

March 2, 2016

Statement in support of House Bill 5449

House Bill 5449 restores to Connecticut workers the right to claim damages flowing from unfair insurance practices and unfair trade practices practiced upon them by workers compensation insurance companies and their employers. It would reverse the decision of the Connecticut Supreme Court in the case of deOliveira v. Liberty Mutual, 273 Conn 487 (2005) which provided insurers and employers with immunity from suits under CUTPA and CUIPA when the claims arose from a workers compensation matter. The Supreme Court appeared to believe that the remedies afforded under the Worker's Compensation Act, Chapter 568 of the Gen. Statutes, are an adequate remedy for workers. This conclusion was reached by the Supreme Court without a basis in practical experience and subsequent events have proven the decision to be extremely harmful to injured workers.

No insurance company is insulated from a suit under CUTPA or CUIPA in any other area of the law merely because there may also be a remedy available at common law or under another regulatory scheme. Violations of the Home Solicitation Sales Act, real estate brokerage practices, security sales agreements, and a host of other matters where there are statutory remedies as well as common-law causes of action are not protected from suit under CUTPA or CUIPA. Unfortunately, the immunity provided by the deOliveira decision has proved to be an encouragement to insurers to act with impunity with regard to the timely processing and prompt provision of benefits to injured workers. Notwithstanding that the cornerstone of the Workers' Compensation system is supposed to be the prompt provision of medical treatment, regrettably the Worker's Compensation Commission has only on rare occasions exercised its power to sanction respondents and in practice consistently discourages claims regarding undue delay and bad faith decision-making.

It is not uncommon, particularly in the area of medical treatment, for respondents to deny medical treatment requested by treating doctors without any medical evidence indicating that the requested treatment is unreasonable or unnecessary. Adjusters regularly substitute their own judgment for medical opinion when a treating doctor seeks authorization for a course of treatment. A delay in such treatment can only economically benefit the insurer, since subsequent provision of the treatment costs the insurer no more than what it would have originally paid, while a delay in treatment, or the outright inability to treat, results in significant savings. Subsequent complaints by an injured worker that their treatment was delayed or denied can never result in the timely provision of needed treatment. Workers who endure pain, restriction in activity, an inability to return to work and potentially a failure to fully recover from an injury cannot be made whole under the provisions of Chapter 568 which only allows a claim for attorney's fees and penalties. Certainly, if delayed treatment is ultimately provided, the last thing that a Worker's Compensation Commissioner wants to do is hold a formal hearing about the fact that the treatment ultimately provided was delayed. These hearings are viewed by the Commissioners as a waste of their valuable time rather than as an important enforcement mechanism to assure compliance with our statutes and the expeditious availability of treatment that the workers compensation system was originally designed to facilitate. Even worse, there is a prevailing belief among the Compensation Commissioners that a finding of undue delay or

bad faith on the part of an insurance company will subject the adjuster on the file to disciplinary retaliation and/or termination. When egregious situations are presented, Commissioners will offer to allow some other benefit to a claimant such as additional temporary indemnity or permanent partial indemnity benefits, a delay in the determination of the date of maximum medical improvement, "consideration" when a settlement might be considered, etc. This means that there are few documented decisions where actual findings of unreasonable contest or undue delay are made after formal hearings. The absence of such decisions does not mean that the practice is not pervasive.

Recently there have been a number of articles regarding the secondary costs of injuries sustained in the workplace. These articles have indicated that only 20 to 40% of the actual costs of workplace injuries are borne by employers. Through the denial of benefits costs are shifted to Medicaid, Medicare, group insurers, welfare agencies or borne as out-of-pocket expense by the workers themselves. Whenever a worker has group insurance, Title XIX, Medicare or other resources to pay for medical care, the first thing that is heard at a hearing regarding the denial of care by an insurer is that the worker should put the costs through the alternate payment sources. Insurers will then magnanimously offer to reimburse the worker for the co-pays which may be sustained. The cost shifting from the employer to third parties in these circumstances is enormous and no effective methodology exists to require Worker's Compensation insurers to reimburse group insurance or governmental programs for the costs avoided as it is rare that the limited lien process which exists in the statute is utilized. Worker's Compensation Commissioners are primarily and properly concerned that the claimant received treatment and are unaffected by the fact that payment is made by third parties other than the employer and/or its insurer. However, the legislature should be concerned that medical care costs are inappropriately shifted to governmental payors or paid by the injured workers.

Further, when a benefit which has been delayed is in fact ultimately provided by the employer and/or its insurer, the injured worker has no immediate incentive to proceed formally against the insurance company. Indeed, when counsel is involved, the attorney and client end up in a situation which can be in conflict with one another. The attorney will have spent many hours securing the benefit which was unfairly delayed or denied but can only secure an award of attorney's fees for that work if the attorney risks additional attorneys' time in a formal hearing chasing after compensation for the time already lost. This creates an unfair playing field before the Worker's Compensation Commission with regard to these issues as the claimant and/or claimant's counsel must risk lost time from work and additional time devoted to a dispute which is at least partially resolved but which never should have existed. This reinforces an environment for the respondents that they have "nothing to lose" by unfairly delaying or denying benefits. Those claims that are not pursued save the monies that were otherwise properly allocated to the case.

The difficulty created by the lack of an effective remedy for delay creates an atmosphere which discourages claimants from even initially undertaking efforts to contest unreasonable denials and delays. Statistics provided by the Worker's Compensation Commission in its annual reports indicate that only approximately 13% of workers compensation claims involve attorney representation. The magnitude of the savings to insurers when dealing with unrepresented claimants who can be easily intimidated by denials and a difficult formal hearing process cannot be understated. Only by the provision of an effective remedy which will inure

directly to claimants and provide compensation to them for the direct harms which they have suffered as a result of the undue delay and unreasonable denial of benefits through an action alleging violations of CUTPA and/or CUIPA can justice be done for these injured workers and an effort undertaken to eliminate, or at least mitigate, what has become in Connecticut an industrywide practice on the behalf of respondents and employers to delay and/or deny the provision of benefits.

I do note that the draft of HB 5449 provides for an award of attorney's fees to respondents if a claimant does not prevail. This is entirely inappropriate. For claims involving unreasonable denials and undue delays to encourage further denials and delays on the part of defendants who are alleged to practice such patterns of behavior, on pain of having to pay fees to defendants if a case is not won at trial, has the effect of entrenching such inappropriate behavior into the litigation arena. Connecticut adheres to the American Rule which provides that fees are borne by the parties without recovery from the other side unless explicitly authorized by statute. No other claims under CUTPA and CUIPA permit an award of fees against an unsuccessful plaintiff purely because the other side prevailed. The fee provision in the draft bill does not address frivolous or malicious claims but rather claims which don't prevail. Again, this would set up a situation where only injured workers would be subject to special conditions essentially penalizing them for attempting to assert their rights. It would also encourage litigation because of the fee shifting provision. The deOliveira decision inappropriately restricted workers' rights to remedies available to all other citizens, and the attorney's fee provision in House Bill 5449 should be deleted so that the bill under consideration does not have the same impact.

Respectfully submitted,

Howard B. Schiller  
Board Certified Workers' Compensation  
Specialist