical testimony can be challenged on competency grounds. The Industrial Commission's findings on the competency of an expert witness's testimony are reviewable on appeal, whereas its findings on the credibility of individual witnesses can never be successfully challenged.

Deputy Sheriff's Aneurysm Found Compensable

Alfred Ferreyra was a Cumberland County deputy sheriff, a job which routinely required him to deal with emergency situations. As such, he attended yearly "First Responder" courses, through which he became certified to perform CPR.

In February 2002, while on routine patrol, Ferreyra was called upon to perform CPR on a woman who had passed out in her daughter's vehicle. After twenty-one sets of five heavy pushes on the victim's chest over the course of approximately four minutes, Ferreyra developed a sharp pain in his head, followed by an excruciating headache. A fellow deputy took over performing CPR on the victim while Ferreyra rested in his patrol car.

Later that evening, Ferreyra's wife took him to the emergency room, where he came under the care of a neurosurgeon, Dr. Bruce Jaufmann, who diagnosed a ruptured cerebral aneurysm. After Dr. Jaufman successfully performed surgery on the aneurysm, Ferreyra filed a workers' compensation claim alleging that it had resulted from an injury by accident he suffered while performing CPR.

Ferreyra subsequently testified that CPR is seldom performed by deputy sheriffs and that while they are trained how to do it, deputies are rarely first responders in medical emergencies. He also testified that this was the first time he had been called upon to administer CPR in over eight years on the force. And, Dr. Jaufman testified that ". . . most likely the stress and excitement while performing CPR in attempting to save the individual's life resulted in an increase in blood pressure, which caused the aneurysm to rupture at that time."

After the Industrial Commission found in Ferreyra's favor, concluding that his aneurysm had resulted from an injury by accident arising out of and in the course of his employment as a sheriff's deputy, Cumberland County appealed, arguing that the Supreme Court's holding in *Neely v. City of Statesville* was controlling.

In *Neely*, a firefighter suffered a fatal heart attack while fighting a fire. The *Neely* Court held that the death of a firefighter from heart failure brought on by excitement and exhaustion while fighting a fire was not the result of an "accident" within the meaning of the Workers' Compensation Act because heat, smoke, excitement and physical exertion are ordinary and expected incidents of a firefighter's employment.

Cumberland County argued that, just like the firefighter in *Neely*, Ferreyra had not suffered an injury "by accident" because physical exertion is routinely required of deputy sheriffs, who often have to act quickly in emergency situations. However, the Court of Appeals was not persuaded. On January 17, it affirmed the Commission's award of benefits in *Ferreyra v. Cumberland County*. In doing so, the Court did not distinguish *Neely*, but instead found that the facts in Ferreyra's case were more analogous to those in *King v. Forsyth County*, a Court of Appeals decision from 1980 in which a deputy sheriff had suffered a heart attack after chasing a fleeing suspect. In *King*, the Court held that it is not necessary for a claimant to show that the overexertion which caused his heart attack occurred while he was engaged in an unusual activity; rather, it was the extent and nature of the exertion which made his heart attack an injury by accident within the meaning of N.C.G.S. § 97-2(6).

So, in *Ferreyra*, the Court of Appeals held that "because plaintiff did not need to show that the overexertion which was the cause of his injury occurred while he was engaged in some unusual activity, the Commission's findings [that the physical exertion and stress of administering CPR caused his aneurysm to burst] are sufficient to support its conclusion" that plaintiff suffered a compensable injury by accident within the meaning of N.C.G.S. § 97-2(6).

Risk Handling Hint: Whether the result in *Ferreyra* would have been different if this had not been the first time claimant had performed CPR on the job is unknown. However, it is clear that the test of compensability in heart attack and aneurysm cases is whether the employee's exertion or stress was unusual or extraordinary. But, the inquiry does not stop there. Even if the employee is able to establish unusual or extraordinary stress or exertion, he must still show that it caused his injury. Unfortunately, our case law is replete with claims which the Commission and our appellate courts have found compensable despite the presence of significant, preexisting heart disease, after it has been found by the Commission that overexertion "precipitated" the employee's condition. Risk managers and their counsel clearly face an uphill battle defending overexertion claims.