

In the
Supreme Court of Ohio

CLEVELAND BAR ASSOCIATION, : Case No. 04-0817
: :
Relator, : Board of Commissioners
: On the Unauthorized Practice
v. : of Law
: Case No. UPL 02-04
COMPMANAGEMENT, INC., et al., :
: Respondents. :
: :
: :
: :

**BRIEF OF THE STATE OF OHIO AS *AMICUS CURIAE*
SUPPORTING NEITHER PARTY**

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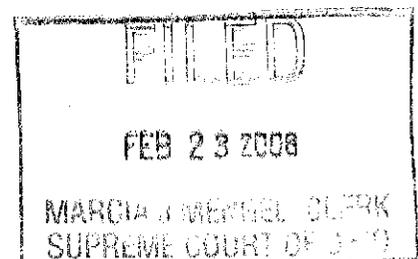
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INTRODUCTION

In its narrowest sense, this case asks the Court to determine whether a particular company has engaged in the unauthorized practice of law. More broadly, however, the court is asked to decide the equally important question whether the experience of the Industrial Commission (IC) and Bureau of Workers' Compensation (BWC) with the negotiation and settlement of claims is relevant to interpretation and application of Resolution R04-1-01. This Court has approved the Industrial Commission's Resolution R04-1-01 as the governing standard for determining whether a nonlawyer has engaged in the unauthorized practice of law in proceedings before the IC and BWC. *Cleveland Bar Association v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181 (*CompManagement I*). The State of Ohio asks the Court to stay the course and continue to look to the expertise of the IC and BWC in interpreting and applying Resolution R04-1-01.

As this Court observed in *CompManagement I*, "lay representation has been a feature of Ohio's workers' compensation system since its inception," and this case "implicates the Industrial Commission's longstanding policy of permitting nonlawyers, specifically actuarial firms and unions, to appear and practice before the commission and the Bureau of Workers' Compensation in a representative capacity on behalf of employers and injured workers and to perform a variety of functions as regards the administration and adjudication of workers' compensation claims." *Id.* at ¶¶10, 13. In approving the standards of Resolution R04-1-01, the Court gave due regard to this "longstanding policy" and acknowledged the grave consequences to the workers' compensation system if the policy were to be reversed and nonlawyer representatives "purged" from the process. *Id.* at ¶¶37, 38.

The experience of the IC and BWC was instrumental in the development of Resolution R04-1-01 and its predecessor, the “1970 agreement.” In turn, the IC and BWC have refined their practices as they have continued to operate under those standards. The only way to preserve the Resolution’s value, in accord with *CompManagement I*, is to continue to interpret and apply the Resolution within the context of that experience.

Relator asks this Court to ignore the agencies’ experience, however, and instead seeks to penalize the Respondent’s participation in settlement agreements, based upon language in the Amended Final Report on Remand, issued by the Board on the Unauthorized Practice of Law (Board Report), indicating that such participation was wrongful. Although the State of Ohio takes no position on the underlying merits of this case, it respectfully asks this Court, in ruling upon the Board Report and the Relator’s request for penalties, to interpret and apply Resolution R04-1-01 in light of the realities of the settlement process, as experienced by BWC and the IC—realities that have helped to inform the development and implementation of Resolution R04-1-01.

STATEMENT OF AMICUS INTEREST

The State, and in particular the agencies that administer Ohio’s workers’ compensation program—BWC and the IC—have an interest in any decision that directly and significantly affects the agencies’ administrative standards and practices. The State’s interest has, if anything, deepened since this Court, in *CompManagement I*, approved the IC’s standards, as embodied in Resolution R04-1-01, to define the circumstances in which nonlawyers may represent claimants and employers in proceedings before BWC and the IC.

In reaching its decision in *CompManagement I*, the Court carefully struck a balance between two important public interests: protecting the public against the dangers of unqualified

persons practicing law, and effectuating the constitutional mandate that workers' compensation be efficiently afforded to employees "without necessity of litigation, attorneys, and their attendant costs." *Id.* at ¶44. In striking that balance through approval of the standards of Resolution R04-1-01, the Court properly took into account and validated the workability, efficiency and utility of the long-standing policies and practices of the IC and BWC that governed representation of employers and claimants by nonlawyers. *Id.* at ¶¶10, 37. The Court also noted the disastrous consequences that would ensue if those practices were vitiated. *Id.* at ¶38. The State is interested, therefore, in continuing to have Resolution R04-1-01 interpreted and applied in a manner that reflects and preserves the policies and practices of the IC and BWC. At this juncture, the State is particularly concerned that the role of actuaries in the settlement of claims be delineated in light of the practices known to BWC and the IC when Resolution R04-1-01 and its predecessor, the "1970 agreement," were approved, and which continue to effectively operate today.

In addition to its role in administering the workers' compensation system, the State has an independent stake in the efficient operation of the system. As the largest employer in the workers' compensation program with over 58,000 employees, the State of Ohio shares with private and other public employers an interest in a workable and cost-effective system, which, of necessity, must include the efficient disposition of claims through settlement.

Most fundamentally, however, the State seeks to protect Ohio's economic strength and continued development, which depend heavily upon an effective and affordable workers' compensation system. Again, at this stage of the proceeding, the State emphasizes its interest in a workable settlement process that promotes the efficient disposition of claims. As explained below, an effective settlement process directly results in lower premiums for employers, and

contributes to the soundness of the State Fund, allowing Ohio to attract and keep employer businesses and compete for jobs. *See Gibson v. Meadow Gold Dairy*, 88 Ohio St.3d 201, 203, 2000-Ohio-301, 724 N.E.2d 787 (“settlement of workers’ compensation cases necessarily affects the interests of the workers’ compensation system itself”).

ARGUMENT

Amicus State of Ohio’s Proposition of Law No. 1:

An actuary does not engage in the unauthorized of law when she advises an employer about a proposed settlement’s impact on the employer’s workers’ compensation premiums, based on risk, insurance, or actuarial computations.

One of Relator’s Objections to the Board Report focuses on the role of actuaries in the settlement process. The Relator’s view of that role, however, is too narrow and fails to distinguish between actuarial functions and legal functions. The Relator asks the Court to impose a multi-million dollar fine on Respondents, based upon a stipulation apparently reached earlier in the litigation that CompManagement participated in 2,800 workers’ compensation claims settlements during 1999. Relator Br. at 6, 12. The Relator argues for a penalty based on \$10,000 per such occurrence, resulting in a minimum fine of \$28,000,000. *Id.* As in the original proceeding leading to *CompManagement I*, the State takes no position on the underlying merits of this case or the appropriateness of penalties. The State asks the Court, however, to consider the Relator’s Objection in light of BWC’s experience with the settlement process, particularly the role of actuaries. The State does so because this experience was relied upon in the IC’s development of standards, now approved by the Court, and is relevant to an interpretation of those standards—especially in light of the Board Report recommending that the Court find that CompManagement violated the standards of Resolution R04-1-01 by participating in the settlement of claims. Board Report at 5, 6.

The State certainly agrees that nonlawyers may not, during the settlement process or at any other stage, engage in the legal review and analysis of claims, evaluate evidence and the credibility of witnesses, or provide advice as to outcomes based on legal considerations— and indeed, Resolution R04-1-01 has never been interpreted or applied otherwise. The experience of BWC, however, is that settlement negotiations and agreements are, for an employer, an *actuarial* exercise, not a *legal* one.

Almost 90% of claim settlements occur *after the claim has been allowed*. See also *Wise v. Urban Industries of Ohio, Inc.*, 158 Ohio App.3d 244, 2004-Ohio-2361, 814 N.E.2d 1232 (3rd Dist.), at ¶¶8-10 (the determination that an employee had the right to participate in the workers' compensation program—that is, the employee's "injury, disease, or death occurred in the course of and arising out of his or her employment"—was made in a separate proceeding before a settlement agreement was proposed (citation omitted)). At the settlement stage, issues such as the credibility of witnesses and the evaluation of evidence have been long decided. The concern of employers during negotiations is whether a settlement will generate a savings in premiums, and employers rely upon the services of actuaries to meet that concern. An actuary's analysis is strictly a risk, insurance, or actuarial computation, and the only advice provided by actuaries as to outcomes involves the impact of the settlement on the employer's premiums and State Fund experience.¹ These are legitimate and routine actuarial functions.

¹ BWC pays compensation and medical benefits in allowed claims, and these payments generate reserves. The claims payments and reserves are driving factors in the employer's experience rating and directly affect an employer's premium rates. See Ohio Admin. Code 4123-17-03 (employer's classification rates). See also R.C. 4123.34. Not only does the settlement of claims beneficially affect an employer's premiums, but also has a positive impact on the surplus of the State Insurance Fund when a claim is settled for less than the reserves. See generally R.C. 4123.29; R.C. 4123.32; R.C. 4123.34.

The focus of settlement negotiations is reflected in BWC's role in settling claims. State Fund settlements must be approved by the BWC administrator before they can become effective. R.C. 4121.121(B)(18); R.C. 4123.65(C). The administrator is required to "utilize whatever methods [he] determines to be appropriate, *consistent with general insurance principles*, to evaluate a claim for settlement" (emphasis added). Ohio Admin. Code 4123-3-34(F).² Again, settlement issues are actuarial, not legal.

Without access to the advice of actuaries, employers would be unable to evaluate the impact of a settlement proposal on their State Fund risk experience and premiums and, understandably, be unwilling to participate in the settlement process. As the Court observed, "it is clear that actuarial firms ... have come to play a critical role in the workers' compensation system." *CompManagement I*, at ¶37. The role of actuaries is essential to the efficient disposition of claims, which, in turn, is essential to a functional and cost-effective workers' compensation system.

Consequently, Resolution R04-1-01 should be interpreted to permit actuaries to give employers an actuarial or risk-based assessment of the impact that proposed settlements would have on the employers' premiums.

Proposition of Law II:

A nonlawyer does not engage in the unauthorized practice of law when he prepares or files a settlement application form on behalf of a claimant or employer.

The Relator's misapprehension about the role of actuaries—perhaps based on the Board Report—also has an impact on whether they may prepare and file settlement application forms

² After the BWC administrator approves a final settlement, he must send a copy of the agreement to the IC, which must determine, through a staff hearing officer, whether the agreement is "a gross miscarriage of justice." R.C. 4123.65(D). If the hearing officer determines that the settlement agreement is not "clearly unfair," the settlement agreement is approved. *Id.*

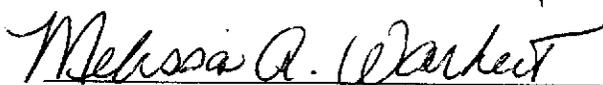
on behalf of employers. The Board Report cites as an example of the Respondent's violation of Resolution R04-1-01 that "CMI files settlement application forms on behalf of their clients with the Bureau of Workers' Compensation." *Id.* at 6. However, the Resolution, as approved by the Court, explicitly lists as permissible activity number 6, the "[c]ompletion and submission of any and all reports or forms concerning, but not limited to ... settlements." *See CompManagement I*, at ¶25. Again, reference to the administrative practices of BWC, which were known to the IC when it approved the Resolution, may prove illuminating. The settlement process is generally initiated when a party or party representative files a BWC settlement application form (attached as Exhibit 1). The form is completed typically by the claimant, and asks only for factual information. No legal analyses or conclusions are required. The employer need only sign the form indicating whether he is agreeable or not agreeable to the settlement, and willing or not willing to participate in negotiations. Nothing about the form implicates the practice of law, so nothing should preclude a nonlawyer from preparing and submitting it on behalf of either party.

CONCLUSION

For the above reasons, the State respectfully requests this Court to interpret and apply Resolution R4-1-01 in light of the experience of BWC and the IC with the negotiation and settlement of claims, and in light of the essential role that actuaries have long played in the efficient and cost-effective settlement of claims.

Respectfully submitted,

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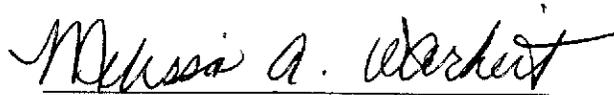
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SETTLEMENT AGREEMENT AND APPLICATION FOR APPROVAL OF SETTLEMENT AGREEMENT

(FOR STATE FUND CLAIMS ONLY)
(SELF INSURED CLAIMS FILE SI-42)

This application should be filed to settle workers' compensation claims with state-fund employers. Ohio Revised Code 4123.65 requires that settlement applications be signed by both the injured worker and the employer, unless the employer is no longer doing business in Ohio. If the claim to be settled is a state-fund claim, and the employer is now self-insuring, the self-insuring employer will be charged dollar for dollar for any portion of the settlement attributed to past, present or future DWRP liability.

By filing this application, the injured worker and the employer agree that all unresolved issues will be suspended. All ongoing compensation and medical payments, however, will continue until the effective settlement date. The effective settlement date is the mailing date of the BWC approval of settlement agreement.

Please Note: After the effective settlement date, BWC will not pay for medical bills or services rendered, regardless of the dates of service generating such bills, whether or not the bills have been submitted to BWC, and whether or not the parties were aware of such bills.

By initialing this box, the injured worker acknowledges that they have read and understand the above statement.

Special Notice to Medicare Beneficiaries

Medicare does not pay medical bills for conditions covered by your workers' compensation claim. If a settlement of your workers' compensation claim is reached, and the settlement allocates certain amounts for future medical expenses (excluding amounts for prescription drugs), Medicare does not pay for those services until medical expenses related to your workers' compensation claim equal the amount of the lump sum settlement allocated to future medical expenses. For additional information, please call the Medicare Coordination of Benefits Contractor at 1-800-999-1118.

INSTRUCTIONS:

- For LOST TIME and MEDICAL ONLY claims mail this completed application to your nearest customer service office.
- Call 1-800-OHIOBWC for the address of your local customer service office.
- To settle a claim with a self-insuring employer, please complete and forward form SI-42, or contact your SI employer for other forms setting out the agreement between the injured worker and self-insuring employer.
- To facilitate settlement of this claim, please forward any unpaid bills to your Managed Care Organization.
- Include a list of any unpaid bills you are aware of or attach copies of any unpaid bills or statements.

APPLICATION FOR APPROVAL OF SETTLEMENT AGREEMENT

The injured worker and employer, as agreed to below, make application to the Ohio Bureau of Workers' Compensation (BWC) for approval of a final settlement in the injured worker's claim(s).

PARTIES TO THE CLAIM				
Injured worker name		Social Security Number	Date of birth	Phone number ()
Address		City	State	ZIP code
Injured worker representative name		I.D. number		Phone number ()
Address		City	State	ZIP code
Employer name		Risk number	Fax number ()	Phone number ()
Address		City	State	ZIP code
Employer representative name		Fax number ()		Phone number ()
Address		City	State	ZIP code
Information on other relevant employers is attached <input type="checkbox"/> Yes <input type="checkbox"/> No				
CLAIM(S) TO BE INCLUDED IN SETTLEMENT				
Claim Number*	Requested Amount for Complete Settlement**	Proposed Allocation of Requested Settlement Amount		
		Indemnity	Prescription Drugs	Medical
*List any claims specifically excluded from settlement: _____				
**Please explain any request for a "partial" settlement: _____				
Clearly set forth the circumstances by reason of which the proposed settlement is deemed desirable: _____ _____ _____ _____				
Has information on other relevant claims been attached <input type="checkbox"/> Yes <input type="checkbox"/> No		Are you receiving, or have you applied for Medicare benefits? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Are you receiving medical treatment at this time? <input type="checkbox"/> Yes <input type="checkbox"/> No		Who is your treating physician(s)?		Wages at time of injury?
Are you currently working? <input type="checkbox"/> Yes <input type="checkbox"/> No		If yes, who is your present employer?		What are your present wages?

EMPLOYER SIGNATURE

(Required by ORC 4123.65 unless the employer is no longer doing business in Ohio)

INSTRUCTIONS:

* Please check one of the following boxes and sign below. Your signature does not waive the employer's right to withdraw consent to the settlement by providing written notice to the employee and the BWC administrator within 30 days after the administrator issues the approval of the settlement agreement.

- A. The employer agrees to the requested settlement terms.
- B. The employer does not agree with the requested settlement terms, but will participate with the BWC in the negotiation process.
- C. The employer is supportive of and agreeable to settlement of the claims listed on the front of this application. However, the employer will not participate in the settlement negotiations and requests the BWC to negotiate the settlement on behalf of the employer.
- D. The employer is not agreeable to settlement of the claim(s) listed on the front of this application.

By signing this agreement, an employer that is currently self-insured acknowledges its obligation to reimburse BWC for the portion of the settlement amount allocated to DWRP costs of the above-referenced claim(s). The DWRP portion of the settlement will be billed to the self-insuring employer, even if the injured worker has not yet been determined to be permanently and totally disabled or currently eligible for DWRP benefits.

Employer signature	Title	Date
Telephone number ()	Fax number ()	

SETTLEMENT AGREEMENT AND RELEASE

As set forth in this agreement, the injured worker for and in consideration of the receipt of the settlement amount approved by the BWC, which sum will be paid from the appropriate fund on behalf of the employer after approval by the BWC administrator, unless within 30 days after such approval the administrator, the employer or the injured worker, withdraws consent to, or unless the Industrial Commission of Ohio (IC) disapproves the agreement, does hereby for him/herself and for anyone claiming by, through or under him/her, forever release and discharge the above referenced employer, its officers, employees, agents, representatives, successors and assigns, the IC, the BWC, the appropriate fund, and all persons, firms or corporations from any or all claims, demands, actions or causes of action incurred on or prior to the date of the approval of this agreement, arising out of Ohio Revised Code Chapter 4121. or 4123., which he/she now has or which he/she hereafter claim to have, whether known or unknown by reason of or in any manner growing out of the claims or parts thereof set forth above. The injured worker further understands and agrees that any amount paid pursuant to this agreement is subject to any valid court-ordered child support. Unless this settlement agreement specifically indicates otherwise, the parties expressly agree that BWC will not make any payments whatsoever in this claim, after the effective settlement date (the mailing date of the BWC approval.) **After the effective settlement date, BWC will not pay for medical bills or services rendered, regardless of the dates of service generating such bills, whether or not the bills have been submitted to BWC, and whether or not the parties were aware of such bills.**

By initialing this box, the injured worker acknowledges that they have read and understand the above statement.

Also as set forth above, the injured worker understands that any settlement amounts allocated for future medical services (excluding amounts for prescription drugs) must be used for medical services before Medicare will consider payment for services for the conditions of the workers' compensation claim.

Settlement of any claim(s) included in this agreement in no way impairs BWC's statutory rights to subrogation recovery. Also, be advised that upon a finding of fraud, the administrator retains the right to rescind this settlement agreement and re-open the claim for an administrative overpayment hearing and referral for criminal prosecution.

Injured worker signature	Date
--------------------------	------

POWER OF ATTORNEY

By signing below the injured worker grants a limited Power of Attorney to the attorney of record for the purpose of receiving the warrant issued because of this settlement agreement.

Injured worker signature	Date
Representative signature	Date