

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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LEGISLATIVE UPDATE

Congress Considers MSA Legislation

Congress is now considering legislation designed to resolve the serious delays created by the Centers for Medicare and Medicaid Services (CMS) in their review of "Medicare Set-Aside Agreements" (MSAs). HR 2549 would exempt from the Medicare Secondary Payer Act (MSP) all workers' compensation settlements of \$250,000 or less, even if the employee is a current Medicare recipient, as well as those settlements which represent a "deep discount compromise for less than 20 percent of the full value" of the case. The MSP obligates all interested parties to protect Medicare's status as a "secondary payer" of medical expenses in workers' compensation cases (see *Risk Alert*, August 2001, January 2003 and February 2006).

If HR 2549 is enacted into law, all MSAs submitted to CMS will be deemed approved unless specifically rejected by CMS within 60 days. It also contains a safe harbor provision under which set-aside agreements of at least ten percent (10%) of the total settlement will be deemed approved.

HR 2549 is backed by a coalition of attorneys representing claimants, employers and carriers, all of whom have been justifiably critical of CMS's current requirements and procedures. TCDG will closely monitor the progress of this important piece of legislation as it proceeds through Congress and report on further developments as they occur.

CASE LAW UPDATE

Court Debates Award of Attorney's Fees

Billy Myers, a printing press operator employed by BBF Printing Solutions, sustained a twisting injury to his left thumb, wrist, hand and shoulder in August 2001, but continued working in a limited capacity for the next three months.

After being laid off because the plant was closing, Myers filed a claim for weekly benefits, but the deputy commissioner concluded that while he was entitled to medical compensation, he failed to prove entitlement to either temporary total or temporary partial disability benefits.

Both parties gave notice of appeal, but BBF did not perfect its appeal. After the Full Commission reversed, awarded permanent total disability benefits, and taxed BBF with \$2,000 in attorney's fees under to N.C.G.S. § 97-88, BBF appealed to the Court of Appeals.

On June 19, in *Myers v. BBF Printing Solutions*, the Court of Appeals affirmed the Commission's award of benefits, but a 2-to-1 majority of the Court reversed on the issue of attorney's fees, agreeing with BBF that the Commission lacked authority to tax them because N.C.G.S. § 97-88 only authorizes the Commission to do so when defendants have brought an unsuccessful appeal. In this case, the only issues addressed by the Full Commission were those raised by *plaintiff's* appeal, as BBF had abandoned its appeal by failing to file a Form 44.

Judge Wynn concurred in the majority's award of weekly benefits, but dissented on the attorney's fee issue, arguing that the Court's 1994 decision in *Estes v. North Carolina State University* supported the proposition that an award of attorney's fees is proper where "(1) the insurer has appealed a decision to the Full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee." To Judge Wynn, BBF had abandoned, not withdrawn, its appeal, and as such, BBF's appeal was "unsuccessful" and the statute applied.

Risk Handling Hint: The decision in *Myers* serves as a useful reminder to risk managers that, in addition to the Commission's authority to award attorney's fees to the prevailing party

under N.C.G.S. § 97-88.1 when it finds that the losing party brought, prosecuted or defended a hearing or appeal without reasonable ground, it may also award attorney's fees (and interest under N.C.G.S. § 97-86.2) whenever the defendants have appealed and the injured worker is ultimately awarded either medical or indemnity compensation.

Insurer's Attempted Cancellation of Workers' Compensation Policy Fails

Canal Insurance Company issued a workers' compensation insurance policy to TWL, Inc. for the period from March 20, 2002 through March 20, 2003. On November 25, 2002, Canal mailed notice to TWL that its policy was being cancelled as of December 7, 2002 due to "underwriting reasons."

On January 31, 2003, before TWL had procured other coverage, Phillip Oxendine was seriously injured while working for TWL. The Commission ordered Canal to pay compensation to Oxendine, notwithstanding the attempted cancellation and Canal's contention that TWL had made false and material misrepresentations on its policy application.

Canal appealed to the Court of Appeals, arguing that the misrepresentations made on TWL's application caused the policy to be void *ab initio* and, therefore, the statutory requirements for cancellation did not apply. But, in an opinion issued on June 19, *Oxendine v. TWL, Inc.*, the Court of Appeals disagreed, holding that workers' compensation insurance contracts are never void *ab initio*. Rather, they must be cancelled in the manner prescribed by N.C.G.S. § 58-36-105(b), which provides that "Any cancellation ... is not effective unless written notice ... has been given by registered or certified mail ... not less than 15 days before the proposed effective date of cancellation...."

The Court held that Canal's purported notice of cancellation missed the mark on two counts: (1) it was not sent by registered or certified mail, return receipt requested and (2) Canal's vague assertion of "underwriting reasons" as the basis for the cancellation failed to meet the requirement that the notice state the "precise reason" for cancellation. Because Canal had failed to follow the proper statutory procedure, the Court held that the policy was in effect at the time of Oxendine's injury and benefits were owed.

Risk Handling Hint: The decision in *Oxendine* provides risk managers with a valuable warning that the provisions of N.C.G.S. § 58-36-105 must be complied with in all respects for

a workers' compensation policy to be properly canceled. Although TWL conceded actual notice of the purported cancellation prior to the date of Oxendine's injury, the Court found that fact irrelevant. Risk managers are advised to confirm strict compliance with the statute before denying a claim on the basis that the insured's policy had been canceled and no longer provided coverage.

Court of Appeals Addresses Validity of Opinion Issued by "Hold-Over" Commissioners

Day'le Lathon, Assistant Director of Pretrial Services for Cumberland County, developed symptoms consistent with bilateral carpal tunnel syndrome and filed a workers' compensation claim, which the county contested and the deputy commissioner denied after concluding that Lathon had failed to establish that her condition qualified as an occupational disease.

Lathon's appeal to the Full Commission was heard by Commissioners Bolch, Mavretic and Sellers after the terms of Commissioners Bolch and Mavretic had expired. Later, Commissioners Bolch and Mavretic, with Commissioner Sellers dissenting, found Lathon's claim compensable. At the time, neither had been re-appointed by the Governor.

On appeal to the Court of Appeals, the county argued that because the terms of Commissioners Bolch and Mavretic had expired, the Full Commission's opinion was void under the holding in *Estes v. North Carolina State University*, in which the Court found a Full Commission decision filed after the departure of one of the Commissioners who joined in the majority opinion void as a matter of law.

In reply, Lathon argued that *Estes* is at odds with a state constitutional provision providing that "in the absence of any contrary provision, all officers in this State, whether appointed or elected, shall hold their positions until other appointments are made ...," and she cited *State ex rel. Martin v. Preston*, in which the Supreme Court considered a similarly-worded constitutional provision pertaining to judges and held that "[w]here ... the incumbents' terms end without successors having been elected and qualified, and new terms of office have not begun, the Constitution's 'hold over' provision operates and allows the incumbents to continue serving in the interim."

In a 2-to-1 decision entered on June 19, *Latton v. Cumberland County*, the Court of Appeals affirmed the Full Commission's award of benefits, finding that by not having objected to the presence of Commissioners Bolch and Mavretic on the panel when the case was heard, the county

had not "preserved for appellate review" the issue of their authority to act as Commissioners. In doing so, the Court distinguished *Estes*, in which it found that the parties "did not have a meaningful opportunity to object" because the term of the commissioner in question did not expire until eight months after the parties' oral argument before the Full Commission.

The Court of Appeals' majority opinion in *Latton* also rejected Cumberland County's argument that its appeal presented a jurisdictional question which could be raised at any time. Rather, "the fact that [Commissioners Bolch and Mavretic] continued to publicly discharge their duties as Commissioners rendered them *de facto* officers." As such, said the Court, their public acts are deemed valid and "their presence on the panel cannot give rise to a jurisdictional challenge."

Judge Tyson dissented, arguing that the majority's opinion ignored not only *Estes*, but also *Coppley v. PPG Industries*, in which the Court of Appeals held that "where a commissioner's vote was taken before the expiration of his term of office, but the decision was not issued until after the term expired, the decision of the Commission is void as a matter of law." Judge Tyson rejected the majority's assertion that the issue had not been properly preserved for appellate review, stating that commissioners whose terms have expired have no jurisdiction to rule upon a case and that, therefore, defendant properly raised and argued the issue through an assignment of error.

Risk Handling Hint: Until this issue is addressed by the Supreme Court, defense counsel face a difficult decision when the panel assigned to hear a case includes a commissioner whose term has expired. Under *Estes* and *Coppley*, the decision of the panel would be void as a matter of law if the vote of the "hold-over" commissioner was necessary to a majority decision. If this is a jurisdictional issue, then it would not be necessary to object to the presence of the "hold-over" commissioner at the Full Commission hearing and the issue could be raised for the first time on appeal. However, if the *Latton* majority is correct, defense counsel must object to the presence of the "hold-over" commissioner at the time of the Full Commission hearing, should they want to preserve that issue for appeal in the event of an unfavorable decision.

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