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MEETING NOTICE:

The Advisory Council on Workers' Compensation and Occupational Disease Disablement will meet at **9 a.m., Thursday, Nov. 20**, at the WCA headquarters, 2410 Centre Ave., SE, Albuquerque, NM. Download agenda at: <http://www.workerscomp.state.nm.us/advisory.php>

New Mexico Workers' Compensation Administration: Leading the Way in Loss Prevention

By Diana Sandoval-Tapia

The New Mexico Workers' Compensation Administration (WCA) has always had its own internal loss control committee to help identify potential hazard risks and to address them. The WCA's Loss Control Committee recently revamped and set new goals. As the administrative agency that collects work-place injury data and adjudicates disputes, the WCA should set the standard and be an example for other businesses in preventing injuries and managing risks on the job.

Another impetus for the agency's renewed efforts is word from New Mexico Risk Management, a division of the state's General Services Department – the insurer for all state agencies – that all state government departments will undergo a risk audit during the last quarter of 2015. Agencies must receive a 70-percent passing score or will be failed, and those that fail may see as much as a 40-percent increase in premiums.

Among some of the audit requirements are that all state agencies must have a Loss Control Committee and coordinator, which will take specific steps to prevent injuries and managing risks. Committees should identify hazards, document notification, as well as all the steps in between first notification of a potential hazard and the remedying of each risk identified.

Steve Bahling, a WCA safety consultant, is the agency's coordinator for loss control. "They want to see that quarterly meetings are held, that there's a clear documentation of injuries that occur or hazards identified or other safety concerns, as well as how those concerns are addressed," Bahling said.

Other requirements of the audit include a showing that safety training is pro-

vided for agency employees, the existence of policies that address various risks, such as an evacuation plan and documentation to show that those plans are tested, i.e., conducting periodic fire or emergency drills during which all staff exit the building.

Since the rejuvenation of the WCA's loss control committee, a variety of hazards have been identified and addressed. For example, a WCA staff member raised concern about a number of cracks in the building's parking lot pavement that could pose hazards not only for staff, but for the many daily visitors to the building. The risk was quickly addressed, and within a few short weeks, all the cracks that were between one and four inches wide were milled and refilled. In another instance, excess water on the floor of one of the building's women's restrooms was brought to the attention of the WCA's facilities manager. Within minutes, the restroom was closed for use and literally blocked so no one entered during the cleanup.

WCA General Counsel Rachel Bayless, a committee member, commended the efforts of everyone involved, from those who first identified potential problems, to Christopher Johnston, the WCA's facilities manager, who was instrumental in efforts to resolve and correct the hazards. With the wet floor issue, for example, Bayless said, "Chris was there in minutes; he put signs and tape to physically block the door so no women would walk in and potentially slip on the wet floor, while he mopped it up.

"It takes a team to make a work place safe. It's not just Facilities' job or the job of the loss control committee. It takes everyone's attention."

Bayless also stressed that the WCA is miles ahead for the audit process because the agency has already had programs and

NM WCA Renews Focus on Keeping New Mexico Workers Safe and Businesses' Premiums Reasonable

By Diana Sandoval-Tapia

New Mexico Workers' Compensation Administration (WCA) Director Darin A. Childers announced a renewed focus at assuring New Mexicans' safety in the work place. To that end, the WCA is making some organizational changes to its safety program. Since the WCA's mission is to assure the quick and efficient delivery of medical and indemnity benefits to injured workers *at a reasonable cost to employers*, Childers said the Administration is working to help employers reduce their the risk of accidents, and therefore, keep their premium costs reasonable. "The best thing for both employers and employees is that these accidents never happen in the first place. To that end, our safety program and safety staff are here to help employers prevent injuries and save on their bottom line too."

Section 52-1-6.2 of the Workers' Compensation Act, addresses safety programs, inspections, penalties, and bonuses for New Mexico employers. Under the statute, employers who pay more than \$15,000 (an increase from \$5,000 became effective July 1, 2013) annually for workers' compensation insurance, or who are certified self-insured, are required to conduct annual safety inspections. Employers who fail to conduct yearly safety inspections can be fined (not to exceed \$5,000) by the director. The WCA's safety program can provide assistance in conducting those inspections, and in training

business owners to take a more active role in assessing their own risk and in conducting their own inspections. In New Mexico, there are approximately 3,587 businesses with insurance premiums of or more than \$15,000, and of those, about 55 percent qualify for the risk reduction program.

Additionally, the WCA is renewing its focus on the "extra hazardous" program, which is now also being referred to as the "Risk Reduction Program." Businesses are identified through a variety of tools as "extra hazardous" if they have reported an unusually large number of work-place injuries. Companies' experience modification rates, known commonly as "E-Mods," are used by their insurers to assess that company's risk for work-place accidents or injuries, and can ultimately affect the cost of the company's insurance premiums. In the workers' compensation industry, an E-Mod rate of 1.0 is considered average. When a company's E-Mod rate begins to creep above 1.0, it might indicate unsafe working conditions, or be due to a spike in on-the-job injuries. The WCA's safety consultants use reported E-Mod rates as a gauge as to whether or not they may need to step in and provide some assistance.

If a business has been identified and notified by the WCA's Risk Reduction Program as "extra hazardous," or having an increased risk, that company will receive a safety consultation and inspection within 30 days of notification. Inspections can be done by WCA safety consultants, the company's

insurer, or another professional consultant. Businesses in the Risk Reduction Program cannot conduct their own safety evaluations. The company must then file a report with the WCA. The company then has 30 days from the report deadline to develop a plan to address any issues identified at inspection. Six months from the approval of the action plan, businesses in the Risk Reduction Program must show that their safety plan has been implemented. Thereafter, the E-Mod rates will be reviewed to determine whether or not companies remain in the program or are removed. Once companies are no longer in the Risk Reduction Program, and no longer identified as "extra hazardous," they may begin to conduct their own safety inspections.

Organizationally, the WCA's safety program has been overseen by a manager who also supervised the agency's Ombudsman and Field Offices. In an effort to more efficiently manage the programs, the Administration is currently searching for an Ombudsman supervisor, and will separate it from the Safety Program. The WCA currently has six safety consultants with two vacancies. In a recent safety training session, Richard "Mac" McCrea, safety manager, told consultants that because of these renewed agency efforts at risk reduction, they will be busier than ever, conducting two or three inspections per week, and then following up with those inspected "extra hazardous" companies to assure they've developed and are implementing safety programs.

NM Workers' Comp. Adm. Quarterly Bulletin

Darin A. Childers Director
Diana Sandoval-Tapia, Editor/Designer

The Bulletin is published in January, April, July and October by the Economic Research Bureau of the New Mexico Workers' Compensation Administration. The Bulletin is available free of charge. Send changes of address and requests to receive the Bulletin to Diana Sandoval in the Economic Research Bureau, New Mexico Workers' Compensation Administration, diana.sandoval@state.nm.us.

Suggestions for articles are welcome; call Diana Sandoval-Tapia at (505) 841-6052. Recent issues of the Quarterly Bulletin can be viewed on the Internet at <http://workerscomp.state.nm.us/research/index.php>.

What is the Advisory Council?

The Advisory Council on Workers' Compensation and Occupational Disease Disablement is a task force created by statute, comprised of six members, three representing workers and three representing employers. The primary role of the Council is to advise the governor and legislature on the status of the workers' compensation system in New Mexico. The Advisory Council meets several times a year on an irregular schedule. Scheduled meetings of the Council are announced on the WCA website, <http://www.workerscomp.state.nm.us/advisory.php>

Sherrie Fowler v. Vista Care and American Home Insurance Company: Understanding the Court's Decision

By Rachel Bayless

The Fowler decision arose from an appeal of a decision issued by workers' compensation judge, Victor Lopez. Sherrie Fowler suffered a back injury while working from Vista Care (Employer). Fowler received temporary total disability (TTD) benefits pursuant to §52-1-41 until she reached maximum medical improvement (MMI) in January 2006. In March 2006, Fowler requested a lump sum payment of permanent partial disability (PPD) benefits, which was granted by a Workers' Compensation judge (WCJ) in April 2006. Fowler continued to receive medical treatment for her back injury, and in March 2007, her doctor determined her condition had deteriorated and recommended she undergo another back surgery. Worker did not have the surgery until July 2010.

In March of 2010, Fowler filed a complaint with the Workers Compensation Administration (WCA) for reinstatement of her TTD benefits and for an increase in her PPD rating. The two issues before Judge Lopez were: (1) whether Fowler was entitled to reinstatement of TTD benefits prior to her July 2010 surgery and (2) whether her continued entitlement to TTD benefits was subject to any durational limit.

After trial, Judge Lopez found that Fowler was entitled to TTD benefits as of March 2007 when her physician found she was no longer at MMI. He also ruled, that despite a long standing practice and understanding by the Workers' Compensation Administration, TTD benefits were not subject to the 700-week limit because the language of Section 52-1-41 "clearly establishes that it does not exclude 'temporary' total disability benefits from the potential payment of disability benefits 'for life'." Employer/Insurer appealed Judge Lopez's decision, and the Court of Appeals reversed the decision. The Court of Appeals held that Section 52-1-47, which provides for a 700-week limit for "any combination of disability benefits," imposed a 700-week limit on TTD benefits.

After a lengthy discussion analyzing the language of Sections 52-1-41, 52-1-42, and 52-1-47, the New Mexico Supreme Court reversed the Court of Appeal's deci-

sion and agreed with Judge Lopez's determination. The Court ruled "[t]he plain language and legislative history of Section 52-1-41 indicates that the Legislature intended TTD benefits to be available for the entire life of a worker."

To reach their conclusion, the Supreme Court focused, initially, on the plain language of Section 52-1-41(A), which applies to total disability benefits (temporary and permanent). That section provides "the worker shall receive, during the period of disability" an amount of benefits determined by a specified formula and that "the worker shall receive compensation benefits for the remainder of his life." The Court noted that nothing in Section 52-1-41 evidenced a legislative intent to administer temporary total disability benefits differently than permanent total disability benefits. The Court reasoned that its interpretation of Section 52-1-41 was consistent with the realistic possibility that an injured worker may come in and out of temporary total disability based on changing MMI determinations for the remainder of the worker's life.

The Court also looked at the legislative history of Section 52-1-41. In 1990, the Legislature amended Section 52-1-41(A) and specifically removed durational limits that previously applied to TTD benefits. At the same time the Legislature enacted Section 52-1-25.1, which expressly defines "temporary total disability." Of this new provision, the Court said "[t]he Legislature specifically numbered Section 52-1-25.1 as a subpart of Section 52-1-25 defining 'permanent total disability,' which indicates its intent that the concept to TTD be interpreted together with the concept of permanent total disability."

To support its conclusion that TTD is not subject to a durational limit, the Court compared Section 52-1-41 with Section 52-1-42. Under Section 52-1-42(A), permanent partial disability (PPD) benefits are explicitly limited to 500 or 700, weeks depending on the worker's percentage of disability. Under Section 52-1-42(B), the period of PPD benefits, whether 500 or 700 weeks, is reduced by the period of benefits a worker receives TTD. Despite the relationship between TTD



and PPD set forth in Section 52-1-42(B), the Court stated "[t]his limitation reducing eligibility for PPD benefits does not indicate an intent of the Legislature to limit eligibility of TTD benefits. Section 52-1-42(B) only limits duration of PPD benefits."

Employer/Insurer's argument on appeal focused primarily on the language of Section 52-1-47. Employer contended Section 52-1-47 provided that TTD benefits were limited because Subsection A limits benefits available for "any combination of benefits." The Court quickly dismissed this argument relying on the plain language of Section 52-1-47(A), stating "Section 52-1-47(A) states that the 700-week limit for any combination of injuries applies 'except for provision of lifetime benefits for total disability awarded pursuant to Section 52-1-41.'"

Impact of the Decision

Fowler is one of many recent decisions of New Mexico's appellate courts to alter established understandings governing predictable payment of workers' compensation benefits. The New Mexico Supreme Court's decision interpreted the statute in a way that was starkly different from the understanding (and practice) of the WCA, workers' compensation judges, attorneys, and insurers over the last 25 years. What was once understood as a temporary benefit subject to the 700-week limit is now a benefit available for the remainder of a worker's life.

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Fowler v. Vista Care: Understanding the Court's Decision

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In addition to eliminating the balance of interests struck in the 1990 reform, the Fowler decision has affected the systematic necessity of predictable disability benefits. Without predictability, insurers may encounter actuarial challenges and may have difficulty setting reserves on claims, especially New Mexico's self-insured employers. This lack of predictability may also impact workers' compensation premiums and increase costs for employers. Increased cost in premiums potentially may translate into fewer employers with appropriate workers' compensation coverage, and consequently, more workers employed in New Mexico without

the necessary coverage. Such increased costs to the system as a whole runs contrary to the intent of the Workers' Compensation Act – "to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to employers" subject to the Act.

Correcting the statutory language relied on by the Supreme Court to reach its ruling is necessary to reflect past understanding and to restore predictability in the workers' compensation system. Legislative action is also necessary to clarify that temporary means temporary, not lifetime, especially so in a system of balanced interests intended to give injured workers the opportunity to

return to gainful employment as soon as possible with minimal dependence on compensation awards.

Correcting the language of 52-1-41 and 52-1-42 also presents an opportunity to correct language limiting benefits for primary and secondary mental impairments. *Breen v. Carlsbad Municipal Schools*, 138 N.M. 331 (NMSC August 5, 2005) held that the 100-week limitation on primary and secondary mental impairments violated Equal Protection. This decision was reached in 2005 and the unconstitutional language should be removed from the statute.

NOTICES, EVENTS & HOLIDAY CALENDAR

Notice of Public Hearing

The New Mexico Workers' Compensation Administration will conduct a public hearing on the changes to the Health Care Provider Fee Schedule at 1:30 p.m., Thursday, November 6, 2014, at the Workers' Compensation Administration, 2410 Centre Avenue S.E., Albuquerque, NM. Copies of the list of changes to the fee schedule are available via the following link: http://www.workerscomp.state.nm.us/proposed_PFS2015.pdf.

Comments made in writing and at the public hearing will be taken into consideration. Written comments on the changes will be accepted until the close of business, November 19, 2014. The final fee schedule will be effective **Jan.**

1, 2015. Oral comments will be limited to five (5) minutes per speaker.

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aide or service to attend or participate in the hearing or meetings, please contact the General Counsel Office at (505) 841-6083.

Meeting Notice

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Holiday Closures

The Workers' Compensation Offices in Albuquerque and all its field offices will be closed on the following upcoming holiday(s):

Veterans' Day, Tuesday, Nov. 11
Thanksgiving, Thursday & Friday, Nov. 27 & 28
Christmas Day, Thursday, Dec. 25
New Year's Day, Thursday, Jan. 1, 2015



NM WCA: Leading the Way in Loss Prevention

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policies in place for years, where some state agencies may not have had formal employee policies for anything, much less to address loss control issues. “We have an employee policy handbook that gets updated frequently,” Bayless said. “We have an aspirational goal to pass the audit with a 100 percent score,” she said. “We want to be a role model for other agencies, particularly because we are workers’ comp!”

The WCA plans ongoing training sessions for its employees on things like preventing sexual harassment, personal and work-place safety to minimize loss and prevent claims, civil rights protections, and others.

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MAIN OFFICE

Location & Main Mail Address:

2410 Centre Ave. SE
Albuquerque, NM 87106-4190

Alternate Mailing Address:

PO Box 27198
Albuquerque, NM 87125-7198

Phone Numbers:

Phone: (505) 841-6000
In state toll-free phone:
1-800-255-7965
Fax Clerk of the Court:
(505) 841-6060
Fax Director: (505) 841-6009

Regional Offices

Farmington:

2700 Farmington Ave., Bldg. E, Ste.2
Farmington, NM 87402
Phone: (505) 599-9746
In state toll-free phone:
1-800-568-7310
Fax: (505) 599-9753

Las Cruces:

1120 Commerce Dr., Ste. B-1
Las Cruces, NM 88011
Phone: (575) 524-6246
In state toll-free phone:
1-800-870-6826
Fax: (575) 524-6249

Las Vegas:

32 NM 65
Las Vegas, NM 87701
Phone: (505) 454-9251
In state toll-free phone:
1-800-281-7889
Fax: (505) 454-9248

Lovington:

100 West Central, Ste. A
Lovington, NM 88260
Phone: (575) 396-3437
In state toll-free phone:
1-800-934-2450
Fax: (575) 396-6044

Roswell:

Penn Plaza Building
400 N. Pennsylvania Ave., Ste. 425
Roswell, NM 88201
Phone: (575) 623-3781
Fax: (575) 623-0078

Santa Fe:

Aspen Plaza
1596 Pacheco, St. #202
Santa Fe, NM 87505
Phone: (505) 476-7381
Fax: (505) 476-7390



WCA Helpline-Hotline: (toll free in New Mexico)

1-866-WORKOMP 1-866-967-5667

WCA Website:

www.workerscomp.state.nm.us