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Can Wellness Programs Help Limit Workers' Compensation Costs?

by Patricia F. Weisberg

Employers large and small are adopting employee wellness programs to help manage health care costs and reduce on-the-job injuries and absenteeism. But an employer still must take employees as they are and can do little if an employee is generally not in good health.

Three recent court rulings demonstrate novel ways in which an unhealthy worker can impact an employer's workers' compensation cost.

In July 2008, the Oregon Supreme Court ruled that an obese worker's gastric bypass surgery was covered under workers' compensation because the procedure was necessary to treat a job-related knee injury. The employee originally injured his knee in 1976 and reinjured it in 1999 while work-

ing for a new employer. Doctors concluded his weight would prevent successful treatment, but the company opposed the employee's request for weight loss surgery on the basis that the obesity existed before the 1976 work injury. The court ruled that the gastric bypass surgery was "directed at" the knee injury; medical evidence demonstrated that the weight loss surgery was necessary for successful knee surgery.

Likewise, in 2009, the Indiana Court of Appeals required a pizza shop

to pay for a 380-pound employee's weight loss surgery to ensure the success of a back operation for a work-related injury. The Workers' Compensation Board concluded that, when added to his work accident, the employee's weight situation created a "single injury" that made him eligible for both the weight loss and back surgery.

In 2010, a New York appellate court af-

firmed a workers' compensation board's approval of an employee's gastric bypass surgery. The sedentary lifestyle resulting from the accident caused the employee to gain a substantial amount of weight. Medical evidence substantiated that the employee's obesity exacerbated his back and knee pain and could be alleviated by weight loss surgery.

While there are no cases directly on point in Ohio, a 1994 Supreme Court of Ohio decision, *State ex rel Miller v. Industrial Commission*, offers insight into how Ohio might address the issue. In *Miller*, the employee was severely overweight before her injury and asked that her weight loss program be covered by workers' compensation. The Court held that obesity did not have to be an "allowed" condition for the employee to be entitled



Ohio Employees May Use "Intentional Tort" Law To Address Chemical Exposure

by Brent C. Taggart

Beginning in 1939, workers' compensation was the only remedy Ohio workers could use when seeking to recover against their employers for injuries suffered in the course of their employment. This involved a legislative tradeoff: the employee received reliable compensation for workplace injury without having to prove fault, and the employer received a predictable and reasonable cap on its liability for such injuries.

All that changed in 1982. That year, the Supreme Court of Ohio held in *Blankenship v. Cincinnati Milicon Chemicals, Inc.* that employees who could prove that their employers intended to harm them could recover both workers' compensation and the full range of tort damages against their employers.

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to the weight loss program. The Court did, however, hold that the treatment's goal must be to improve or cure the allowed condition rather than to simply provide relief.

The problem for employers is difficult and extends beyond weight loss surgery. One can easily see the extension of this reasoning to other medical conditions and diseases, and where a sedentary lifestyle following an accident negatively impacts the health condition.

Improving the health of our workforce and controlling workers' compensation costs are honorable goals, but employers must not violate the many employment laws protecting individuals with disabilities. They may not refuse to hire or otherwise discriminate against disabled individuals even if it results in significant costs.

Employers should remember that the original intent of the workers' compensation system was to create a compromise between employers and

employees. Employees receive a defined benefit for any job-related injury regardless of fault and employers receive protection from high damage awards. While the system works well most of the time, court decisions like those referenced show the difficulty of controlling these costs.

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Two years later, in *Jones v. VIP Development Company*, the Court further expanded the exception, holding that "intentional tort" could be established by showing that the employer knew that injury to the employee was "substantially certain." The requisite "intent," the Court later explained in *Fyffe v. Jenos, Inc.*, was something more than "reckless" or "willful and wanton" conduct, but something less than specific intent to harm.

During the past two decades, more and more Ohio workers have sought (and often received) "intentional tort" recoveries against their employers. Most cases have involved sudden traumatic injuries, but there has been a growing trend toward filing such cases for occupational disease from exposure to substances such as asbestos, silica, and various other chemicals.

Ohio's General Assembly has made three attempts to legislatively re-interpret the *Blankenship* standard. To date, two of those statutes have been rejected by the Supreme Court of Ohio as unconstitutional. The third is at issue in two cases currently pending before the Court.

In 2008, the Supreme Court of Ohio decided *DiCenzo v. A-Best Products Company, Inc.* That case had nothing to do with employment intentional tort. Rather, it analyzed the question of whether strict liability of non-manufacturing suppliers, which the Court had recognized for the first

time in 1977 in *Temple v. Wean*, could be retroactively applied to exposures before the date of that decision. The Court held that such liability could not be retroactively applied.

Using the same reasoning applied in *DiCenzo*, a Summit County Common Pleas judge recently held, in *Widican v. Bridgestone/Firestone North American Tire, LLC*, that employer-intentional tort liability cannot apply to claims arising from exposures before 1982, the year that *Blankenship* first recognized such claims. Whether *Widican* will be appealed and how the Supreme Court of Ohio will view it remain open questions at present. However, *Widican* provides the outline of an appealing defense for employers contesting employment intentional tort claims related to pre-1982 exposures. Because many occupational diseases have long latency periods, that defense may apply to many such claims. For example, if an employee was exposed to asbestos insulation before asbestos was removed from insulation in the 1970s, under the reasoning in *Widican*, that employee would be limited to workers' compensation relief if he or she developed an asbestos-related disease 35 years later.

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If the SOX Fits: SOX §404

by Alan S. Wernick

Effective June 15, 2010, small reporting companies will be required to report the effectiveness of their internal controls. Previously Sarbanes Oxley ("SOX") §404 applied only to larger companies. §404(b) requires public companies to get an outside auditor's review of internal controls (including privacy, data security, and data breach controls). Unless Congress steps in to change the law (or the SEC delays enforcement), small cap companies (\$75 million or less) must start complying beginning with annual reports filed for fiscal years ending on or after June 15, 2010. Yes, there will be a cost to small companies for compliance, but there may be greater costs to the companies for non-compliance including, without limitation, cost of remediation from a data breach, increased attorney fees due to dealing with a remediation, possible government oversight of the company's privacy policies and procedures, SEC fines, possible loss of the company's trade secrets, and a loss of trust by the company's customers. Copyright © 2010 Alan S. Wernick. All rights reserved. www.wernick.com.