Workers’ Compensation

Chapter 9
Workers’ Compensation: Basics of Coverage

Q: Who are covered “employers” for purposes of workers’ compensation?
A: The workers’ compensation statutes define employer broadly to include every person, firm or corporation which employs one or more employees under a contract of hire, whether that contract is oral or written. All such employers are required to obtain workers’ compensation coverage. An application for coverage may be obtained from any local Bureau of Workers’ Compensation (BWC) service office, or through the Ohio BWC website, www.ohiobwc.com.

Q: Who are covered “employees” for purposes of workers’ compensation?
A: “Employees” are equally broadly defined to include any person in the service of any person, firm or corporation. An employee for workers’ compensation purposes also includes household workers who earn $160 or more in any calendar quarter.

Q: Are independent contractors “employees” for workers’ compensation purposes?
A: No. Independent contractors are responsible for obtaining their own workers’ compensation coverage. An employer must be careful, however, to ensure that persons performing work for them are truly independent contractors before relying upon this exception. Generally, the question of whether someone is an independent contractor involves a case-by-case determination focusing on which party had the right to direct and control the work (i.e., manner/details of work, hours of employment, method of payment).

Q: What insurance is required? What is available (e.g., private carriers, state fund, assigned risk pools, etc.)?
A: Ohio is a monopoly state, meaning that private insurance is not permitted for workers’ compensation. All employers must either participate in the state insurance fund or be self-insured. The privilege of self-insurance is restricted to employers having more than 500 employees, who have done business in Ohio for more than two years, and who can demonstrate to the administrator of the BWC that they have sufficient financial wherewithal to satisfy and pay workers’ compensation costs directly.

Q: Is group rating available?
A: State Fund employers do have the option of participating in workers’ compensation group rating programs which, in many cases, will substantially decrease their workers’ compensation costs. Such groups consist of at least 100 members engaged in similarly conducted businesses, which participate in group rating in order to increase their aggregate payroll and take advantage of rate reductions (workers’ compensation premiums are based upon a percentage of the employer’s payroll).

Q: What are some of the risks of non-coverage?
A: In general, employers who comply with the law by paying workers’ compensation premiums are not liable for damages for any injuries sustained by an employee on the job. If the employer has not obtained coverage, however, this broad immunity does not apply, and the employer may be sued in a civil action for negligence. Moreover, certain potential common law defenses are denied to non-complying employers. Last but not
least, non-complying employers are subject to charges by the BWC for the full costs of any claims which are filed, together with back premiums and penalties.

–by Brian P. Perry, an attorney with the Cincinnati firm of Dinsmore & Shohl, LLP, where he represents employers in workers’ compensation and related matters.
Workers’ Compensation: Basics of Litigation and Benefits

Q: What is the litigation process for a contested workers’ compensation claim?
A: Once a claim is filed, the initial determination is made by a Bureau of Workers’ Compensation (BWC) claims representative or, in the case of a self-insured employer, by the employer. The BWC claims representative will review all the information submitted and issue a tentative order either allowing or disallowing the claim. If either the injured worker (claimant) or the employer disagrees with the BWC decision, each may file an appeal, which will result in a hearing before a hearing officer of the Industrial Commission of Ohio.

Once at the Industrial Commission, a series of up to three hearings may be held, depending upon whether either party files a further appeal. Industrial Commission hearings are informal, and the rules of evidence (rules followed in a formal court of law) do not apply. After the Industrial Commission has issued its final decision, both the claimant and the employer have the right to file an appeal to the court of common pleas. Once before the court of common pleas, the rules of evidence apply, and a decision is made to allow or disallow the claim by either a judge or a jury (if either party demands a jury), without reference to the prior administrative decision.

Q: Assuming that the claim is allowed, how long must an employee be off work before he or she will receive temporary total disability compensation?
A: No compensation is paid for the first week after an injury, unless the employee is totally disabled for a period of at least two weeks, at which time compensation will be paid retroactive to the first day of disability.

Q: What is the basis for calculating an award of temporary total compensation?
A: An employee receives compensation based upon a percentage (generally $66 \frac{2}{3}$ percent) of his or her prior weekly earnings. For 2013 injuries, the maximum rate for temporary total compensation is $827 per week.

Q: How long can temporary total compensation be received?
A: As long as the claimant’s condition remains temporary, temporary total compensation can continue indefinitely. Temporary total compensation can be terminated, however, based upon any of the following circumstances: 1) where the employee returns to work; 2) where the employee’s treating physician releases the employee to return to work; 3) when work within the physical capabilities of the employee is made available by the employer or another employer (e.g., a light-duty offer); and 4) where the claimant’s treating physician and/or an Industrial Commission hearing officer finds that the claimant has reached maximum medical improvement (MMI).

Q: Other than temporary total compensation, what other sorts of compensation benefits are available?
A: Twenty-six weeks after he or she receives the last payment of temporary total compensation, an employee may be eligible for a permanent partial award, calculated based upon a percentage of bodily impairment assessed by a physician under the American Medical Association (AMA) guidelines. If, due to his or her industrial injury, an employee either cannot find work within his or her restrictions, or is required to accept work at a lesser rate of pay, the claimant may be entitled to wage loss compensation payable at $66 \frac{2}{3}$ percent of the difference, subject to a statutory maximum. If an injury
has resulted in the loss of—or in the loss of use of—a body part, the claimant is entitled to a scheduled award, payable at the maximum rate for a specified number of weeks, depending upon the body part affected. If the claimant is rendered permanently and totally disabled from continued employment as a result of the industrial injury, he or she will be entitled to permanent total disability benefits, payable for the remainder of his or her life. Finally, where an employee dies as the result of a work-related injury or occupational disease, his or her dependents may be eligible to recover death benefits, as well as statutory funeral expense.

Q: Can a workers’ compensation claim be settled?
   A: Yes. Claims involving self-insured employers may be settled by agreement of the parties, subject to approval by the Industrial Commission. Where a State Fund employer is involved, the injured worker may apply for a settlement of the claim through the BWC, generally subject to the approval of the employer. Once a full and final settlement has been entered into, the entire claim is closed, including future medical benefits.

—by Brian P. Perry, an attorney with the Cincinnati firm of Dinsmore & Shohl, LLP, where he represents employers in workers’ compensation and related matters.
Workers’ Compensation: When Is an Injury or Disease Compensable?

**Q:** What is an “injury” for workers’ compensation purposes?

**A:** In general, injury includes any injury received in the course of, and arising out of, the injured employee’s employment. However, the workers’ compensation statute specifically provides that injury does not include:

1) psychiatric conditions, *except* where the condition has arisen from an injury or occupational disease;
2) injury or disability caused primarily by the natural deterioration of tissue, an organ or part of the body; or
3) an injury or disability incurred when an employee is participating *voluntarily* in an employer-sponsored recreation or fitness activity, *provided* that the employee has signed a waiver of compensation for injuries sustained in such activities.

**Q:** What are some other potential defenses to workers’ compensation claims?

**A:** Several circumstances may preclude compensation for an injury, even where the injury may have occurred on the employers’ premises. These potential defenses include the following:

1) Purposely self-inflicted injuries;
2) Intoxication;
3) *Horseplay and fighting:* Injuries sustained as a result of horseplay or fighting are not compensable where the injured employee instigated or participated in the horseplay or instigated the fight.

**Q:** Are injuries sustained during work-related travel compensable?

**A:** The compensability of a travel-related injury depends on the nature of the travel involved. Under the so-called *going and coming* rule, where an employee has a fixed place of employment, an injury sustained while traveling to or from that place of employment is not compensable. However, where travel is an integral part of the employment, and creates a risk greater than the typical commute, an injury sustained during the travel will be compensable (*e.g.*, a traveling salesperson with no fixed place of employment).

**Q:** What about injuries in other common employment situations?

**A:** Based on the case law that has developed over the years, the following rules exist concerning the compensability of injuries occurring in other common situations:

1) *Parking lot injuries:* The going and coming rule ends once the employee reaches the employer’s premises. Thus, where an injury occurs in a parking lot owned or controlled by the employer, it will generally be compensable. Where the lot is not owned or controlled by the employer, however, this rule will not apply.
2) *Lunch hour and break time injuries:* In general, injuries occurring on the employer’s premises are compensable. This rule of compensability extends to injuries sustained while an employee is on a lunch break or other break authorized by the employer. An injury sustained off-premises on a lunch hour, however, is generally not compensable, whether the break is paid or unpaid.
Q: Are stress-related conditions compensable?
A: Recall that purely psychological conditions are not compensable unless they arise from a work-related injury. Thus, a mental condition caused by work-related stress is not compensable. Physical conditions caused by work-related stress are treated differently. Where work-related stress causes a physical injury (e.g., a stress-related heart attack), the injury will be compensable where it is shown that the employee was subject to pressures greater than those occasionally experienced in most types of employment.

Q: Is the aggravation of a pre-existing injury compensable?
A: In general, the “substantial” aggravation of a pre-existing condition is a compensable injury for workers’ compensation purposes. Such an aggravation must generally be proven by objective diagnostic studies or clinical findings.

Q: What is an “occupational disease”?
A: An occupational disease is defined under the Workers’ Compensation Act as a disease contracted in the course of employment, wherein the nature of the employment puts an employee at risk of contracting the disease to a greater degree and in a different manner than would be true of a member of the general public. A common occupational disease is carpal tunnel syndrome, caused by overuse of the hands in a job that requires extensive manipulative use of the hands.

Q: Is the aggravation of a pre-existing disease compensable?
A: No. Unlike the aggravation of a pre-existing injury, the aggravation of a pre-existing disease condition is not compensable, since the statute requires that the disease be contracted in the course of the employment in order to be compensable.

–by Brian P. Perry, an attorney with the Cincinnati firm of Dinsmore & Shohl, LLP, where he represents employers in workers’ compensation and related matters.
Workers’ Compensation: Related Issues

Q: Are there any penalties against the employer for unsafe working conditions?
A: Yes. Where an employee is injured as a result of the employer’s failure to comply with a specific safety requirement, the employee is eligible for an additional award amounting to 15 percent to 50 percent (depending upon the circumstances) of the maximum compensation payable for the life of the claim. Such awards are commonly referred to as “VSSR” (violation of specific safety requirement) awards, and are charged directly to the employer.

Q: What is a specific safety requirement?
A: A VSSR award may be paid based upon the violation of a safety statute or administrative regulation. The specific safety requirements of the Industrial Commission are printed in the Ohio Administrative Code. There are specific safety requirements for each of the following categories: workshops and factories; elevators; metal casting; steel mills; laundering and dry cleaning; rubber and plastic industries; window cleaning; and construction.

Q: Are there any other exceptions to the broad immunity provided to employers who possess workers’ compensation coverage?
A: Unlike actions based on a theory of negligence, the immunity from liability provided to employers having workers’ compensation coverage does not extend to so-called employment-intentional torts.

Q: What is an “employment-intentional tort”?
A: Unlike negligence, an employer is not immune from liability where that employer has intentionally injured an employee. However, in order to recover under such a theory, the plaintiff must prove that the employer acted with deliberate intent to injure the employee, or with knowledge that an injury was substantially certain to occur.

Q: Is there a workers’ compensation discrimination statute?
A: Yes. No employer may discharge, demote, reassign, or take any punitive action against an employee because the employee filed a workers’ compensation claim or testified in a workers’ compensation proceeding. If successful in a civil suit, the employee is entitled to be reinstated in his or her position with back pay and/or lost wages, plus attorneys’ fees.

Q: What happens when a third party’s negligence causes the injury?
A: Where an employee recovers workers’ compensation benefits as a result of injuries sustained due to the negligence of fault of a third party, a right of subrogation exists. This right entitles the self-insured employer (or the BWC administrator on behalf of the State Fund employer) to recover a share of the amounts of workers’ compensation benefits paid from monies received by the claimant from the third party at fault (minus costs and attorneys’ fees). Subrogation rights exist under the current statute even when the injured employee does not file a lawsuit against the third party, but instead, for example, enters into a settlement. The statute places upon the injured worker the burden of notifying the employer/administrator of potential third parties from whom the injured worker might seek compensation. Moreover, no settlement or award can be final unless the employee
has provided the employer or BWC administrator with appropriate notice and an opportunity to assert its subrogation rights.

–by Brian P. Perry, an attorney with the Cincinnati firm of Dinsmore & Shohl, LLP, where he represents employers in workers’ compensation and related matters.
Ohio Workers’ Compensation System Addresses
Needs of Injured Employees

Q. How does workers’ compensation address injured employees’ income loss?
A: Instead of lump sum payments such as might be awarded in lawsuits, your injured workers receive indemnity benefits to address their particular losses. Generally, weekly indemnity benefits are paid as a percentage of the injured worker’s average earnings (usually two-thirds) subject to a maximum weekly rate. Various forms of compensation available in Ohio address the different losses that might result from an injury over the life of a claim.

For example, an injured worker who is temporarily unable to return to work receives temporary total disability compensation. An injured worker who cannot return to his/her regular job, but returns to a lower paying job, can receive “wage loss compensation” that may be paid for more than four years at two-thirds of the difference between pre-injury and post-injury earnings.

Vocational rehabilitation costs may be paid under the workers’ compensation system to an injured worker who must acquire new skills to return to the work force. The injured worker receives a weekly stipend while participating in rehabilitation. If, after completing rehabilitation, the employee must take a lower paying job, he or she may be eligible for another form of wage loss compensation. For most employers, the costs for rehabilitation are paid by the workers’ compensation system.

An injured worker who is permanently removed from the work force because of an injury may be entitled to permanent total disability compensation. This is a lifetime benefit paid when an injured worker can no longer perform any form of sustained, remunerative employment. When an injured worker dies as a result of the work-related event, the surviving spouse would receive compensation for life or until remarriage. Any children would receive benefits until they reach age of majority.

Finally, a benefit that is unrelated to economic loss, called permanent partial disability compensation, compensates the injured worker for impairment to, or loss of, a body part.

Q. Are medical costs paid for in a workers’ compensation claim?
A: Yes. Subject to schedules, medical benefits are paid on behalf of the injured worker to healthcare providers. There is no co-pay and no balance billing is permitted.

Q. How long does workers’ compensation protection last?
A: The Ohio system is designed to protect the injured worker for as long as reasonably necessary. A claim remains “open” for five years from the last payment of compensation or benefits.

Q. Can an injured worker settle a claim?
A: Yes. In Ohio, claims may be settled in whole or in part. The workers’ compensation system is funded entirely by employer money, so an employer has a say as to whether a claim may be settled. Many employers choose not to agree to a settlement because they...
have already purchased years of valuable protection for their injured workers through premiums paid to the State Insurance Fund.

—by Robert A. Minor, an attorney and principal with the Columbus office of Vorys, Sater, Seymour and Pease LLP.
Employers Should Understand Limits on the Use of Non-Lawyers in Workers’ Compensation Claims and Other Areas of the Law

Employers should carefully consider when utilizing non-lawyers (usually third-party administrators) to represent their interests in workers’ compensation administrative hearings. Non-lawyers have restriction on their activities while representing an employer, and failure to recognize and comply with these restrictions may be considered the unauthorized practice of law in Ohio. Unauthorized practice of law is defined as “the rendering of legal service for another by any person not admitted to practice law in Ohio.” Gov. Bar. VII (2)(A). The Supreme Court of Ohio has limited the practice of law to licensed attorneys “… to protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation.”

The Supreme Court of Ohio has held that there are limitations on non-lawyers in administrative hearings in Cleveland Bar Assn. v. CompManagement, Inc. (2006) 111 Ohio St. 3d 444, 2006-Ohio-6108. In this case, a third-party administrator’s employees were appearing at administrative hearings and representing employers in defense of their workers’ compensation claims. Allegations were brought by the Cleveland Bar Association that this activity represented the unauthorized practice of law by non-lawyers. Specifically, the Court held that:

1) Allegations of acts of unauthorized practice of law must be supported by either admission or other evidence of specific act(s) or conduct.

2) Third-party administrators may:
   a) make actuarial determinations regarding settlement;
   b) act as a messenger for the employer with regard to settlement issues;
   c) file settlement documents; and
   d) communicate to the hearing officer the employer’s area(s) of concern relating to a particular claim.

3) Third-party administrators may NOT:
   a) conduct an examination of a witness or comment on credibility of a witness;
   b) make or give any legal interpretation or comment about evidence;
   c) give legal opinions or advice; and
   d) provide representation for a fee at a workers’ compensation hearing without providing other services.

In response to the Supreme Court of Ohio’s decision, the Ohio Industrial Commission adopted the Resolution Standards of Conduct in R04-1-01, which outlines prohibitive activities of non-lawyers when appearing before the Industrial Commission or Bureau of Workers’ Compensation. These Standards of Conduct preclude the following activity by non-lawyers:

1) To examine or cross-examine any witness, including the claimant;
2) To cite, file or interpret a statute, law, or administrative provisions or rulings;

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3) To make and give legal interpretations with respect to testimony, affidavits and medical evidence in the form of reports or testimony, or file any brief, memorandum, reconsideration or other pleading beyond the forms actually provided by the Commission or Bureau;
4) To comment on or give opinions with respect to the evidence or credibility of witnesses, the nature and weight of the evidence, or the legal significance of the contents of the claim file;
5) To provide legal advice to anyone including employers;
6) To give or render legal opinions, or cite case law or statutes to anyone including employers before, at or after the time when claims are initially certified or denied certification as valid claims by the employer upon presentation of claim applications by employees; or
7) To provide stand-alone representation at a hearing by charging a fee specifically associated with such hearing representation without providing other services.

Basically, a non-lawyer can not act in any manner like an attorney when appearing before the Industrial Commission. Non-lawyers can offer general claims assistance as long as that assistance does not involve legal analysis skill or legal advocacy that includes examination of claimant or witnesses, arguing reliability of evidence or defense of claims or medical records.

In addition to workers’ compensation matters, licensed counsel must represent a corporation in judicial proceedings.

Non-lawyers may have limited representation of employers in matters before the Unemployment Compensation Board of Review Commission and the Ohio Department of Job and Family Services. Non-lawyers are also permitted to prepare and file complaints with the county board of revision.

In conclusion, non-lawyers in workers’ compensation proceedings have limits on their activities and abilities to represent an employer. If an employer is faced with a workers’ compensation claim that involves witnesses, legal arguments, or a dispute over evidence, that employer should retain the services of a licensed attorney. Likewise, an employer who has been named in a lawsuit must retain an attorney to represent the company.

—by Cathryn R. Ensign, attorney and owner of Cathryn R. Ensign, LLC.
Workers’ Compensation Drug and Alcohol Testing Law

Effective October 12, 2004, Ohio law establishes a rebuttable presumption against an employee who makes a workers’ compensation claim if he/she either tests positive for alcohol or drugs or refuses to be tested. A rebuttable presumption is a legal conclusion that is thought to be valid until evidence to the contrary is provided. In lay terms, this means that, if an employee tests positive or refuses to be tested for alcohol or drugs following a work-related accident, the employer may be able to prove that drug or alcohol use contributed to or caused the employee’s injury. The employer could thereby avoid the costs of such a claim.

In order for employers to take advantage of this law, a notice of the rebuttable presumption must be posted in their place of business. The notice must be the same size or larger than the Bureau of Workers’ Compensation (BWC) compliance certificate that must be posted, and it must be in the same location as the current BWC postings. A copy of the required notice may be downloaded and printed from the BWC’s website at www.ohiobwc.com.

While the law does not require businesses to implement drug testing, it is a very effective method of reducing an employer’s exposure from a costly claim for injuries or death where the employee was under the influence of drugs or alcohol at the time of a workplace accident.

Be advised, however, that the posting of the BWC notice of this law is only the starting point. The rebuttable presumption is effective after a workplace injury only if specific steps are taken within a certain amount of time after the injury occurs. If alcohol is suspected as a cause of the accident, a “qualifying” test must be given within eight hours of the injury. If non-prescribed drugs are suspected, the qualifying test must be given within 32 hours of the injury. If the injured employee refuses to take a test, and assuming the required notice has been posted, the employee’s refusal triggers the rebuttable presumption. Note, however, that in order to trigger the presumption, the test must be offered within the timeframes mentioned above.

Employers must address many other issues and requirements if they wish to take full advantage of the law. For example, unless a police officer or a doctor requests the drug or alcohol test, an employer must have “reasonable cause” to believe the injured employee was under the influence of alcohol or drugs at the time of the accident. Otherwise, the test may not qualify under the law. Therefore, the employer will need to collect evidence to show that the test was justified. Direct evidence of possession, consumption or distribution may be available, but employers also will need to train supervisors to collect evidence in the form of their own observations and records, witness statements and other evidence that can confirm symptoms, behavior, patterns of conduct, attendance, work and safety rules violations, and the like. For example, two witnesses smelling alcohol on an employee’s breath meets the reasonable cause to test requirement.

For further information regarding these issues, the BWC has a very informative and useful website at www.ohiobwc.com.

–by James D. (Chip) Viets, Of Counsel, and James M. Vonau, partner, Decker, Vonau, LLC.
Protecting the Business When an Employee Is Injured on the Job

Small businesses usually avoid significant experience with the Ohio Bureau of Workers’ Compensation (Ohio BWC). However, when an employee is injured on the job, all employers must know how to proceed.

What must our business do if an employee is injured on the job?

Individual situations may be simple or complicated, but there are several things every employer should do regardless of the circumstances:

- Designate a person to meet with the injured employee as soon as practicable. This meeting may be held at any location convenient for the employee and the person you have designated to represent your business. The designated person should thoroughly investigate, getting all details in writing from the employee, including the names of witnesses and when, where and how the injury occurred. Witnesses should also be interviewed and provide their statements in writing. Written, signed statements guard against forgotten or changed stories.

- During this initial meeting, you should also ask the employee to sign a medical authorization form. This form is available on the Ohio BWC’s website (www.ohiobwc.com). The signed authorization will allow you to communicate with the employee’s doctor and to keep updated on the employee’s medical progress.

- Determine whether the injury arose within the course and scope of employment. An employee may participate in the workers’ compensation system if he or she is injured within the course and scope of employment, regardless of fault. However, you may dispute the employee’s assertion that the injury arose within the course and scope of employment. An employee may not be eligible for benefits if the injury was a result of the employee’s own medical condition, intoxication, etc. Before making this determination, it is wise to consult with an attorney.

How do we contest a claim?

If you decide to contest an injured employee’s claim for workers’ compensation benefits, you should contact an attorney or your third-party administrator. However, understand that an attorney can advise you about having an independent physician evaluate the injured employee and potential legal issues. The attorney can also question the employee and witnesses on your behalf during workers’ compensation hearings, and can make legal arguments.

How should we treat our continuing relationship with an injured employee?

If the injured employee is capable of performing some work but has some physician-imposed restrictions, you might consider assigning temporary light-duty work. Even without a signed medical authorization, you can ask a treating physician if the employee can perform light-duty responsibilities. Before assigning an employee to a light-duty position, however, you should get approval from the employee’s physician.

If an employee is completely off work due to an at-work injury, a supervisor should stay in touch with the employee at home concerning recovery and work status. Employees are more likely to stay at home longer if they are not communicating with the employer. The goal is to get the employee back on the job as soon and as safely possible.
If the employee will be totally disabled for an extended period of time, you may consider entering into a wage continuation agreement. In this agreement, you agree to continue paying the employee’s wages to avoid having the employee seek compensation through the workers’ compensation system. You should consult with an attorney before offering a wage continuation agreement to ensure that legal requirements are met and that the employer’s interests are protected.

—by Stacy V. Pollock, an attorney with the Columbus law firm of Downes Fishel Hass Kim LLP.
Can Wellness Programs Help Limit Workers’ Compensation Costs?

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 working 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 affirmed 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. More recently, an Illinois law firm announced on the Internet that one of its clients, an employee, was awarded the cost of bariatric weight loss surgery as a basis for evaluating and treating his underlying spine injury.

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 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 above show the difficulty of controlling these costs.

–by Patricia F. Weisberg, head of the Workers’ Compensation Practice in the Cleveland firm of Walter Haverfield LLP.