

Our Work and Our Clients

Letter From the Section Chair

Greetings from the workers compensation section! The recent Legislature debates and ultimate passage of amendments of the Mississippi Workers' Compensation Act unfortunately caused strife within our Section. I respectfully suggest that we reunite and return our normal professional relationships.

The Amendments will require all of us to revise our prior strategies and practices. Some of the Amendments may require judicial interpretations. We can be friendly with each other without sacrificing our professional obligations to our clients.

The Mississippi Bar Convention is scheduled for July 11-14, 2012 in Destin, Florida. On July 13, 2012, the Workers Compensation and Labor and Employment Law Section will join to present "The Intersection of Workers Compensation and Employment Law." The speakers are Nick Norris and Amanda Green Alexander. This will be an opportunity for our Section Members to rekindle friendships and discuss the future of Workers' Compensation in Mississippi.

New officers for 2012-2013 will be installed at the Bar Convention and are as follows: Amanda Green Alexander, chair; Carlos Moore, vice-chair; Chad Shook secretary/treasurer. Executive committee members are Richie Edmonson (term expires 7/15), Phillip Embry (term expires 7/14), Roxanne Case (term expires 7/13) and Tommy Dulin, past chair.

We would like to work toward having more participation from the section members and we encourage each of you to let us know if you have any suggestions or "bright" ideas which may be useful. Be sure to mark your calendars for the Kid's Chance mediator training seminar which is scheduled for November 2013. Further details will be provided. The "Power Behind the Throne" seminar for paralegals is currently being planned for the spring of 2013 and, of course, the MWCEA annual educational conference is scheduled for April 17-19, 2013 at the Beau Rivage in Biloxi, MS.

Thank you,
Tommy Dulin, Chair



Tommy Dulin

Special points of interest:

- 2012 Legislative Changes to MS Workers' Compensation Law
- A Perspective on the 2012 Workers' Compensation Amendments
- Calendar of Events

A View from Claimant's Counsel: *2012 Legislative Changes to MS Workers' Compensation Law* By: Jason Pollan

The law affecting nearly every single worker in the state was changed this year after a long, desperate fight in the legislature. The changes were pushed through on razor thin margins after ignoring all requests for more considered deliberation. A premium was placed on rushing the job without input from the legal community in an effort to preserve a constantly shifting voting majority. The work was sloppy, sadly ignorant of the actual problems (for both sides) in the Workers' Compensation system, and has simplified the process of diminishing the rights of the Mississippi worker. I cannot address all portions of the legislation here, but let's review a few glaring portions of the new law:

Drug/Alcohol presumption

For years Mississippi has denied workers' compensation to workers whose injuries were directly related to the use of drugs/alcohol. The law drew a simple line to deny injuries incurred because of intoxication or incapacitation. Now, if a worker is found to have drugs or alcohol in their system, this is deemed to be automatic proof that the drugs/alcohol in the system was the proximate cause of

the injury and no coverage need be given. This ignores the basic science of drug testing. It assumes that drugs—which can remain in the system for days and weeks—are now somehow magically known to have caused any subsequent, particular injury in question. The vague construction of the law appears to apply the new rules even when the drug/alcohol testing comes days or weeks post injury. The rule takes a Kafka-esque turn by forcing a claimant to rebut these assumptions only if they can prove the found substances were not the cause of the injury—effectively forcing one to prove a negative. There is no interest in denying coverage due to reckless behavior in this new language. It simply supplies another means for the employer/carrier to deny proper claims. Previously they were required to show factual causation and now evidence is contrived by the legislature. And what of a carrier who wantonly denies coverage due to a sham positive test? What of an employer who purposefully slanders a worker with false drug claims in order to wrongfully deny protections under state law? This legislation protects those willful acts by denying a cause of action for defama-



Jason Pollan

tion, libel, slander or damage to reputation. Despite claimed attempts to make the changes to the act appear fair and impartial, we have nothing of the sort. The paltry increases to the disfigurement, death, and vocational assistance benefits, while allowing the specific exclusion of claims for defamation is quite telling, as to the true motivations.

Apportionment for pre-existing conditions when they are not occupationally disabling

This is a clear attempt to negate case law and limit carrier responsibility under the act. There is a justified argument

2012 Legislative Changes to MS Workers' Compensation Law, continued

for apportionment for pre-existing injuries under the act. Unfortunately, this doesn't ask for simple apportionment to apply. It demands apportionment discounts for employer/carriers when pre-existing ailments or injuries (work related or not) have been shown to have no role in making a worker occupationally disabled. This is an attempt to openly credit one side for previous injuries that are admitted as having no effect on occupational disability. It is a one-way discount system created to ignore fact and a worker's ability to continue a productive life in order to distribute otherwise unjustifiable discounts in claim valuation.

Medical proof/causation required before filing a Petition to Controvert

This is perhaps the most cynical of the new rules, if not the most troublesome. A worker would be denied access to the Mississippi Workers' Compensation Commission without medical documentation showing his/her injury is work related. Such a petition is the only means to bring a controversy before the courts. When an employer/carrier refuses to pay for the most basic medical attention in a proper claim, it has a new protection for this sort of action. The worker is barred from the courthouse door without records from the very care being denied contra-

ry to the law. We see medical providers having to shift expenses for the care of those who cannot pay.

Time and again, the theme is the same here. Employer/carriers are given an easier path when denying proper claims and no such interest is paid in the protection of workers. The law has created needless new requirements for litigation and places health care providers, as well as Medicaid/Medicare, in the position of treating more uninsured patients.

I contend that these laws do not actually solve the problems they purport to address. That does not mean we have no problems or that we need not find compromises. I admit the assertions above and the notion of fair and impartial construction of the act are debatable. During the fight over this bill, there was near universal support for full legislative review and hearings concerning the workers' compensation law in Mississippi en lieu of a flawed, rushed bill. Despite my own repeated requests, not a single member of the MS Bar's Workers' Comp section tell me they preferred the less measured approach. During the numerous discussions with all parties interested in the comp system, the direction became clear. Even manage-

ment with carriers in our state openly asserted this law will simplify the denial of proper claims.

Our system already offers the least in worker compensation compared to the other 49 states as well as Puerto Rico & Washington D.C. However, no substantial benefits increase was detailed in any version of the bill in this past legislative session. We needed a legitimate, rational look at our Workers' Compensation laws and we have instead created more cracks in our system. The workers of Mississippi deserve better.

ABOUT THE AUTHOR:

Jason Pollan is a partner in the firm Pollan Dobbs, PLLC. The firm handles claims for injured workers via offices in Jackson, New Orleans, & Memphis. He is licensed in Mississippi.

A View from the Employer/Carrier's Counsel: A Perspective on the 2012 Workers' Compensation Amendments By: James M. Anderson

Governor Bryant has signed into law revisions to the Mississippi Workers' Compensation law from the 2012 legislative session. Spokespersons for the business community tout those changes as being for the betterment of the workers' compensation system, but many workers' compensation professionals have expressed concerns with that conclusion.

Some practitioners have urged that the bill "goes too far" in favor of the Employer/Carrier, but I suggest that the legislation was, for the most part, focused on the wrong things. My prediction is that most of the changes will prove to be insignificant while others will lead to additional litigation to find out if they will survive constitutional scrutiny. Still others could prove to have unintended consequences that, in my opinion, are not in the best interests of a viable workers' compensation system.

Space will not permit an analysis of every change in the bill, so this presentation is only going to focus on a few of the concepts covered by the bill and offer other issues to be considered. The cornerstone amendment of the new law attempts to eliminate liberal construction of the workers' compensation law in favor of the claimant and the abrogation of all case law requiring fulfillment of the beneficent purposes of the Act. In so doing, Mississippi joins a handful of states who have redefined their workers' compensation laws in an effort to create a level playing field. By my count, about ten states so far have passed legislation taking their systems in this direction.

Workers' compensation was a compromise: in exchange for employers not being sued for every workplace injury, employees injured in work-related accidents were given a right to recover limited income protection benefits and medical services to aid their recovery. Interpretations regarding the workers' compensation systems across the country are replete with mandates concluding that the humanitarian objectives of workers' compensation laws are not to be defeated on technicalities or by putting form over substance.

Every defense attorney can provide anecdotal evidence illustrating decisions where employers and carriers have suffered gravely at the hands of a "liberal interpretation gone amok". Clearly, the liberality of the system has been abused by some jurists in permitting awards where "liberal construction" is the only basis for the decision in favor of the employee.

This change, however, attacks every claim existing within the workers' compensation system, and not just those examples of overreaching.

Some counter that argument with "so what", and this is the root of my concern: we have begun to see increasing examples where the "exclusive remedy" provision of the workers' compensation law designed to protect employers is being abrogated on new and novel theories. The exclusive remedy protection of an employer under a workers' compensation system is its most valuable asset in the system. Will this change be interpreted in such a way as to foster increasing attacks on exclusive remedy which will in turn hasten the demise of a viable workers' compensation system? I do not know, but I would not have made this change in the law without also considering the unintended possibility that it will cause more efforts to erode exclusive remedy, and I would have encouraged including provisions to strengthen exclusive remedy.

The changes involving the intoxication defense are an attempt to give a legitimate life to the statutory defense. Over the years, judicial decisions have



James M. Anderson

A Perspective on the 2012 Workers' Compensation Amendments, continued

gone overboard in trying to find ways to defeat the defense. Philosophically, irresponsible claimants who get injured because of alcohol, illegal drugs, or improper use of prescription drugs should not get paid. Whether this approach to dealing with those cases is the right direction remains to be seen, and I foresee significant litigation dealing with the application of the new law and have some concerns that it will survive a constitutional challenge.

Benefit changes in the law were appropriate and appreciated. They were argued by proponents as the trade-off for the more dramatic changes urged by the legislation. Those changes were long overdue, but the number of cases affected by the changes is probably less than 1% of all the claims filed.

The legislation did not focus on the big cost drivers in the system. The biggest single threat to the viability of the Mississippi Workers' Compensation system is the judicially created cause of action for "bad faith" claims handling. Parties can and do disagree as to appropriate benefits to be paid in given circumstances, but bad faith threats often strip the employer/carrier of an opportunity to pursue defenses, the result of which is a chilling effect on the entire claims process. The legislation does not attempt to address that problem at all. Admittedly there are problems with claims handling by some companies that should be addressed. Some claims professionals do not understand the concept of being a competent, rational, objective professional, and mistakes made by those require a course correction. We can and should address and fix this problem for the benefit of the system as a whole.

The largest expense seen in claims today concerns pain medication and procedures and no effort was made to tackle that problem. That oversight leaves everyone wallowing in misery, and a genuine effort to address those problems is long overdue.

A healthy workers' compensation system is in the best interests of everyone in the State. Employers need to know that the system is stable and that they can realistically evaluate and manage the cost of the system. Injured workers are entitled to reasonable compensation for legitimate injuries. With informed dialogue and appropriate consideration of the is-

sues, the workers' compensation system can continue to improve for the benefit of everyone. I think that the trigger was pulled before the aiming was completed in this legislation, and I hope that further opportunities for dialogue and healthy debate will foster additional opportunities to improve the system.

ABOUT THE AUTHOR:

Jim Anderson is the Managing Member of Anderson Crawley & Burke, PLLC, a firm representing businesses, the insurance community, and governmental entities throughout Mississippi. He has been Chairman of the Mississippi Workers' Compensation Educational Association's Annual Conference since 2008 and has participated throughout his career as an educator and reform advocate for workers' compensation. He was honored earlier this year by being named the 2012 Lawyer of the Year by The Best Lawyers in America in the field of Workers' Compensation—Employers, in the Jackson, Mississippi area.

**The Mississippi Bar Workers
Compensation Section**

P.O. Box 2168
Jackson, Mississippi 39225-2168

Rene' Garner
Section and Division Coordinator
Phone: 601-355-9226
Fax: 601-355-8635
Email: rgamer@msbar.org



Workers Compensation Section Officers

Chair

Tommy Dulin
dulinlaw@att.net

Vice-Chair

Amanda Green Alexander
aga@alexanderandwatson.com

Secretary/Treasurer

Carlos E. Moore
carlos@carlosmoorelaw.com

Past Chair

Richie Edmonson
redmonson@markowwalker.com

Executive Committee

Chad Shook
chad@shooklaw-adr.com

Roxanne Case
rcase@wellsmar.com

Phillip P Embry
pembry@markowwalker.com

Calendar of Events

MS Bar Annual Meeting

July 11-14, 2012
Destin, Florida

Workers Compensation & Labor/Employment Law Section Meeting

July 13, 2012
10:15 a.m.-12:15 a.m.
Destin, Florida

The Power Behind the Throne Seminar

Spring 2013

Kid's Chance Mediator Training

November 2012
TBD

**MS Workers' Compensation Commission
Annual Educational Conference**

April 17-19, 2012
Beau Rivage, Biloxi, MS

If you are interested in submitting an article or would like to announce upcoming worker's compensation events, please forward this information to Amanda Green Alexander, Alexander & Watson, P.A. at aga@alexanderandwatson.com

About the Editor - Amanda Green Alexander

About the Editor:

Amanda Green Alexander, a native of Kokomo, Mississippi, is a shareholder of Alexander & Watson, P.A. in Jackson, Mississippi. She represents both self-insured employers and insurance companies in the areas of worker's compensation, labor and employment law. She is a member of the Mississippi Bar Association, the District of Columbia Bar Association, the Hinds County Bar Association, Young Lawyers Division of the Mississippi Bar, the Magnolia Bar Association, Vice-Chair of the Worker's Compensation Section, MS Bar Ethics Committee, Past Chair of the Women in the Profession of the Mississippi Bar, Secretary/Treasurer of the Capital Area Bar Association and Chair-Elect of the MS Volunteer Lawyers Project. She is a certified "Kids Chance" mediator of the Mississippi Worker's Compensation Commission and is a member of the Board of National Conference of Women Bar Associations.



Amanda Green Alexander

Special Thanks:

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