COMP TIMES

Arizona Municipal Risk Retention Pool

AMRRP

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7 roadway workers killed in Arizona during 2008

Transportation incidents were the leading cause of worker fatalities during 2008 in Arizona, according to data compiled by the Arizona Division of Occupational Safety and Health (ADOSH), including seven roadway workers who were struck by vehicles or mobile equipment.

Overall, there were 37 transportation fatalities. In addition to the roadway workers:

- 19 fatalities were aircraft related, and
- 10 were highway incidents, of which eight were collisions between vehicles or mobile equipment.

ADOSH cites statistics from the American Society of Civil Engineers on the perils of roadway work-zone crews. These crews sustain nearly 27,000 first-aid injuries and 26,000 lost-time injuries per year at an annual cost of $2.4 billion. Each year in the United States, more than 1,000 workers are killed in roadway work zone incidents – an average of three workers per day.

While ADOSH addresses concerns about Arizona Department of Transportation (ADOT) roadway workers, municipalities might want to consider precautions for their employees who work along the roadways. ADOT has multiple construction projects throughout the state, notes ADOSH, with roadway work zones established to protect both the public and project workers. The need to provide adequate protection for workers is evident by the number of fatalities that continue to occur year after year, says ADOSH.

ADOSH cites a 2006 incident to illustrate its point. Oscar Ruiz was working near a conveyer belt that sprayed crushed gravel onto the shoulder of the Santan Freeway at Gilbert Road, when he was struck

by a vehicle and killed. The driver of the eastbound vehicle, who had just worked a 10-hour night shift and had three hours of sleep the previous night, struck a truck pulling a trailer, then veered off onto the shoulder of the road where Ruiz was working. Ruiz was pronounced dead at the scene.

In 2007 incident, a vehicle killed a worker who was cleaning the edge of northbound Arizona 87 near Gilbert Road. The worker was a female in her mid 40s who was struck at approximately 6:15 a.m. She had been removing debris from the roadway, items that had fallen off vehicles and trucks. The worker died at the scene as a result of the trauma caused by the collision.

To make roadway work zone workers more visible to drivers, employers must provide high visibility clothing such as fluorescent orange or green shirts and vests, says ADOSH. The use of such apparel is required by the U.S. Occupational Safety and

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Court rules death in auto accident is compensable

The Arizona Court of Appeals, Division Two, has ruled that the death of a Pima County employee while driving a county-provided automobile to meet his wife for dinner at a restaurant is compensable.

The decision affirms a ruling by an administrative law judge (ALJ) that was challenged by Pima County and its workers' compensation insurer.

The decision is a Memorandum Decision, and, under Arizona Rules for Civil Appellate Procedure, cannot serve as a precedent. Memorandum Decisions can only be cited in future litigation under limited, prescribed circumstances. Employers and their workers' compensation carriers or third party administrators are not required to apply a Memorandum Decision in their compensability determinations for claims. This story on the decision is being published for the information of AMRRP Members.

Robert Hooker was a county public defender who was killed in 2008 when the county-provided vehicle he was driving was struck by another vehicle. The driver of the other vehicle subsequently pleaded guilty to charges including reckless manslaughter.

Hooker's widow filed a claim with the Industrial Commission of Arizona (ICA), and an ALJ found the claim compensable. The decision was appealed.

In describing the situation and discussion the court's legal rationale, the Appeals Court decision says:

"Hooker was employed by Pima County. As part of his employment contract, Pima County provided him a car that it owned and maintained; it also paid for fuel and maintenance for the car. Hooker used this car to travel between home and the office and to get to various work-related appointments during the day. Hooker had just left the office and was driving to meet his wife for dinner when his car was struck by another vehicle. He died of injuries sustained in the accident.

"Pima County and [its insurer] argue the ALJ incorrectly interpreted the employer's conveyance exception to the going and coming rule. We have a duty to 'liberally construe' the law on workers' compensation to ensure that 'industry bears its share of the burden of human injury as a cost of doing business.' Generally, 'when an employee is injured going to or coming from his work place, the accident and resulting injuries do not arise out of or occur in the course and scope of employment.'

"However, there are several exceptions to this going and coming rule, including the employer's conveyance exception. The employer's conveyance exception requires both that the vehicle provided by the employer and that the travel time appear to benefit the employer. A totality-of-the-circumstances test is used to determine whether the employer's conveyance exception to the going and coming rule applies.

"In applying this test, the ALJ found that Pima County benefited from furnishing the vehicle to Hooker. The ALJ made specific findings of several benefits, including that Hooker accepted the job with Pima County in part because it furnished him the vehicle; he used the vehicle to attend work-related engagements, and he conducted work from the vehicle via his telephone. Those findings are supported by substantial evidence, and we must accept them.

"Pima County and [its insurer] assert, however, that this particular trip was not between Hooker's work and home but rather between work and a restaurant. They do not provide any authority suggesting this factual distinction renders the employer's conveyance exception inapplicable. Pima County and [its insurer] also contend this particular trip did not benefit the employer."

In refuting contentions and citations of previous decisions, the Appeals Court decision goes along with the ALJ findings 'that the provision of the car was an important factor in Hooker's decision to take the job … and, further, that he used it to 'attend meetings, attend court appearances and to call his assistants from the road.'

"Because the ALJ's factual findings are supported by substantial evident and we find no error of law, we affirm the award that the injury is compensable."

Court of Appeals affirms reimbursement of employer

Stating that A.R.S. § 23-1065(C) was enacted to "promote the hiring of disabled or handicapped workers," an Arizona Court of Appeals, Division One, panel affirmed a loss of earning capacity award and reimbursement for the employer although the firm had hired the claimant knowing he was a diabetic.

"Prior to the enactment of A.R.S. § 23-1065(C), an employer that hired an individual with a preexisting injury who then suffered an industrial injury was required to fully compensate the individual for both the preexisting injury and the permanent physical impairment," says the panel's decision. "Employers therefore had an incentive to avoid employing disabled workers. [The statute] was adopted to remedy that situation by ameliorating the employer's burden in such cases."

If conditions set forth in A.R.S. § 23-1065(C) are met, the decision continues, "the employer or carrier may be reimbursed by the Special Fund for half the compensation paid to the claimant.

"We acknowledge and apply the principle enunciated by the Arizona Supreme Court that a remedial statute must be liberally construed to achieve the special purpose underlying the legislation," says the decision. "Because A.R.S. § 23-1065(C) is intended to promote the hiring of handicapped workers, we decline to adopt a narrow interpretation of the statute. The award of reimbursement in this case advances the purpose of the legislation."

Michael Sordia, the claimant, was working McCarthy Building Companies in April 2004 when he was suffered a broken leg and arm in an accident. Sordia filed a workers' compensation claim, which was accepted, and received medical, surgical and psychological treatment.

It was eventually determined that Sordia had permanent impairment, and the Industrial Commission of Arizona (ICA) granted a 20 percent loss of earning capacity award. Both Sordia and McCarthy protested. Sordia sought a greater award, and McCarthy sought reimbursement from the ICA Special Fund.

Following a hearing, an ICA administrative law judge (ALJ) ruled Sordia was permanently and totally disabled and ordered reimbursement for McCarthy. On the reimbursement, the ALJ noted that McCarthy was aware Sordia suffered from Type II diabetes when he was hired and that the condition predated the April 2004 accident.

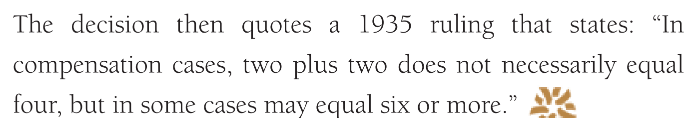
Following a review in which the ALJ affirmed the awards, the Special Fund appealed, arguing that Sordia's injuries were covered under A.R.S. § 23-1044(B) and therefore A.R.S. § 23-1065(C), with its reimbursement provision, should not apply.

The panel agreed the injuries are listed in A.R.S. § 23-1044(B), but they are listed in separate provisions of the statute.

"Sordia did not suffer the injuries separately, but as part of the same accident" says the decision. "[The statute] does not list, as a 'scheduled injury,' an impairment to one arm and one leg." Except for a provision on "permanent and complete loss of hearing in both ears, the listed injuries are all to a single body part. Because Sordia suffered an injury to two body parts – a non-enumerated injury – we conclude that the ALJ did not err in finding Sordia's impairment was not the type specified in A.R.S. § 23-1044(B).

"Our conclusion is supported by the principle that an injury to the whole person often will have a greater overall effect than might be expected simply from the separate injuries," says the decision. "Arizona case law recognizes that two scheduled injuries, when suffered contemporaneously, are beyond the purview of A.R.S. § 23-1044(B)."

The decision then quotes a 1935 ruling that states: "In compensation cases, two plus two does not necessarily equal four, but in some cases may equal six or more."



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Work Comp 101:

The right to choose a treating physician

In the development of workers' compensation system, each state has had to answer a fundamental but highly controversial question: To what extent should an injured worker be able to choose his or her treating physician?

On the one hand, injured employees do not want to be treated by what they see as a "company doctor," whose perceived purpose is to return injured workers to their jobs and affect a discharge from medical care as quickly as possible. Conversely, employers seek assurances that their workers will not be treated by a physician who will draw out the employee's treatment and disability status and add to the economic burden of the incident.

Arizona law has set different criteria for (1) private employers whose coverage is underwritten by an insurance company or the State Compensation Fund (SCF Arizona); (2) private employers who are self insured and provide medical benefits directly to their employees through an ICA approved medical network; and (3) self-insured public entities.

For private employers in the first group, the injured employee can first be treated for any non-emergent injury by a physician (usually an urgent care facility) designated by the employer. Under A.R.S. § 23-908(F), the employer may select a physician "to make one examination of the injured employee in order to ascertain the character and extent of the injury occasioned by the accident." After this initial visit, the claimant has an unrestricted right under A.A.C. R20-5-113(F) to chose a treating physician without any approval from the insurance carrier or the Industrial Commission of Arizona (ICA). However, if the worker returns to the same employer physician seen under the mandate of A.R.S. § 23-908(F), then that individual is now deemed the treating physician. Any subsequent change to another physician, per A.R.S. § 23-1071(B), cannot be done without approval from the ICA, insurance carrier or the treating physician. Frequently, subsequent changes are readily approved to expedite the claimant's recovery, since they usually involve referrals to a medical specialist, such as an orthopedic surgeon.

Under the rules for private employers in the second group, injured workers do not have an unrestricted right to chose their own treating physician. They must accept the medical treatment provided through their employer's medical network. Failure to do so could render the injured worker personally responsible for the cost of any care obtained outside this network without the employer's approval. Under A.R.S. § 23-1070(E), an injured worker can request that the ICA approve a change of the treating physician outside of the employer's medical network. However, there must be "reasonable ground to believe that the health, life or recovery of any employee is endangered or impaired" if treatment is continued under the employer's physician. Not only is this a weighty legal burden to meet, but the ICA is often reluctant, without appropriate cause, to interfere. In prior Arizona appellate cases, the justices have opined that the purpose of A.R.S. § 23-1070(E) is to prevent a self-insured employer from having to provide duplicate medical coverage for its employees.

Self-insured public entities, under A.R.S. § 23-1070 (A), are precluded from controlling treatment through the mandated utilization of an employer-provided medical network. Public employees have the same unrestricted right to choose their treating physician as the employees of private entities insured for workers' compensation through

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Injury/illness rate higher for government workers

Nearly 940,000 injury and illness cases were reported among state and local government workers in 2008, resulting in a rate of 6.3 cases per 100 full-time equivalent (FTE) workers, which was significantly higher than the rate among private industry workers – 3.9 cases per 100 workers, according to data collected by the U.S. Bureau of Labor Statistics (BLS) for its annual Survey of Occupational Injuries and Illnesses.

Approximately 4 in 5 injuries and illnesses reported in the public sector occurred among local government workers, resulting in an injury and illness rate of 7.0 cases per 100 workers. The rate for state government workers was than the 4.7 cases per 100 workers.

In the private sector, the rate of nonfatal workplace injuries and illnesses declined from 4.2 cases in 2007, the BLS reported. Similarly, the number of nonfatal occupational injuries and illnesses reported in 2008 declined to 3.7 million cases, compared to 4 million cases in 2007.

Also, a total of 5,071 fatal work injuries were recorded in 2008, down from a total of 5,657 fatal work injuries reported for 2007, according to BLS data. While the 2008 results are preliminary, this figure represents the smallest annual preliminary total since the Census of Fatal Occupational Injuries (CFOI) program was first conducted in 1992. Final results for 2008 will be released in April 2010.

Based on these preliminary counts, the rate of fatal injury for U.S. workers in 2008 was 3.6 fatal work injuries per 100,000 FTE workers, down from the final rate of 4.0 in 2007.

Overall, 90 percent of the fatal work injuries involved workers in private industry while 10 percent of the fatal work injury cases involved government workers. Fatalities among government workers, including military personnel, were down 4 percent. Fatality rates remained unchanged for civilian government workers. While fatalities incurred by federal and local government workers decreased in 2008, fatalities among state government workers were at the highest level since 1998 – 115 fatal work injuries in 2008.

Among the key findings on occupational injuries and illnesses were:

- Approximately 3.5 million – 94.9 percent – of the 3.7 million nonfatal occupational injuries and illnesses were injuries, of which 2.5 million – 71.2 percent – occurred in service-providing industries, which employed 80.1 percent of the private industry workforce covered by this survey. The remaining 1.0 million injuries – 28.8 percent – occurred in goods-producing industries, which accounted for 19.9 percent of private industry employment in 2008.
- Workplace illnesses accounted for slightly more than 5 percent of the 3.7 million injury and illness cases. Private industry employers reported 18,900 fewer illness cases in 2008 – down to 187,400 cases compared to 206,300 in 2007. This resulted in a decline in the rate of workplace illnesses from 21.8 to 19.7 cases per 10,000 FTE workers.
- Slightly more than one-half of the 3.7 million private industry injury and illnesses cases reported nationally were of a more serious nature that involved days away from work, job transfer, or restriction. These occurred at a rate of 2.0 cases per 100 FTE workers, declining from 2.1 cases in 2007. The rate of cases involving days away from work fell from 1.2 to 1.1 cases per 100 workers, while the rate for cases resulting in job transfer or restriction remained unchanged at 0.9 cases in 2008. Other recordable cases – those not involving days away from work, job transfer, or restriction – accounted for the remaining injury and illness cases nationally and occurred at a lower rate in 2008 (1.9 cases per 100 workers) compared to 2007 (2.1 cases per 100 workers).
- Laborers and freight, stock, and material movers experienced the highest number of days-away-from-work injuries and illnesses in 2008, with 79,590 cases, substantially unchanged from 2007 levels. The median days away from work for this occupation increased by one day to eight days from 2007.
- Heavy and tractor-trailer truck drivers had 57,700 cases with days-away-from-work injuries and illnesses and required 17 median days away from work to recuperate, up from 15 days in 2007. While the number of cases did not increase significantly from 2007, the rate per 10,000 full time workers for heavy and tractor-trailer truck drivers increased 4 percent from 2007.
- Carpenters (for whom the number of days-away-from-work cases decreased by 24 percent from 2007 levels) had fewer than 20,000 injuries and illnesses for the first time since 2003. They had 18,160 cases with days-away-from-work injuries and illnesses.

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Health Administration (OSHA) and is referred to in a letter of interpretation issued in August 2009 on "Whether use of high-visibility warning garments by construction workers in highway work zones is required," which states:

"Road and construction traffic poses an obvious and well-recognized hazard to highway/road construction work zone employees. OSHA standards require such employees to wear high visibility garments in two specific circumstances: when they work as flaggers and when they are exposed to public vehicular traffic in the vicinity of excavations. However, other construction workers in highway/road construction work zones are also exposed to the danger of being struck by the vehicles operating near them; for such workers, section 5(a)(1) of the OSH Act, 29 U.S.C. §654(a)(1), also known as the General Duty Clause, requires similar protection.

"In the preamble to the Worker Visibility Rule (Volume 71 of the Federal Register, page 67792), the FHWA (Federal Highway Administration) stated: High visibility is one of the most prominent needs for workers who must perform tasks near moving vehicles or equipment. The need to be seen by those who drive or operate vehicles or equipment is recognized as a critical issue for worker safety. The sooner a worker in or near the path of travel is seen, the more time the operator has to avoid an accident. The FHWA recognized this fact and included language in the 2000 Edition of the Manual on Uniform Traffic Control Devices (MUTCD) to address this issue."

The FHWA's reasoning makes clear that all employees who are exposed to the hazards of working near road traffic need the protection provided by high-visibility apparel, says ADOSH. Typically, workers in a roadway work zone are exposed to that hazard most of the time. Accordingly, high-visibility apparel is required under the General Duty Clause to protect employees exposed to the danger of being struck by public and construction traffic while working in roadway construction work zones.

Pedestrian workers are at high risk of injury or death, particularly when working at times of low visibility such as early morning or evening hours ADOSH continues. Employees are required to wear high visibility apparel (i.e., Class 2) during all daylight hours of work near traffic zones however; darker hours will require a higher visibility factor (i.e., Class 3).

"High-visibility safety apparel" is defined by FHWA as any garment meeting the American National Standards Institute (ANSI) 107–2004 Class 2 or 3 standard:

Class 2 Apparel

- Required as a minimum for all workers within highway work zones.
- Provides superior visibility over Class 1 apparel for wearers by the additional coverage of the chest and back.
- Helps protect workers exposed either to traffic or to construction equipment within the work area.
- Typical use on lower speed, lower volume, and secondary road environments.

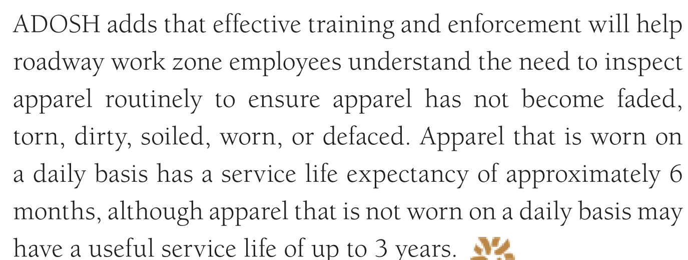
Class 3 Apparel, which is recommended.

- Offers the greatest visibility to make the wearer stand out against a variety of backgrounds.
- Allows workers to be easily seen through a full range of body motions at a minimum of _ mile (1,280 feet).
- Additional background and reflective material on the apparel increases visibility beyond what is provided by Performance Class 2 apparel.
- High-risk environments including, but not limited to, high speed roadways, highly congested areas, complex lane shifts, bad weather, and/or complex work zones.
- Class 2 apparel in combination with Class E apparel is considered Class 3 Ensemble. Class E apparel is either trousers or shorts that have retroreflective material encircling each leg.
- Enhances visibility of worker and helps differentiate a person from a traffic control device.

For further guidance in selecting high visibility apparel, consult the High Visibility in Work Zones Pocket Guide, available on line at http://www.atssa.com/galleries/rsti/Product6HighVisibilityinWorkZonespocketguide.pdf

ADOSH points out that worker visibility during dawn or dusk conditions may be enhanced by the use of fluorescent colored high-visibility apparel. Consider that the use of colors such as yellow-green for the worker apparel may help to differentiate the worker from the orange-colored work vehicles, signs, drums, etc.

ADOSH adds that effective training and enforcement will help roadway work zone employees understand the need to inspect apparel routinely to ensure apparel has not become faded, torn, dirty, soiled, worn, or defaced. Apparel that is worn on a daily basis has a service life expectancy of approximately 6 months, although apparel that is not worn on a daily basis may have a useful service life of up to 3 years.



Injury/illness rate continued from page 5

- Workers who were 20 to 24 years of age had a days-away-from-work rate of 119 cases per 10,000 full-time workers, which was a decrease of 11 percent from 2007.
- Men accounted for 64 percent of days-away-from-work cases, the same proportion as in 2007.

Key findings of occupational fatalities included:

- Fatal work injuries in the private construction sector in 2008 declined by 20 percent from the 2007 total.
- Fatal workplace falls, which had risen to a high in 2007, also declined by 20 percent in 2008.
- Workplace suicides were up 28 percent to a high of 251 cases in 2008, but workplace homicides declined 18 percent.
- Transportation incidents, which accounted for approximately two-fifths of all the workplace fatalities in 2008, fell 13 percent from the series low of 2,351 cases reported in 2007.
- About one-fourth of all occupational fatalities in 2008 involved workers in transportation and material moving occupations, though fatalities among these workers declined by 12 percent. Driver/sales workers and truck drivers, the largest occupation group in this sector, led the decline with 16 percent fewer fatal work injuries in 2008 than in 2007. Heavy and tractor-trailer truck driver fatalities were lower by 13 percent.

Economic factors likely played a role in the fatality decrease, according to the BLS. Average hours worked at the national level fell by one percent in 2008, and some industries that had historically accounted for a significant share of worker fatalities, such as construction, experienced larger declines in employment or hours worked.

In addition to the impact of declining employment, another factor that should be considered when reviewing these preliminary results, says the BLS, is how the economy may have impacted the government agencies that provide source documents used in the compilation of data. Budget constraints at some of these governmental agencies may have delayed the receipt and processing of the documents that are used to classify and code CFOI cases, says the BLS. The average net increase in cases as a result of updates over the past two years has been 153 cases, but the updated 2008 counts scheduled for release in April 2010 have the potential to be larger because of these delays, according to the BLS.

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an insurance company or the SCF. Similarly, self-insurance pools, such as the Arizona Municipal Risk Retention Pool, are also precluded from controlling treatment under A.R.S. § 23-961.01 (E), which states, in pertinent part, that "...no pool, employer within a pool, or agent of any pool or employer within a pool may require an employee to be treated by or directed to any specific medical provider subsequent to the employee's initial visit to treat an industrial injury or illness..."

Thus under Arizona law, an injured worker's ability to choose a treating physician is determined on the basis of the respective employment status (public versus private) involved and how the affected employer procures its workers' compensation coverage. Private, self-insured entities have the greatest amount of control over who will treat their workers for industrial injuries. In contrast, the employees of private companies, who obtain their workers' compensation coverage through an insurance company, SCF Arizona, or a self-insurance pool, along with all public employees, have a great advantage in their statutory, unrestricted right to choose a physician that they feel will best serve their personal interests.

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