SPRING 2011 VOLUME 1 ISSUE 1

HAYES, SCHLOSS, & ALCOCER, P.A.

WORKERS COMPENSATION NEWSLETTER

Law: the only game where the best players get to sit on the bench. ~Author Unknown

IN THIS ISSUE:

APPORTIONMENT-

Claims handling in light of Staffmark v. Merrell

Last year, the First District Court of Appeal issued a ruling in Staffmark v. Merrell denying the Employer/Carrier's claim for apportionment. The Employer/Carrier was not permitted to apportion medical and indemnity benefits in a post 10/1/03 case where the industrial accident was found by an EMA physician to be 75% responsible for the claimant's condition and 25% due to pre-existing conditions which were not proven to be non-occupational. This was despite the language now in 440.15(5)(b) which allows apportionment where the claimant has a pre-existing condition, if the compensable injury is an acceleration or aggravation of the pre-existing injury or a merger of the two. The 1st DCA defined "pre-existing condition" to mean a pre-existing non-work related condition or injury. The opinion pointed out that the industry should carry the burden of all injuries and damages of occupational cause and Employers/Carriers can seek contribution under 440.42(4) against prior Employers/Carriers.

While great in theory, it could result in double dipping by the Claimant. For example, the Claimant settles a claim with a prior Employer/Carrier for a lumbar injury, and then 3 years later is working for another Employer when he lifts a heavy object and reinjures his back. The Claimant files a claim against the new Employer. The doctor states the new accident is at least 51% responsible for his current need for treatment as he has not treated for his back since he settled his case 3 years ago. Now he is able to recover 100% of his medical and indemnity benefits under this new accident as the Employer/Carrier does not have a ripe contribution claim against the prior Employer/Carrier.

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TEMPORARY PARTIAL DISABILITY-

ARE THERE ANY DEFENSES REMAINING?

Here's a typical fact scenario - an Employer offers a Claimant a position within their restrictions and qualifications, the Claimant refuses the job, then when the Employer has to fill the position, TPD benefits are payable until MMI is reached. In the aftermath of the First DCA opinions in 2010, it would seem that defeating a claim for temporary partial disability benefits on a post 10/1/03 accident is nearly impossible before a Claimant reaches overall MMI. Don't give up hope quite yet!

Some Judges are hinting that the Claimant is going to have to show they did not just sit at home and collect TPD, but that they were actively looking for work during the time they were paid TPD benefits. If the Claimant does not conduct a proper job search or make any effort to look for alternative employment, some Judges may deny TPD benefits.

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APPORTIONMENT – CON'T.

Suggestions to handling files in light of Staffmark v. Merrell:

1) Obtain a background search/review of prior medical records to determine the extent of any prior non work related conditions/injuries to the body part(s) at issue.

2) Provide those documents to the treating physician(s) to address apportionment.

3) If a physician opines that 51% of the Claimant's need for medical treatment is work related, the Employer/Carrier will need to find out what the other 49% is attributable to. If it is attributable to a personal, non-work related condition or "pre-existing" condition, the 49% may be apportioned out.

4) If the other 49% is due to a prior work related injury/condition, contribution should be looked into.

The concurring opinion in Staffmark left the door open to future claims that the apportionment statute is unconstitutional. It is to be seen as to whether that issue is brought up before the 1st DCA.

IF THERE ARE ANY TOPICS YOU WOULD LIKE TO SEE COVERED IN A FUTURE EDITION OF THIS NEWSLETTER – PLEASE LET US KNOW

The language of law must not be foreign to the ears of those who are to obey it.
- Learned Hand

TEMPORARY PARTIAL - CON'T

Offsets are also available for TPD benefits. If a Claimant leaves employment without just cause while receiving TPD benefits, the benefits are paid deemed earnings which could have been made had the Claimant continued in said employment. If the Claimant is obtaining unemployment benefits, TPD benefits can be offset during that time period.

TPD benefits can be denied on the basis of a termination for a valid misconduct. The Employer/Carrier can also deny TPD benefits until a Claimant returns employee earnings reports for that time period, if the earnings reports were properly provided to the Claimant. Once properly completed employee earnings reports are returned, TPD benefits would be due for the time periods covered in the earnings reports.

RESPONSES TO PETITIONS – DON'T GIVE THE CLAIMANT A PASS INTO CIRCUIT COURT

In the aftermath of the recent decision in Kauffman and the Legislature's limitation of Claimants' attorneys' fees, it would be no surprise if Claimants' attorneys began filing more claims against Employer/Carriers for benefits in Circuit Court. Typically, filing a claim through workers compensation is the exclusive remedy to an injured worker and they cannot file a tort claim in Circuit Court. That's not always true in absence of an intentional tort. If an Employer/Carrier denies that the Claimant's accident and/or injuries should be covered by workers compensation, the Claimant may look for Part II (formerly Part B) of the workers' compensation policy and claim benefits in Circuit Court. Part II of the policy covers injuries to an employee not covered by Chapter 440.

In order to avoid potentially lengthy and costly proceedings in Circuit Court, Petitions for Benefits should be responded to thoughtfully and carefully when denying a claim in its entirety. An Employer/Carrier cannot raise the defense that the accident/condition is not covered by Chapter 440 and then claim workers' compensation immunity to stay out of Circuit Court. The Appellate Courts have permitted a tort suit against the employer under Part II where denials were worded in the following fashion:

1) There was no injury suffered which arose out of and in the course and scope of the claimant's employment.
2) Denied in its entirety.
3) The accident and/or condition are not covered by workers' compensation.

The Appellate Courts have suggested that language which admits Chapter 440 would apply, but the denial is issued based on causation will keep the action with a Judge of Compensation Claims. For example, explain the reason for the denial:

1) Although the Claimant suffered a compensable accident, indemnity and medical benefits are denied because the statute of limitations has run/proper notice was not provided/the claimant was intoxicated.
2) The major contributing cause of the Claimant's low back injury is due to personal pre-existing condition and not the lifting she did in the course and scope of her employment.
3) The accident as alleged by the claimant did not occur, even though he was performing actions within the course and scope of his employment on the alleged date of accident.

So the next time you are denying a claim, please take the time to consider the proper response to the Petition for Benefits.

THE ATTORNEYS AT HAYES, SCHLOSS & ALCOCER, P.A. ARE AVAILABLE TO SPEAK TO YOUR GROUP ON ANY WORKERS COMPENSATION RELATED ISSUE

"Everything has it's beauty, but not everyone sees it."
- Confusius

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This newsletter is intended for general information only. The information included in this newsletter should not be construed to be formal legal advice or as establishing an attorney/client relationship.

*The attorneys at **Hayes, Schloss, & Alcocer, P.A.** primarily represent the interests of Employers/Carriers/Servicing Agents in the area of Workers' Compensation.*

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"Advice is what we ask for when we already know the answer but wish we didn't." - Erica Jong