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Risky Business

In This Issue

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Workers' Compensation Services

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The Ohio BWC is Changing the Billing Process and You Benefit!

Hopefully, if you are an Ohio State Fund private employer, you have already paid your Bureau of Workers' Compensation (BWC) premiums that were due on March 2, 2015. If so, you have made your last "6 month in arrears" payment to BWC. Now we are embarking on a journey whereby the BWC will be transitioning to a prospective, "in advance" billing system.

Looking Back
In the past, BWC has sent a payroll report requiring you to write in your actual payroll from the prior six-month period, multiply by the rate on the bill and pay the indicated premium. For the January 1, 2015 – June 30, 2015 period you will receive the same report (in July 2015) but will only need to report the payroll and multiply by the rate, but not pay that premium.

The Move to Prospective – Raise the Anchor, Full Steam Ahead!
In May 2015, the BWC will report the estimated premium which they will be billing you for the upcoming 7/1/2015 – 6/30/2016 period. This estimate will be based on the historical payroll you reported (7/1/2013 – 6/30/2014) applied to your new rates for July 1, 2015, including any group rating discounts you have earned, as available through V & A Risk Services. This annual premium will be broken down into 6 equal payments. As part of the transition credit, BWC will forgive the first payment for the 7/1/15 – 8/31/15 period.

Your first prospective payment will be due to BWC by 8/31/15. That payment will forward your coverage from 9/1/15 through 10/31/15. Consequently, by 10/31/15 you will make a payment that will forward your coverage from 11/1/15 through 12/31/15. Rinse and repeat.

The BWC will be requiring all employers to go online by 8/15/16 & "true-up" their payroll. That means reporting what you actually had in payroll from 7/1/15 – 6/30/16 and paying any shortage in premiums during the past year. If you overpaid premiums, BWC will issue a credit.

If you are like me, a visual display of this would be helpful. To see a full color timeline that we developed to help employers understand this transition, click here.

The BWC will reward employers with a 10% average decrease in July 1, 2015 rates, of which 2% is attributed to the move to prospective billing.
Look for future updates here as there is never a dull moment in Ohio Workers' Compensation!

Have you visited our new website? Check us out!
www.variskservices.com

Important Dates

May, 2015
Premium notices mailed to employers

May 29, 2015
Drug Free Safety Program, Transitional Work Bonus and Industry Specific Safety Program Applications Due

Unemployment Tax Contribution Due (first quarter)

July 31, 2015
Deadline to enroll for Safety Council Rebate Program

August 1, 2015
BWC to mail first prospective invoice to employers

August 31, 2015
Deadline to report 1/1 – 6/30/2015 payroll to receive transition credit

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Termination as a Result of a Positive Post Accident Drug Test Does Not Bar TTD

There seems to be some confusion and misunderstanding among employers and even defense attorneys as to the impact on TTD when a claimant is terminated because of a positive post accident drug (or alcohol) test. A just released decision by the Franklin County Court of Appeals clarifies this issue. The law is that a claimant who is terminated because of a positive post accident drug or alcohol test is still entitled to temporary total disability. There is one exception that will be discussed below, but, generally speaking, the law is stated above.

In the recent appellate court case, an employee was injured when a truck driver pulled away from the loading dock, causing the employee, who was on a tow motor at the time, to fall from the dock to the ground. At the emergency room, a post accident drug screen was ordered. Claimant tested positive for marijuana and morphine. The employer had a written policy that mandated termination for a positive post accident drug screen. As a result of the positive test, the employee was terminated.

The employee subsequently applied for TTD. The BWC granted claimant TTD and the employer appealed. The IC's decisions were a jumbled mess (reflecting the confusion of the state of the law on whether voluntary abandonment of employment can be used to bar TTD for a positive post accident test). The DHO denied TTD based on voluntary abandonment, the SHO reversed, granting TTD and the full Commission reversed the SHO's decision and denied TTD. Claimant appealed and the Court of Appeals reinstated the SHO's decision, finding the claimant was entitled to TTD.

In finding claimant entitled to TTD, the appellate court cited Ohio Supreme Court case law (Gross II and Ohio Welded Blank (that held that voluntary abandonment does not bar TTD in cases involving a pre injury infraction undetected until after the injury. In this case, it was the ingestion of marijuana pre injury that was only discovered post injury - that is, once the claimant was disabled from the injury – that resulted in the claimant's termination. Therefore, the court held, because claimant was disabled from the injury, voluntary abandonment of employment does not apply despite the positive post accident drug test. This is a critically important holding because some employers and TPAs have the mistaken belief that a positive post accident drug test that results in the employee's termination will bar TTD. Again, this is not the case.

There is one way an employer can use a positive post accident drug test to their advantage. That is, the employer can get a medical report from a physician who opines that injured worker's consumption of the drug (or alcohol (impaired his judgment thereby causing the injury. However, this is no panacea. If, for example, the claimant was an innocent bystander and the injury was caused by a third party, as was the case in the court case discussed above, then, even if the employer manages to find a doctor that concludes the injury was caused by the ingestion of drugs or alcohol, it is highly unlikely the IC will accept that opinion.

Understandably, most employers are irate with the current state of the law. Nevertheless, to use a tired cliché, "It is what it is".

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Reduce your BWC Premium with the $15,000 Medical Only Program ($15k Program)

Employers who choose to participate in the $15K Program have the option to pay up to $15,000 in medical and pharmacy bills. By paying these costs directly the employer is keeping expenses out of their experience which can ultimately lower their experience modifier thus reducing future premium liability. In addition the employer has the option to turn over the bill payment at any time to their MCO.

How to Enroll

If you want to enroll in the $15K Program, call 1-800-644-6292 and listen to the options. Once you enroll, you will have the option to pay bills in all medical-only claims (claims with seven or fewer lost calendar days from work) with injury dates after your enrollment effective date. Please advise V&A of your enrollment by calling or e-mailing your claims manager or jweisz@variskservices.com.

Program requirements

- Notify your injured workers and their health-care providers that you, not the MCO, are paying the medical bills for an injury.
- Employers cannot process a Physician's Request for Medical Service or Recommendation for Additional Conditions for Industrial Injury or Occupational Disease (C-9).
- Pay all bills within 30 days of receipt or risk disqualification from the $15K program.
- Pay in accordance with BWC's fee schedule.

Note: BWC's professional (practitioner) fee schedule is available in the Medical Providers section under Look-ups. Facility reimbursement policies are in Chapter 3 of the Provider Billing and Reimbursement Manual in the Medical Providers section under Services.

- Notify BWC and the MCO if/when the $15,000 maximum is reached and supply proof of such payment to the MCO.
- Report some claims to Medicare beginning July 2010. You can learn more about this through the Centers for Medicare & Medicaid Services website.

REMINDER: This is a federal requirement.

- Keep a record* of all work-related injuries, including:
  - Injured worker's name, address and Social Security number;
  - Date and time of injury;
  - Type of injury;
  - Part of the body injured;
  - A brief description of the accident that led to the injury;
  - Copies of all bills with proof and date of payment under this program;
  - Proof of payments made within 30 days of request from BWC;
  - Documentation for excluding any wages paid to the employee while off work in the $15,000 limit;
  - Documentation showing no denial of any bills. If you participate in the program, you inherently approve the first $15,000 of medical and pharmacy costs.

*You must maintain these records for six years from the last date of bill payment.

EXCEPTIONS to program requirements

- Notify BWC within 14 days of learning that a claim has been filed that you do not want to pay for the bills in that claim.
- Notify BWC that you've reached the $15,000 maximum in a claim.
- Notify BWC that you do not want to pay for any additional medical bills, and you provide the last date you will be responsible for a particular claim.

Opting out of the program

You can opt out of the $15K Program by calling 1-800-644-6292 and listening to the options. Once you notify the BWC that you want to opt out you will receive written confirmation of this decision. The MCO will then be responsible for processing bills received after the program termination date for all medical-only claims. To opt a specific claim out of the program, you must notify the BWC-assigned claims service specialist for that claim.

Intentional Torts Remain a Dead Issue in Ohio

Intentional torts remain a dead issue in Ohio, at least for the time being. Last month, the Ohio Supreme Court heard an employer's appeal in *Pixley v. Pro-Pak Industries*, 2014-Ohio-5460, and decided that an intentional tort claim will fail if there is no evidence the employer deliberately removed an equipment safety guard. Under R.C. 2745.01(C), there is a rebuttable presumption that the employer acted with the intent to injure another if an injury occurs as a direct result of the deliberate removal of an equipment safety guard.

Pixley, a maintenance worker, suffered a severe degloving injury to his right leg, when he was kneeling in the path of a transfer car, which pinned him against a conveyor line after the shut-off mechanism failed to stop the transfer car from moving. The operator of the transfer car manually stopped the transfer car after realizing he had struck Pixley. Post-accident tests revealed all the safety mechanisms functioned properly. Nevertheless, Pixley filed an intentional tort lawsuit against Pro-Pak, alleging the company intentionally bypassed the transfer car's safety bumper, causing the shut-off mechanism to fail.

In the trial court, Pro-Pak filed for summary judgment on the ground there was no evidence the company deliberately intended to harm Pixley. Pixley opposed summary judgment by submitting expert affidavits, which experts opined a sensor for the safety bumper had been deliberately bypassed or disabled. The trial court granted summary judgment, agreeing there was no evidence Pro-Pak had specific intent to harm Pixley. In addition, the court found the definition of an equipment safety guard is designed to protect the operator only and Pixley was not the operator.

The court of appeals reversed the trial court. Relying on the expert affidavits, the court of appeals held there was a question of fact whether Pro-Pak deliberately removed the safety guard. The court also held an "equipment safety guard" is a device designed to shield not only the operator, but also any employee from exposure to or injury by a dangerous aspect of the equipment. Pro-Pak appealed to the Ohio Supreme Court, which accepted the appeal pursuant to its discretionary jurisdiction.

The appeal to the Supreme Court garnered significant interest from employer and plaintiff advocacy groups alike. The Ohio Chamber of Commerce, the Ohio Self-Insurers Association, the Ohio Association of Claimant's Counsel, and the Ohio Association for Justice are among the associations which filed "friends of the court" briefs in the Court.

On December 18, 2014, the Supreme Court issued its decision reversing the court of appeals. The Court held Pixley failed to establish a critical element of an intentional tort because he provided no proof Pro-Pak deliberately removed the safety bumper on the transfer car that injured him, finding the expert affidavits insufficient evidence. Although the experts concluded the sensor of the safety bumper had been deliberately disabled, there was no evidence Pro-Pak, itself, disabled the sensor. Because Pixley failed to establish Pro-Pak deliberately removed an equipment safety guard, the Court found it was unnecessary to address whom an equipment safety guard is designed to protect under the statute.

Bugbee & Conkle, LLP concentrates its practice in the areas of employment, labor and workers' compensation for companies and businesses of all sizes throughout Ohio. Bugbee and Conkle has been delivering high-quality, responsive legal services since 1953 and is committed to the highest standards of practice and service to the community. Bugbee & Conkle, LLP, 405 Madison Avenue, Suite 1300, Toledo, Ohio 43604. http://www.bugeelaywers.com

Ohio BWC Announces Double Digit Rate Drop

The Ohio BWC will adopt a 10.8 percent overall rate reduction for Ohio private employers effective July 1, 2015. The reduction will bring private employer rate levels 21.4 percent lower than the rate levels in effect January 1, 2011.

The reduction is possible due to a number of factors, including lower expected claim frequency, as well as the upcoming adoption of a prospective billing system. The reduction is an overall statewide average. The actual premium paid by an employer will depend on expected future costs in their industry segment, their recent claims history and participation in various premium credit and savings programs.

For more information, visit the Ohio BWC website.

Ohio Below National Average in Non Fatal Workplace Injuries, Illnesses

Ohio employers have a cause to celebrate! According to the most recent Survey of Occupational Injuries and Illnesses, Ohio employers have three cases per 100 full time workers' compared to the national rate of 3.5. The Survey also documented a 5% drop in total estimated injuries and illness in Ohio with 122,600 recordable cases in 2013 compared to 129,200 in 2012.

Destination: Excellence Applications Due May 30

Employers that wish to participate in the July 1 program period of the Drug Free Safety, Industry Specific Safety or Transitional Work Bonus Programs must submit the application to the Ohio BWC by May 30th.

Reminder: Employers currently participating in the Transitional Work Bonus or the Industry Specific Safety Programs must submit applications annually.

Ohio Employers Still Waiting for BWC Settlement

Ohio employers that filed a claim seeking to collect a share of the $420 million court settlement in the class action lawsuit between Ohio employers and the Ohio BWC will have to wait a little longer.

Stuart Garson, one of the plaintiff's attorneys recently told the Columbus Dispatch that distributions will probably go out the first half of May. Garson said the delay is due to some claims that have been more complicated to resolve, including those businesses that have filed for bankruptcy and raise questions about who is entitled to the money.

The court ruled in favor of Ohio employers, stating that Ohio's state fund set up an illegal rating system resulting in employers being overcharged nearly $860 million. The state settled the case last year for $420 million rather than appealing to the Ohio Supreme Court. 300,000 employers were eligible to receive settlements however only 29,000 employers filed a claim.

Ohio BWC administrator, Steve Buehrer said at the time of settlement that the state has made major changes to its system.