

From: Don Drinko  
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Gallagher Sharp Shop Talk: Workers' Compensation

**Question: When a self-insured employer "opts out" of the Surplus Fund Reimbursement Program, can the employer still be reimbursed for medical expenses paid on claims reversed after the date it opted out?**

Since 2006, self-insured employers have faced the question of whether to "opt out" of the BWC's Surplus Fund Reimbursement Program. The "surplus fund" was created by the Ohio Legislature to fund, among other things, the reimbursement of self-insured employers for amounts paid for claims or conditions that are subsequently disallowed. In 2006, R.C. §4123.512(H) was amended to permit self-insured employers to "opt out" of the reimbursement program and stop payment in exchange for agreeing to forego reimbursement. Recently, the Supreme Court of Ohio considered whether a decision to "opt out" precluded reimbursement for amounts paid prior to that decision.

*State ex rel. Extendicare Health Servs., Inc. v. Ryan*, 126 Ohio St.3d 12, 2010-Ohio-2452, concerned a self-insured employer who had opted out of the reimbursement program on July 1, 2007. Subsequent to that date, the employer successfully appealed the allowance of several conditions for which it continued to pay benefits. The employer then sought to be reimbursed for payments made up to the date it "opted out" of the program. The BWC refused, contending that the "final determination" on the disputed conditions had been made after the employer had "opted out." On *mandamus*, the Supreme Court disagreed, concluding that the employer was entitled to reimbursement for medical expenses paid for the disallowed conditions up to the date it "opted out." Rejecting the BWC's argument that the rights had not "vested" until a final determination was made, the Court cited the plain language of the statute and *State ex rel. First Nat'l Supermarkets, Inc. v. Industrial Commission* (1996), 74, Ohio St.3d 673, in holding that amounts paid for medical expenses for the disallowed conditions can be recouped. However, the Court declined to extend this reasoning to temporary total benefits, citing the lack of evidence that the disability was due solely to the disallowed conditions. The Court left open the possibility that a "definitive declaration" that the period of disability was based solely on the disallowed conditions could support such a finding.

Next week, I will once again be attending the National Workers' Compensation Law Review, an annual gathering of workers' compensation professionals from around the country held in Orlando, Florida. I look forward to reporting in future Shop Talks on the latest developments in workers' compensation law.

Donald G. Drinko, Esq.  
Certified Workers' Compensation Specialist,  
Ohio State Bar Association  
Gallagher Sharp  
1501 Euclid Avenue  
Cleveland, OH 44115  
Direct: 216.522.1326  
ddrinko@gallaghersharp.com  
www.gallaghersharp.com