

Worker injuries to be made public

OSHA is expected to issue a final rule this year which will require employers to report workplace injuries electronically so the data can be made public and easily accessible to anyone. "Under the proposed rule, employers would electronically transfer worker injury records to OSHA. The agency then would make it possible for the public to search how many injuries and illnesses occurred at each workplace, the title of the affected employee, and the circumstances related to each incident," reports *Modern Healthcare*.

This is how OSHA describes it: With the information acquired through this proposed rule, employers, employees, employee representatives, the government, and researchers will be better able to identify and abate workplace hazards. This information will also help OSHA use its resources more effectively by enabling OSHA to identify the workplaces where workers are at greatest risk.

OSHA says the only difference between this provision and the current regulation is that employers would be required to submit the requested information electronically. OSHA will provide a secure website for the data collection. Employers will register their establishments and be assigned a login ID and password.

The website will allow for both direct data entry and submission of data through a batch file upload, as appropriate. Please see http://www.osha.gov/recordkeeping/proposed_data_form.html for an example of what the website might look like.

The agency has put employers on notice the following information will likely become public: The data fields on the right side of the OSHA Form 301 (Incident report), i.e., case number, date of injury or illness, time employee began work, time of event, what the employee was doing just before the incident occurred, what happened, what the injury or illness was, what object or substance directly harmed the employee, and the date of death if applicable.

Workplace-safety advocates say such measures are important because fines imposed by OSHA tend to be minimal,

and the agency has limited resources to inspect workplaces. Public shaming would be a bigger deterrent, they say, and is a way to hold companies accountable in the same way they are held accountable for their environmental or discrimination records or other community values people care about.

James Stanley, a former OSHA official who consults for companies, told the *Wall Street Journal* companies would be less likely to report as many injuries. "I think they'll try to do everything in the world not to report, because now it's going to be public. Injury reporting is not an exact science. The rules are gray at best," he added.

Major employers lambasted OSHA in a sternly worded letter. The Coalition for Workplace Safety argues OSHA simply lacks the authority to issue the regulation, which is burdensome and unnecessary. Also, public disclosure of injuries will lead to underreporting and create a PR problem for businesses. "It will allow those who wish to do so, to mischaracterize and misuse the information for reasons wholly unrelated to safety," the coalition said.

Besides, injury and illness data are not reliable measures of an employer's safety record or its efforts to promote a safe work environment. "Many factors outside of an employer's control contribute to workplace accidents, and many injuries that have no bearing on an employer's safety program must be recorded," the coalition said.

The coalition is comprised of the U.S. Chamber of Commerce, American Forest & Paper Association, American Health Care Association, American Hotel & Lodging Association, American Truck Dealers, and the National Federation of Independent Business, among others.

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President's Note

A resurgent conference

Our March 2015 annual conference in Wrightsville Beach drew more registrants than we've had in several years and, for the first time in a long while, exhibitors filled up every available slot.

Perhaps the gains were due to an improving economy. But I think certainly part of the reason is that we have been steadily improving our conference, and each year word of mouth works to our advantage. First-timers to the conference almost unanimously say they are pleasantly surprised at the quality of the presentations and enjoyed the collegial atmosphere and opportunity to make new contacts.

Nevertheless, we have to figure out a way to draw more employers to the conference. It is a problem faced by almost every self-insurance association in the country, and no one seems to have figured out a way to reverse the declining attendance by employers. The problem is something like that faced by major media outlets: almost all of them have fewer readers and viewers, and almost no one has figured out a way to reverse the decline.

It may be we have to try something new and bold. Those who do make it to the conference are pleased. The challenge is how to get them there.

With very best wishes,
Jay Norris



OSHA, major publications slam workers' comp

Even as employers are convinced they are paying too much for workers' compensation, two powerful reports conclude employers are not paying nearly enough and, in fact, are shifting their costs to injured workers, their families, and to safety net programs paid for by taxpayers.

Earlier this year, *National Public Radio* and *ProPublica*, a highly respected news outlet, created a sensation in the workers' compensation industry with an in-depth look at the nuances of workers' comp across the country. The title of the series - *The Demolition of Workers' Compensation* - says it all and *ProPublica* spells it out:

"Over the past decade, states have slashed workers' compensation benefits, denying injured workers help when they need it most and shifting the costs of workplace accidents to taxpayers. The changes, often passed under the banner of "reform," have been pushed by big businesses and insurance companies on the false premise that costs are out of control," the publication said.

Robert Hartwig, president of the Insurance Information Institute, aptly responded the media outlets had created a sensation because their report was sensational. He points out workers' comp insurers provide nearly \$40 billion in benefits annually to injured workers, hardly an indication of a demolished program, and, thanks to insurers and employers, the workplace has never been safer.

He took the media to task for using inflammatory language to describe cost-control measures such as managed care, formularies of approved drugs, and reduced benefits for workers injured because of intoxication. To describe these measures as "slashing benefits" paints a misleading picture of complex realities, Dr. Hartwig noted.

He also refuted the assertion employers and insurance companies have made up the part about costs being out of control. In fact, between 1991-2009, workers' comp medical costs increased by 277%, while healthcare costs in general rose 100%, and the overall consumer prices rose 56%.

The National Academy of Social Insurance, a nonprofit, nonpartisan organization, also weighed in with a judicious response. "In 2012, the most recent year for which data are available, workers' compensation *benefits* rose by 1.3 percent to \$61.9 billion, while employer costs rose by 6.9 percent to \$83.2 billion," the group noted.

However, it added, "workers' compensation benefits and costs tend to be pro-cyclical, that is, increasing in periods of expansion (as employment grows) and decreasing in periods of recession (as employment contracts). In examining trends over time, therefore, the Academy considers benefits and costs as a share of total wages. Between 2006 and 2012 benefits per \$100 of wages were, in fact, lower than at any time since 1980-81."

Dr. John Burton, one of the most widely respected authorities in workers' compensation, said as much: "The recent changes are "unprecedented in the history of workers' comp. I think we're in a pretty vicious period right now of racing to the bottom."

Perhaps the most surprising observations came from OSHA, in its report titled *Adding Inequality to Injury*. "The costs of workplace injuries are borne primarily by injured workers, their families, and taxpayer-supported components of the social safety net. Employers now provide only a small percentage (about 20%) of the overall financial cost of workplace injuries and illnesses through workers' compensation."

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MEDLIN V. WEAVER COOKE

By Julie Hooten



The 2008 recession had a significant impact on many types of businesses. The construction industry took a particularly hard hit. In a recent Supreme Court case, one employer, Weaver Cooke, used evidence of the recession to oppose the ongoing payment of disability benefits.

In *Medlin v. Weaver Cooke*, Weaver Cooke, a commercial construction company, hired employee in 2006 as a project manager. Employee sustained a compensable injury to his shoulder at work in May 2008. Employee continued working until November 2008, when he was laid off as part of a general reduction of force for lack of business. Employee later underwent shoulder surgery, and defendants started paying weekly temporary total disability benefits.

Employee was eventually released to return to work with restrictions that prevented him from resuming work as a project manager. However, employee was capable of working as an estimator. Employee had experience working as an estimator for other employers before Weaver Cooke. At times, employee had also worked as an estimator for Weaver Cooke in addition to his usual job as a project manager. Defendants obtained a labor market survey, which showed that the estimator position was within employee's restrictions, but the economic downturn essentially precluded employee from being employed as an estimator.

To be entitled to ongoing weekly benefits, an employee must show that his or her disability is due to a work-related injury. The *Medlin* Court ultimately agreed with defendants' argument that consideration of economic factors relative to a certain profession are important in determining whether an employee's disability is due to a work-related injury, or whether the employee's disability is due to other factors. Applying for hundreds of jobs may show that an employee cannot find work, but this does not, in and of itself, establish that an employee's disability or inability to return to work is due to a work-related injury. The Court clarified that an employee must show an inability to earn his or her pre-injury wage with the defendant-employer or any other employer and the work-related injury caused the employee's reduction in wages.

In cases where an employee is able to perform some work, but remains out of work while receiving disability benefits, defendants should request information regarding the employee's independent job search efforts. Defendants should first look to the quantity of jobs the employee has sought. Defendants should also look further to the quality of positions the employee has sought. For example, an employee may have applied for positions for which he or she is not qualified, or for which the employee has no legitimate chance of obtaining. *Medlin* also reminds defendants to scrutinize an employee's past work experience and current job search effort as alternative methods for disproving disability.

Julie Hooten is a partner with Teague Campbell Dennis & Gorham, LLP in the firm's Asheville office. She received a Master of Arts degree in American History from Western Carolina University and her Juris Doctor degree from Campbell University. In 2014, she was named by Best Lawyers as its 2014 Asheville Workers' Compensation-Employers "Lawyer of the Year."

coming up

Mar. 30–Apr. 1, 2016

NC Association of Self-Insurers' Annual Conference

Holiday Inn Resort, Wrightsville Beach

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Industrial Commission News

■ New commissioner nominated

New and revised medical fee schedules went into effect on April 1, 2015, involving medical compensation, professional services, and institutional services fees. Please click [here](#) for the memorandum posted on the Industrial Commission's website regarding changes to the Fee Schedule, which includes a link to Frequently Asked Questions. Further revisions to the rule regarding professional services fees are anticipated on July 1, 2015.

The Commission offers a secure FTP site (<ftp://149.168.254.96/>) so that insurance companies and other entities may upload Rule 1001 Medical Practice Guidelines, Rule 1001 Peer Reviewer Profiles, and related documents and correspondence for the Commission to view. Please click [here](#) for complete instructions on how to use this FTP site.

The Commission has also implemented a fraud alerting tool called NETS (Noncompliant Employer Targeting System) to further its stated goal to "thoroughly investigate and penalize state businesses that operate without required workers' compensation coverage." Please click [here](#) to view the news release regarding the Industrial Commission's fraud and compliance enforcement initiatives.

■ New Commissioner

Governor Pat McCrory has nominated chief deputy commissioner Christopher Loutit for appointment to the North Carolina Industrial Commission. The nomination must be approved by the General Assembly. Loutit, previously administrator of the Industrial Commission's operations, received his law degree from American University in Washington, D.C.

■ New Deputy Commissioner

Chairman Andrew Heath has appointed Thomas Perlungher to serve as a Deputy Commissioner. Perlungher will serve out the remainder of Deputy Commissioner Theresa Stephenson's term. Stephenson left the Industrial Commission to accept a position with the North Carolina Department of Public Safety.

Thomas Perlungher has been serving as Law Clerk at the Industrial Commission since 2010. He is a Phi Beta Kappa graduate of the University of Vermont and earned his J.D. from Wake Forest University in 2002.

OSHA, major publications slam workers' comp *(continued from page 2)*

Most astonishing is the agency's conclusion that when researchers have matched injuries recorded by employers on OSHA logs with treatments rendered in emergency rooms or elsewhere, they've found a sizable proportion of injured workers received no benefits through the workers' compensation system.

"For example, a review of all recordable work-related amputations in Massachusetts found that less than 50 percent of the cases received any workers' compensation benefits. A similar California study found that one-third of workers who had amputations that were recorded by their employers had not received workers' compensation benefits," according to OSHA.