



COMMERCIAL INSURANCE

EMPLOYEE BENEFITS

PERSONAL INSURANCE

RISK MANAGEMENT

SURETY

WORKERS' COMPENSATION NATIONAL TRENDS

2023 Update



NOTEWORTHY WORKERS' COMPENSATION CASES

MARIJUANA UPDATE

In two cases in the Commonwealth Court of Pennsylvania, *Fegley v. Firestone Tire & Rubber* and *Appel v. GWC Warranty Corp.* injured workers were treating workers' compensation injuries with medical marijuana, which the carrier/ employer refused to reimburse them for. Despite Pennsylvania law clearly noting that a carrier, nor employer would be required to pay for such marijuana treatment in their "coverage," judges ruled in March, 2023, that the word "coverage" suggested a carrier would have to pay the provider through policy benefits. The ruling determined that the law did not restrict employers or carriers from reimbursing an employee, monetarily, for medicinal treatment. They also found no contradiction to their ruling in Federal law, since neither the carrier nor employer were manufacturing, nor distributing the restricted drug. The case will likely be appealed.

COVID UPDATE

Per the National Council on Compensation Insurance (NCCI), fourteen states have brought forth 23 legislative bills related to COVID. Bills are primarily geared at first responders and hospital workers with the most common exposures to the virus.

Most are dealing with a presumptive position that expands coverage for these viruses as being automatically covered by workers' compensation.



Meanwhile, New Mexico courts set a precedent several years ago that carriers/employers were obligated to reimburse injured workers for marijuana used to treat a work-related injury. However, in late 2022, in *Barrozo v. Albertson's, Inc.*, the courts determined that reimbursement was limited to the maximum set state treatment fee amount allowed for medical marijuana.

Then, in the same time period, the Mississippi Court of Appeals, in *Meek v. Cheyenne Steel, Inc.*, barred an employee from receiving workers' compensation benefits, entirely, when there was a post-injury drug test that was positive for marijuana. The Mississippi statute allowing for denial of coverage of an injury was upheld based on the presence of an illegal drug in the claimant's system and the automatic presumption that it played a role in the injury.



According to NCCI, Arkansas, Maryland, Missouri, North Dakota, and South Dakota also introduced ballots that would legalize recreational marijuana in their states and twenty states have legalized recreational marijuana, with 38 having passed laws to provide for its legal medical use.

According to NCCI, in 2022, there were ten states considering legislation to legalize medical or recreational marijuana. Rhode Island legalized recreational marijuana with Senate Bill 2430 and House bill 7593. Maryland passed legislation with House Bill 1 last year, which would let voters bring forth a constitutional amendment to legalize recreational use, while Mississippi passed Senate Bill 2095 that legalizes medical marijuana.

EXCLUSIVE REMEDY DOCTRINE

Exclusive remedy provisions of workers' compensation coverage are intended to restrict an injured worker or their family from bringing legal action through other civil/tort actions. This provision has been tested through numerous cases in recent years.

In the Southern District of Indiana, in *Johal v. FedEx Corp.*, a family brought suit through a civil action against an employer when their family member was fatally shot at work. The Indiana court confirmed the facts that the employee was fatally injured in the course and scope of their work responsibilities and as such, workers' compensation was upheld as the exclusive remedy for the worker's injury.

In August, 2022, the Supreme Court of South Dakota, in *Althoff v. Pro-Tec Roofing, Inc.*, also addressed this same issue of exclusive remedy and suing an employer for an intentional act, through a civil action. The court once again considered the argument of an employer's intentional act and opined with new language that a claimant must prove that it was *substantially* certain (chosen over previous cases using *virtually* certain) that the worker would be injured due to their employer's actions. In this case, the roofer/worker fell to his death. However, the court determined that workers' compensation was the exclusive remedy as the employer's actions regarding safety devices could not be assumed to be substantially certain to have caused the injury, therefore the employer could not have intentionally caused the fatal injury.

SUBROGATION RECOVERY

In late 2022, the Oklahoma Court of Civil Appeals upheld the right of an employer/carrier to recover workers' compensation costs from a negligent third party in *Jones v. Cabler*, keeping the injured worker from double-recoveries through both workers' compensation benefits and then via a civil action against the third party.

In a somewhat similar case, the Texas Court of Appeals last year ruled in *Stevenson v. Texas Mutual Insurance Co.*, that a workers' compensation insurer was allowed to recover all of their costs, first, from any settlement a claimant may have received from a civil settlement against a negligent third party.



THE “COMING AND GOING” PREMISE

Workers' compensation benefits may often be found compensable for workers who are traveling to and from work sites. This is referred to as the “coming and going rule” and is particularly common for workers who travel frequently for their employers, such as salespersons or those in the construction or energy sectors. These employees are often “directed” by their employer to visit or perform work at a specific client's destination. Adding to this determination is sometimes the fact that the worker is using an employer-owned vehicle while enroute.

However, in 2022, the Florida District Court of Appeals heard arguments in *Kelly Air Systems, LLC v. Kohlun*, in which a technician was injured while traveling home after his last service appointment. The court found that due to the employee's duties being concluded, he was no longer in the course and scope of his employment. The fact that he was driving a company-issued vehicle was not a factor in denying workers' compensation benefits, as the court considered that the vehicle was also provided for his personal use when not performing work duties. Therefore, the court ruled his injuries non-compensable, and deemed that the “coming-and-going” provisions did not apply.



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