ALABAMA SELF-INSURERS
— A S S O C I A T I O N —

VOLUME 1 SPRING 2013

ASIA Objectives

ASIA is committed to a workers' compensation program that:

- Adequately compensates the employee with a work-related injury
- Recognizes fair limitations on employer responsibility
- Provides for an appropriate distribution of the compensation dollar
- Reduces litigation
- Is dedicated to eliminating abuses within the system
- Operates within the bounds of reasonable and necessary regulations

ASIA Summer Conference

August 11-13, 2013
Hilton Sandestin Beach Golf Resort & Spa
Destin, Florida

ASIA Winter Workshop

January 16-17, 2014
Cahaba Grand Conference Center
Birmingham, Alabama

INSIDE THIS ISSUE:

Strategy For Defending a Claim for Unscheduled Benefits Under the Graben Pain Exception

John Webb and Aaron D. Ashcraft
Lloyd, Gray, Whitehead & Monroe, P.c

Under the Alabama Workers' Compensation Act, injuries are divided between injuries compensated according to the schedule of benefits contained in Ala. Code § 25-57(a)(3) and injuries compensated outside of the schedule. Typically, compensation for scheduled injuries is less than compensation awarded outside of the schedule. More significantly, evidence of a vocational impairment has been deemed irrelevant to a claim for scheduled benefits, and scheduled injuries are not eligible for an award of permanent and total disability benefits under Ala. Code § 25-5-57(a)(4).

As such, it is often the strategy of a workers' compensation claimant to attempt to remove their case from the schedule, in order to receive unscheduled benefits. The Alabama Supreme Court has created two avenues for a claimant to do so. The first, established by Ex Parte Drummond Co., 837 So. 2D 831 (Ala. 2002), Provides "if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not exclusive."

In *Norandal U.S.A., Inc. v. Graben, 18 so. 3D 405 (Ala. 2009) ("Graben i")*, the court allowed a second exception to the schedule, and stated "pain that is totally, or virtually, totally disabling justifies an award of non scheduled benefits even if that pain is isolated to a scheduled member." The court of civil appeals expanded on this rule in *Norandal U.S.A., Inc. v. Graben, 2010 ala. Civ. App. Lexis 71 (Ala. Civ. App. 2010) ("Graben ii")* by requiring proof "that whatever pain the worker experiences completely, or almost completely, physically debilitates the worker."

Since the supreme court enacted the pain exception, there has been only one (1) reported case where the court of civil appeals or supreme court found that pain was sufficiently severe to bring the case outside of the schedule. In fact, even in graben ii, following the remand to the trial court to consider the pain exception, the court of civil appeals found the evidence was insufficient to establish that the plaintiff's pain was virtually, totally disabling.

In order to establish what is required to meet the pain exception, a comparison of two (2) recent cases, one (1) affirming and one (1) reversing the trial court's

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A Word from the President...

Charles Hough

To all of our sponsors, exhibitors and participants in the ASIA Winter Workshop, thank you. We all braved the cold, snow and ice to come together for excellent speakers, good networking opportunities and the chance to talk workers comp with our peers. Yes, our speakers were as good as ever, but I always get so much from being with others in workers comp. Sometimes, you can learn as much between sessions comparing notes with your peers as you do from our presenters. Bottom line, come to ASIA meetings and learn new tips, tricks and information to help you be better at work.

Spring is finally here! Time to put our cold weather clothes away and get back outside and enjoy our favorite activities. I travel a good bit in my job and I much prefer seeing greenery to the drab winter colors. Spring is a time for growth, a time to expand our roots and reach out. Maybe that means doing a little extra at work. Maybe volunteer to do a routine task that everyone else dreads. Maybe reach out to a friend or peer to tell them about ASIA.

The ASIA leadership needs your help to spread ASIA's reach. The more people we get involved in ASIA, the more valuable we become, the more valuable the organization. The stronger ASIA becomes the stronger our influence will be in Montgomery, on the Hill, in the court races and when we file amicus briefs. So, reach out to someone you know who could benefit from ASIA. You will qualify for our Membership Campaign and cash.

In closing, please mark you calendar today and plan to participate in our Summer Conference, planned by August 11 – 13, in Destin, Florida. We usually draw 600 – 650 people for that meeting and we guarantee you will benefit from your attendance. Look for registration material soon and make hotel reservations as the Hilton always sells out for this meeting.

Charles

104 Weeks No More? Recent Decision Invalidates Florida's 104 Week Time Limitation for the Receipt Temporary Disibility Benefits

Matt Hall • Carr Allison

On February 28, 2013, Florida's First District Court of Appeals decided that the 104 week time limitation for the receipt of temporary disability benefits provided for under 440.15(2)(a), Florida Statutes (2009), was unconstitutional under Article 1, Section 21 of the Florida Constitution. In rendering its decision in the matter of Westphal v. City of St. Petersburg, et al., Case No. 1D12-3563, the Court of Appeals also held that an injured employee was entitled to receive up to 260 weeks of temporary disability benefits instead of the maximum 104 weeks set forth under Florida's Workers' Compensation Act.

PROCEDURAL HISTORY

According to the facts detailed in the decision, Westphal, a firefighter and paramedic, severely injured his back and knee resulting in nerve damage and requiring spine surgery, while in the course of his employment. During the course of his difficult recovery, Westphal's 104 weeks of temporary disability benefits expired before he reached maximum medical improvement (MMI) and before his treating physicians could assign a permanent physical impairment rating. According to the Court, Westphal was incapable of working and thus was still temporarily totally disabled on the date said benefits expired. Westphal, in an attempt to recover the loss of his temporary benefits, filed a claim for permanent and total disability benefits, which was subsequently denied by the JCC because he had not yet reached MMI. In the Final Order rendering this opinion, the JCC noted that Wespthal fell within the "statutory gap" created when an injured employee exhausts his or her temporary benefits but is unable to receive permanent and total disability benefits because the issue is not yet ripe for determination.

Westphal then appealed the JCC's opinion on the grounds that the 104 time limitation denied him access to the courts and the constitutionally guaranteed right to the administration of justice without denial or delay provided for in the Florida Constitution. See Fla. Const. Art. I, § 21. The Court of Appeals agreed with Westphal's position and held that section 440.15(2)(a) was unconstitutional. Additionally, the Court also revived the repealed portion of the statute which allowed for the entitlement of temporary total disability benefits in an amount not to exceed 260 weeks.

ANALYSIS

The Court relied upon several factors in rendering its opinion. The Court first addressed the concept of natural justice, and held that by denying Westphal recovery for his injury in a timely manner, the statute's effect denied him the right to the administration of justice without delay or denial. In this same vein, the Court also looked at the drastic reduction of weekly temporary benefits the legislature enacted after the Florida's Constitution was enacted in 1968 (350 to 260 weeks in 1991, 260 to 104 weeks in 1994), and held that such a reduction was also a violation of natural justice.

Secondly, the Court looked at the temporary benefit time limitations enacted by Florida's "sister states" (Alabama – no limitation, Georgia – 400 weeks, Georgia- no limitation, Mississippi – 450 weels, North Carolina – 500 + weeks, and Tennessee – 400 weeks), in holding that such an examination revealed, "Florida to be even more significantly lacking in providing disability payments to severely injured workers…."

Lastly, the Court looked at whether Westphal's case was an isolated example, and thus, inappropriate to consider as indicative of a systemic deprivation of justice. This notion, however, was quickly dismissed by the Court based upon a review of its own decisions in cases with similar fact patterns. In addressing this issue, the Court noted, "This case illustrates a recurrent problem resulting from the 104-week limitation on temporary disability benefits enacted by the Legislature effective January 1, 1994…."

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ASIA Calendar of Events

AUGUST 11-13, 2013	**ASIA Summer Conference** Hilton Sandestin Beach Golf Resort & Spa • Destin, FL
JANUARY 16-17, 2014	**ASIA Winter Workshop** Cahaba Grand Conference Center • Birmingham, AL
AUGUST 9-11, 2014	**ASIA Summer Conference** Hilton Sandestin Beach Golf Resort & Spa • Destin, FL

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Fortunately the Court concluded by holding that its decision in this matter did not apply to rulings, adjudications, or proceedings that have become final prior to the date of the opinion, thus preventing a flood of new petitions in matters that had already been settled or ruled upon by the OJCC.

APPLICATION

It is highly likely that the controversial decision in Westphal will be taken up by Florida's Supreme Court. Nonetheless the ramifications of such a decision will certainly be felt by employers and insurance carriers subject to Florida's workers' compensation system and statutory scheme. An increase in the amount of benefits available to an injured employee will certainly translate to an increase in costs to employers to maintain a self-insured workers' compensation program and to insurance workers' compensation insurance premiums for those who don't. Such an increase will also likely have a detrimental impact on businesses who are already struggling in today's economy.

Secondly, the 104 week time limitation for temporary benefits provided an incentive for injured employees to participate in their medical treatment as there was a very short window for the recovery of these benefits. If the decision in Westphal is upheld, however, an injured employee will be entitled to five years of benefits before they are exhausted. Such an extension of time provides no such incentive, and will likely result in prolonged litigation in most cases, which will again increase costs for employers.

CONCLUSION

As stated above, the Court's decision in Westphal will almost certainly have negative consequences on Florida employers. From a litigation standpoint, the selection of the employee's treating physician is now of even greater importance. An employee's course of treatment should be focused entirely on getting him or her to MMI as soon as possible. Employer's should also consider focusing their efforts on creating beneficial jobs that employee's with temporary work restrictions can perform in order to offset the increased costs associated with providing temporary benefits.

Hopefully the judicial legislation exhibited by the Court of Appeals in this decision will be overturned by the Florida Supreme Court before further damage is done. Nonetheless it is imperative that Florida employers and carriers prepare for the potential consequences of this decision.

Matthew Hall, located in the Mobile, Alabama office of Carr Allison, focuses his practice on complex litigation with a concentration on workers' compensation defense cases. Mr. Hall is a member of the Alabama Defense Lawyers Association and the Defense Research Institute. Prior to joining Carr Allison, he served as Assistant State Attorney in the state of Florida from June 2006 to October 2007. Mr. Hall earned his Bachelor of Arts degree from Auburn University and his Juris Doctorate from Gonzaga University School of Law located in Spokane, Washington. W. Walker Moss is a shareholder in the Birmingham office of Carr Allison where his practice concentrates on general litigation, labor and employment, and workers' compensation defense Mr. Hall may be reached at 6251 Monroe Street, Suite 200, Mobile, AL 36526, (251) 626.9340 phone, (251) 626.8928 fax, mhall@carrallison.com.

National Council of Self-Insurers News

Larry Holt, Executive Director • National Council of Self-Insurers

MEMBERS OF NATIONAL COUNCIL OF SELF-INSURERS:

I was informed of the following significant workers' compensation decision by Doug Holmes, President of UWC – Strategic Services on Unemployment and Workers' Compensation in Washington, DC.

> *On March 1, an Appeals Court in the case of Westphal v. City of St. Petersburg, FL released an extended decision finding that the 104 week limit on payment of temporary total disability benefits under Florida law was unconstitutional. The court cited as the basis for its conclusion that the statute was against "natural justice" as it denied an individual the payment for TTD after 104 weeks and before reaching maximum medical improvement and determination of permanent total disability. To find a definition of "natural justice" the court reached back to 1917 to the case of N.Y. Cent. R. Co. v. White, 243 U.S. 188, 202 (1917).*

The decision reached the conclusion that:

> *Section 440.15(2)(a), Florida Statutes, is unconstitutional as applied, to the extent that it limits entitlement to temporary total disability benefits to 104 weeks, and we revive the repealed portion of the statute to allow for entitlement temporary total disability benefits in an amount not to exceed 260 weeks.*

The decision, Doug Holmes points out, is not just an outcome-based decision seeking equity on the part of one individual. The court took the additional step to apply its reasoning to the point of legislating that the number of weeks should be 260 instead of 104.

The cost of the decision if broadly applied could be significant for employers in Florida.

Larry Holt
Executive Director

DOUG HOLMES, PRESIDENT OF THE UWC – STRATEGIC SERVICES ON UNEMPLOYMENT & WORKERS' COMPENSATION IN WASHINGTON, DC, HAS INFORMED THE NATIONAL COUNCIL OF THE FOLLOWING:

> *The UWC is working with Representatives Dave Reichert (WA) and Mike Thompson (CA) to prepare for reintroduction of the "Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2013" which was HR 5284 in the previous congress. In preparation for reintroduction the UWC is not only updating the bill to address changes in cross references but also making sure that it is clear that the bill is consistent with changes in federal law with respect to conditional payments that were enacted as part of the SMART Act (HR 1063) which passed last year as an amendment to HR 1845.*
>
> *The UWC anticipates reintroduction this Spring and that there will be an opportunity to address the Medicare Secondary Payer (MSP) issues impacting workers' compensation settlements and set-aside arrangements during this Congress.*
>
> *UWC continues to coordinate the broad national coalition in support of this legislation, which includes AIA, the National Council of Self-Insurers, PCI, the American Bar Association, the American Association for Justice, and the Workers Injury Law and Advocacy Group.*

If you have any questions, you may contact Doug Holmes by email at holmesd@uwcstrategy.org or by phone at 202-223-8904.

The 2013 annual meeting of the National Council of Self-Insurers will occur from Sunday, May 19 to Wednesday, May 22 at the Rancho Bernardo Inn in San Diego, California.

The documents can be found on 2013 Annual Meeting Page of the National Council of Self-Insurers website. http://www.natcouncil.com/meet.html

New Form I-9 Mandatory

Tommy Eden • Constangy, Brooks & Smith, LLP

The Federal Government released a new Employment Eligibility Verification Form I-9 on March 8, 2013. It is sure to become the most complex and misunderstood two page form ever issued by the Federal Government. All employers should begin using the new Form I-9 immediately for all new hires. The revision date is on the lower left of the new form (Rev. 03/08/13) N. Employers may continue to use the previously valid Forms I-9 (Rev. 08/07/09Y and 02/02/09N) until May 7, 2013. After that date only use the new Form I-9. In the cases of reverification or rehires the new version of the Form I-9 must be used. Here are some of the changes:

- Form I-9 is now 2 pages; with page 1 to be completed by the new hire while page 2 is solely the employer's responsibility
- Expanded instructions to 6 pages
- New fields for e-mail address, phone number and foreign passport in Section 1.
- Updated "Handbook for Employers" M-274 is now 70 pages long.

Take precautions to avoid mistakes when completing the new form since even simple paperwork fines can range from $110 to $935 per violation. The aim of the new I-9 form is to clear up many of the ambiguities that have existed in the past such as how persons with temporary visas should complete Section 1? What should employers do in Section 2 if they are presented with a receipt instead of a listed document? The Department of Homeland Security (DHS) plans to use email and phone information to contact an employee whose information on the I-9 does not match DHS or Social Security records. Other significant changes include:

- Few employers know that new hires need not list their Social Security numbers in Section 1, unless the employer is part of the E-Verify system, then the Social Security number is mandatory
- Certain foreign nationals who are not lawful permanent residents of the U.S. may be required to list the country of issuance of their passports and their passport numbers on the I-9.
- Many of the new fields on the forms are far more complex than they appear: 1) who is a "noncitizen national"? 2) How should the employer properly reverify an expiring employment authorization before it expires? or 3) How to handle hiring of minors and those with a disability.

Common Sense Counsel: Training on how to properly complete the new Form I-9 is not optional if you wish to hire new employees and avoid fines and penalties after May 7, 2013. You may download the new Form I-9 and Handbook for Employers by visiting www.uscis.gov Tommy Eden of the Constangy Firm and Rosemary Elebash of the NFIB will be doing Webinar Form I-9 Training for the Alabama Cooperative Extension System which can be found on the ACES Website at http://www.aces.edu/events/index.php after April 3, 2013.

Tommy Eden is an attorney with Constangy, Brooks & Smith, LLP, member of the ABA Section of Labor and Employment Law, East Alabama SHRM Board of Directors and presented throughout the State of Alabama on Immigration Workplace Compliance. Tommy can be contacted at teden@constangy.com or 334-246-2901. Compliance and training resources at www.immigrationalabamalaw.com

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decision to award unscheduled benefits based on pain is helpful.

In the case of *Goodyear Tire & Rubber Co. v. Haygood, 2012 ala. Civ. App. Lexis 15 (Ala. Civ. App. 2012)*, The court of civil appeals, for the first time since the supreme court enacted the rule in *Graben I*, found that the evidence presented at trial was sufficient to establish that the plaintiff's pain in his left foot was severe enough to bring the case out of the schedule. In that case, the plaintiff suffered an injury to his left foot, and immediately felt a sensation like his foot was on fire. The plaintiff was subsequently diagnosed with complex regional pain syndrome (crps). At trial, the plaintiff testified that his right foot was in constant pain, even when he was lying down. He testified the pain causes him to lie down about 23 hours per day and that he often cried because of the pain he experienced. He often fell because of numbness in his foot. In addition, he testified he seldom left his house and in fact only left his house twice to go to Wal-mart in the two (2) years following the injury. While at Wal-mart, he testified he had to ride in a motorized cart. He consistently rated his pain as a 9 or 10 on scale of 1 to 10 and took pain medication three (3) times per day. The court of civil appeals specifically found this evidence was sufficient to establish that "the effects of the pain alone are so severe that it virtually, totally physically disables the plaintiff."

In contrast, in *Gold Kist, Inc. v. Smith, 2012 ala. Civ. App. Lexis 220 (Ala. Civ. App 2012)*, the court of civil appeals reversed the trial court's award of unscheduled benefits on the basis of pain. Like haygood, the plaintiff suffered a work related injury to her right foot. The plaintiff testified she had trouble performing everyday activities, including cleaning, sleeping, working, and visiting with her grandchildren. However, the plaintiff testified she had the ability to walk and she could perform most activities with the use of a cane, although she required occasional breaks. The court further noted the record did not indicate the plaintiff had any limitations regarding the use of her upper extremities. The court found that this was insufficient to establish that the plaintiff's pain was virtually, totally disabling.

The decision in *Gold Kist* is consistent with the majority of the other pain decisions, wherein the court routinely found that although the pain was severe, it was not virtually, totally disabling. *Steinmart, Inc. v. Delashaw, 64 so. 3D 1101 (Ala. Civ. App. 2010)* (Holding that evidence was not sufficient to establish the pain exception where pain is reduced to a 2 or 3 on 10 point scale with pain medication). *G.Ub.Mk Construction v. Davis, 78 so. 3D 998 (Ala. Civ. App. 2011)* (Finding that evidence was not sufficient to establish the pain exception where the plaintiff did not testify the pain from his left hand prevents him from fully using the uninjured parts of his body including his dominant right hand.) *Graben II* supra (finding that the plaintiff did not establish the pain exception where "the pain does not completely, or almost completely, prevent the employee from using his upper extremities, lifting light objects, driving, walking, climbing the stairs leading to his home, sitting, standing, occasionally fishing or travelling.")

Based on the above cases, it appears that the pain exception in alabama will be very limited, and awards of unscheduled benefits based solely on pain at the trial court level will be reversed in all but the most severe cases. Defense of pain cases will be bolstered by objective evidence, such as surveillance and performance on fce's. Plaintiffs will sometimes overstate their subjective pain complaints in depositions. However, the following questions might be helpful in defending a claim for unscheduled benefits based on the pain exception.

1) Q: in the course of a typical day, how much time do you spend standing or walking? With or without an assistive device?

2) Q: in the course of a typical week, how often to you leave your house to run errands? Travel?

3) Q: are you able to drive over short distances? Long distances?

4) Q: do you have any limitations in using your [non-injured members] as a result of your pain?

5) Q: is your pain lessened with inactivity? Pain medication?

6) Q: has your pain prevented you from engaging in any hobbies? Have you replaced those hobbies with others?

7) Q: do you have stairs at home? Are you able to climb the stairs?

If you have any questions about this article or other worker compensation issues, please feel free to contact:

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Win CASH!!!

ASIA is entering our 21st year of service in workers compensation. We want to continue for many years to come and we know we can reach more people in workers comp. To help us spread the word, we are rolling out a Member-Get-A-Member program.

At the Summer Conference, we will announce the winners. Anyone who recruits a new member qualifies for cash prizes. For every new member you recruit, your name goes in the pot for the cash drawings. The more new members you get, the more times your name goes in the pot. We will draw four winners, each will receive $250 in cash. You can win multiple times if you have recruited multiple members.

An application is listed here and available on the ASIA web site at ASIAal.org. Or, just contact the ASIA Office at 334.260.7970.

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For companies wanting to register subsidiares, please contact the ASIA office for dues structure.

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ASIA Summer Conference...

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