



Spring, 2006

Workers' Compensation Electronic Newsletter

“Accidental Injury” After Harris

The decision of the Maryland Court of Appeals in *Harris v. Board of Education*, issued by the Court on June 6, 2003, expanded the definition of “accidental injury” under Maryland law and eliminated the requirement that the injury must result from some “unusual activity” in order to be compensable. Almost three years later, the Maryland workers’ compensation community is still sorting out exactly what is covered, and what is not, after *Harris*. Attempts to have the Maryland Legislature amend the statute to redefine “accidental injury” after the *Harris* case have, to date, not been successful.

While there have been no additional appellate court cases defining an “accidental injury,” numerous claims can be contested and won at the Commission based on an “accidental injury” defense. From our experience, the Maryland Commission generally requires that there be a *specific incident* that causes the onset of pain, rather than simply a gradual onset of pain over the course of several hours during the work day, or over several days. This is especially true in cases where the claimant had prior medical problems with the area of the body involved in the claim. In addition, in most claims, the Commission seems to be requiring that there be some *added risk* of the employment in causing an injury to occur before it will be compensable. In essence, this is an “idiopathic injury” defense. Simply walking along and feeling a pain, or bending over and feeling a pain, without carrying any item of significant weight as a result of the employment, is often found not to be compensable.

Semmes' attorneys are always available to discuss whether a specific factual scenario would constitute a compensable “accidental injury” under current Maryland Law.

Upcoming Seminars

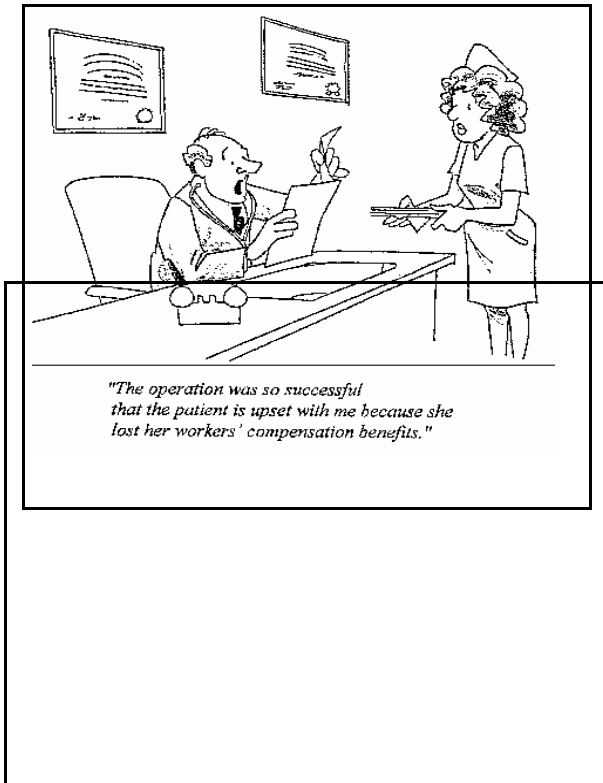
The annual *Semmes Workers’ Compensation Client Seminar* will be held on **Tuesday, May 23, 2006**, at the Sheraton Baltimore North Hotel in Towson, starting at 1:30 p.m. The Chairman of the Maryland Workers’ Compensation Commission, the *Honorable R. Karl Aumann*, will be our guest speaker at the seminar. Contact Wallie Meeks at (410) 539-5040, extension 3929, for details and information.

The *Maryland Workers’ Compensation Educational Association* (“MWCEA”) will be holding its annual conference in Ocean City, Maryland, at the Clarion Resort Fountainbleu Hotel, from **September 17-20, 2006**. See www.mwcea.com for details and information.

The *Southern Association of Workers’ Compensation Administrators* (“SAWCA”) will be holding its annual conference in Baltimore at the Hyatt Regency Hotel from **July 15-19, 2006**. SAWCA is a regional organization of seventeen states and the Virgin Islands. *Mary Ahearn*, Executive Director of the Maryland Workers’ Compensation Commission, is the President-Elect of SAWCA. This is the first time that the conference has been held in Maryland since 1995. See www.sawca.com for details and information.

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Commission adopted, an emergency regulation increasing reimbursement rates for certain types of providers. The new regulation took effect on February 1, 2006, and applies to treatment rendered on or after that date. It provides that **orthopedic and neurosurgical procedures** will be reimbursed at **144%** of the 2004 Medicare reimbursement rate, and that facility fees at **ambulatory surgery centers** will be reimbursed at **125%** of the 2004 Medicare reimbursement rate. All other medical procedures covered under the Medical Fee Guide remain at the prior **109%** reimbursement rate.

Medical Fee Guide Revised

One of the most effective methods in Maryland for controlling workers' compensation costs is use of the Medical Fee Guide to limit payments for non-hospital medical treatment. The Maryland Workers' Compensation has worked to find the proper balance between providing injured workers with quality medical care, controlling medical costs for employers and insurers, and providing medical care practitioners with a reasonable financial incentive in order to insure their participation in the system.

In 2004, the Commission determined that all payments under the Medical Fee Guide would be based upon the federal government's Medicare reimbursement rate for 2004 and medical care providers in Maryland would receive **109%** of the 2004 Medicare rate. Some providers, particularly orthopedic surgeons, declined treatment of workers' compensation patients, which raised concerns as to whether such patients had access to quality medical care.

After studying this issue, the Commission's Medical Fee Guide Committee recently recommended, and the

It is hoped by the Commission that these changes will strike the proper balance and encourage providers to participate in the workers' compensation system, control medical costs for employers and insurers and provide workers' compensation patients with access to care.

Semmes News

New Semmes Attorneys

We are very pleased to welcome several new attorneys to our Workers' Compensation Practice Group.

Phillip T. Levin has joined us as counsel to the firm. Phil is a 1989 graduate of the University of Maryland School of Law and has been practicing workers' compensation defense for seventeen years. He was previously with the law firm of Herwig & Humphreys.

We also welcome back **Kenneth M. Shaffrey** to the firm as an associate attorney. Ken is a 1999 graduate of the University of Baltimore School of Law and was

most recently in-house counsel for Zurich Insurance Company. Ken was previously with us as a law clerk and associate from 1996 to 2002.

Finally, **James S. Maloney** has joined us as an associate attorney. James is a 2004 graduate of the University of Baltimore School of Law. He has two years of experience in handling workers' compensation cases and was previously with the law firm of Herwig & Humphreys.

Stan Haynes has been named Coordinator of the firm's Workers' Compensation Practice Group, a position that he held previously from 1999 to 2001. Stan had been serving as Vice-Chairman of the firm since 2002.

Heather Kraus has been nominated and elected to serve on the Board of Directors of the Maryland Workers' Compensation Educational Association ("MWCEA"), the organization that sponsors the annual workers' compensation conference in Ocean City. Heather joins two other Semmes attorneys, Rudy Rose (Past President, 1987) and Stan Haynes (Past President, 2005) on the Board of the MWCEA.

Larry Giambelluca has been nominated and elected to serve on the Board of Directors of the Maryland Self-Insurers' and Employer's Compensation Association ("MSIECA").

Changes at the Maryland Commission

In October, Governor Robert L. Ehrlich, Jr. named **R. Karl Aumann** to serve as Chairman of the Maryland Workers' Compensation Commission. Chairman Aumann had originally been appointed to the Commission in August of 2005 and, prior to coming to the Commission, had served as Maryland's Secretary of State.

Governor Ehrlich also nominated, in February, two new Commissioners to the Maryland Workers' Compensation Commission, both of whom have been in private practice as workers' compensation defense attorneys. **David O. Godwin, Jr.**, an attorney in Frederick, Maryland, with the firm of Godwin & Hickey, was sworn in as a member of the Commission in early May. **Jeffrey C. Herwig**, an attorney with the

New Positions

Richard Scheiner was elected by the principals of Semmes, Bowen & Semmes to be Chairman of the firm, effective January 1, 2006. Rick has been with Semmes since 1981 and had been serving as Coordinator of the Workers' Compensation Practice Group.

Baltimore law firm of Herwig & Humphreys, will join the Commission in early July of 2006.

2006 Compensation Rates

For injuries occurring on or after January 1, 2006, the following *maximum* weekly compensation rates are effective in Maryland:

Temporary Total	\$801.00
Temporary Partial	\$401.00
Permanent Partial:	
Lower Tier (1-74 weeks).....	\$114.00
Second Tier (75-249 weeks)	\$267.00
Serious Disability (250 or more weeks).....	\$601.00
Permanent Total	\$801.00
Death Benefits.....	\$801.00

The Commission has also announced that, for claimants receiving permanent total disability for injuries occurring after January 1, 1988, the annual cost of living adjustment ("COLA") for 2006 is 2.7 percent.

The Commission has set the mileage reimbursement rate for medical treatment at 44 ½ cents per mile for 2006.

Recent Cases

Several cases decided by Maryland's appellate courts over the last few months have addressed issues relevant to the workers' compensation community. These cases include:

Burden Of Proof On Appeal:

Baltimore County v. Kelly III, 391 Md. 64 (February 7, 2006).

An employer appealing a workers' compensation award of medical treatment and causation bears the burden of proof. The Circuit Court granted the motion, but the Court of Special Appeals reversed. The Court of Appeals affirmed the Court of Special Appeals, stating that, "given the Commission's decision in favor of Kelly, the burden of proof rested with the County in the Circuit Court." This burden required that the employer produce evidence regarding the lack of causation between the motor vehicle accident and the back surgery. The claimant, therefore, was not required, at that stage of the Circuit Court proceedings, to produce medical evidence affirmatively establishing causation.

Theft Conviction Not Enough To Bar Permanency:

Kelly v. Consolidated Delivery Co., 166 Md. App. 178 (December 6, 2005).

The claimant was awarded temporary total benefits by the Commission and, while receiving benefits, he got a job, but did not tell anyone and continued collecting benefits. Section 9-1106(a) prohibits a claimant from knowingly collecting benefits by "fraudulent misrepresentation" and §9-1106(b) provides that a person convicted of fraudulent misrepresentation may not receive compensation under the workers' compensation law. The insurer applied for a statement of charges against the claimant in the District Court, and that Court found him guilty of theft and sentenced him to one year and one day imprisonment, all suspended in favor of probation and ordered him to pay restitution. The state *nol prossed* the charge of fraud. The claimant then applied for permanency benefits. The employer argued that, under §9-1106(b), he should not get benefits. The claimant argued he was never convicted of fraud, so §9-1106(b) could not apply.

The Commission denied the claimant benefits for permanent partial disability, which was affirmed by the

showing the injury is not work related. The Court affirmed the reversal below of the granting of the employer's Motion for Summary Judgment. The claimant had a pre-existing back problem that was aggravated at work. He later has disc surgery. The employer alleged that the surgery was not work-related.

The Commission disagreed and awarded benefits. The employer appealed to the Circuit Court for Baltimore County, alleging that the case involved a complicated medical question and when the claimant failed to introduce any evidence on causation, the employer moved for summary judgment.

The Circuit Court for Baltimore County. The claimant appealed to the Court of Special Appeals on the issue of whether he was entitled to pursue his claim for permanent partial disability benefits. The Court of Special Appeals reversed the Circuit Court and the Commission and found he could receive permanency benefits. The Court held that a claimant must be convicted of a fraud charge. Since the claimant was never convicted of fraud, only theft, the Commission could not convict him and, therefore §9-1106(a) does not apply and does not preclude the claimant from collecting permanency benefits.

Jurisdiction and "Regular" Employment

Hodgson v. Flippo, 164 Md. App. 263 (September 15, 2005).

The claimant, a resident of Maryland who was employed by a construction company located in Maryland was principally assigned to work at District of Columbia job sites. In the year prior to his injury, he worked approximately 60% of the time in D.C. and only about 20% of his time in Maryland. He was injured while working in the District of Columbia. He filed a claim for his injuries with both the Maryland Commission and the District of Columbia Commission.

The employer argued that the Maryland Commission did not have jurisdiction over the claim, because his injury occurred in the District of Columbia and the claimant has been working there the majority of time in the year preceding the injury. The Maryland Commission concluded that it did not have jurisdiction and dismissed the claim. The Circuit Court for Prince George's County agreed. The claimant appealed to the Court of Special Appeals, which affirmed the lower court and the Commission.

The Court held to be eligible for workers' compensation benefits in Maryland, a claimant must be a covered employee under L.E. §9-203(a) (2). To be a covered employee under L.E. §9-203(a) (2), a claimant must be "regularly" employed within the State while working outside of the State on a casual, incidental or occasional basis. The Court used a comparative test to determine whether a claimant is "regularly" employed in Maryland. The dispositive factor in that determination is whether the employment in Maryland

Illegal Aliens Are Covered In Maryland

Design Kitchen and Baths v. Lagos, 388 Md. 718 (September 12, 2005).

The Court of Appeals ruled that an undocumented worker injured in the course of employment is a "covered employee" under Maryland law and eligible to receive workers' compensation benefits. The employee was an illegal alien who sustained a work-related injury. The Commission found in favor of the claimant and the employer and insurer appealed to the Circuit Court for Montgomery County. Each party filed a Motion for Summary Judgment. The Circuit

is "regular" when compared to the employment outside of Maryland. The Court found that the claimant's work in Maryland was "casual, incidental, or occasional" to his work in the District of Columbia and, therefore, Maryland had no jurisdiction over his claim.

Court granted the claimant's Motion for Summary Judgment. The employer and insurer appealed. The employer and insurer's position was that the claimant's undocumented alien status prohibited legal employment and precluded him from being able to prove that he was a covered employee. In addition, the employer and insurer argued that under, the Workers' Compensation Act, coverage must arise from a contract of employment and that a contract with an illegal alien is illegal and cannot constitute a "contract of service." The Court disagreed and found the claimant to be a "covered employee" and entitled to benefits.

Semmes' Workers' Compensation Practice Group

Baltimore Office

250 West Pratt Street
Baltimore, Maryland 21201

Principals:

Lawrence G. Giambelluca 410-576-4892 lgiambelluca@semmes.com
William H. Kable 410-576-4724 wkable@semmes.com
Stuart M. Lesser 410-576-4821 slesser@semmes.com
Stan M. Haynes (Coordinator).. 410-576-4723 shaynes@semmes.com
Heather H. Kraus 410-576-4874 hkraus@semmes.com
Rudolph L. Rose 410-576-4721 rrose@semmes.com
Richard W. Scheiner 410-576-4831 rscheiner@semmes.com
Anthony J. Zaccagnini 410-576-4781 azaccagnini@semmes.com

Counsel:

William A. Kress 410-576-4729 wkress@semmes.com
Phillip T. Levin 410-576-4828 plevin@semmes.com

Associates:

Wilson K. Barnes III 410-576-4769 wbarnes@semmes.com
Barry D. Bernstein 410-385-3943 bbernstein@semmes.com
Pamela T. Broache 410-576-4726 pbroache@semmes.com
Anthony D' Alessadro 410-576-4704 adalessandro@semmes.com
Pamela Dement-Carpenter 410-576-4847 pdement-carpenter@semmes.com
John R. DiCalogero 410-576-4782 jdicalogero@semmes.com
James R. Forrester 410-576-4812 jforrester@semmes.com
Brigitte J. Gardenier 410-576-4732 bgardenier@semmes.com
Janis R. Harvey 410-576-4815 jharvey@semmes.com
James S. Maloney 410-576-4827 jmaloney@semmes.com
Joel E. Ogden 410-576-4727 jogden@semmes.com
Gregory S. Savage 410-576-4787 gsavage@semmes.com
Dayna L. Schneibolk 410-576-4753 dschneibolk@semmes.com
Kenneth M. Shaffrey 410-576-4825 kshaffrey@semmes.com

Hagerstown Office

322 E. Antietam Street, Suite 102
Hagerstown, Maryland 21740

Principal:

Robert E. Rockwell 301-766-7742 rrockwell@semmes.com

Associate:

James A. Lanier 410-576-4771 jlanier@semmes.com

Virginia Office

1577 Spring Hill Road, Suite 200
Vienna, Virginia 22182

Principal:

Joseph F. Giordano 703-288-2527 jgiordano@semmes.com

Associates:

Andrew M. Alexander 703-288-2533 aalexander@semmes.com
G. Bryant Butler, Jr. 703-288-2522 bbutler@semmes.com
Bryan J. Olmos 703-288-2535 bolmos@semmes.com
Jeremy P. Paner 703-288-2534 jpaner@semmes.com
Sarah W. Price 703-288-2529 sprice@semmes.com
Richard M. Reed 703-288-2528 rreed@semmes.com

Washington, DC Office

1001 Connecticut Avenue, N.W., Suite 1100
Washington, DC 20036

Principal:

Thomas G. Hagerty 202-778-8684 thagerty@semmes.com

Salisbury Office



Sean E. Smith.....	410-576-4792.....	ssmith@semmes.com	231 West Main Street
Joseph C. Tarpine III.....	410-576-4736.....	jtarpine@semmes.com	Salisbury, Maryland 21801
Lisa A. Zelenak.....	410-576-4705.....	lzelenak@semmes.com	Main Number 410-749-1710

Visit us on the Internet at www.semmes.com

This Newsletter is not intended to provide legal advice or opinions but, rather, to provide information concerning recent developments of interest to the Maryland workers' compensation community. Questions concerning individual problems or claims should be addressed to one of our attorneys.