

Workers' Compensation Appeals (State Courts only, others follow):

Arizona: *McCreary, Robert v. Industrial Commission of Arizona*, 835 P.2d 469, Arizona Court of Appeals 1992 [1 page, R-70];

California: *Kyles v. Workers' Compensation Appeals Board et al.*, No. A037375, 240 Cal. Rptr. 886, California Court of Appeals 1987 [9 pages, R-68]; *Menedez v. Continental Ins. Co.*, 515 So.2d 525, La. App. 1 Cir. 1987 [6 pages, R-69];

Kansas: *Armstrong, Dan H. v. City of Wichita*, No. 73038, 907 P.2d 923, Kansas Court of Appeals [9 pages, R-185];

Nevada: *Harvey's Wagon Wheel, Inc. dba Harvey's Resort Hotel v. Joan Amann, et al.*, No. 25155, order dated 25 January 1995, Nevada Supreme Court [4 pages, R-93], in an order dismissing the casino's appeal of a district court ruling that reversed the decision of an appeals officer in favor of a group of 23 claimants. The Supreme Court agreed with the lower court's finding that the officer had "overlooked substantial evidence offered by the [23] claimants that clearly supported a causal relation between their work place injuries [due to pesticide exposure] and their continuing disabilities."

New Hampshire: *Appeal of Denise Kehoe* (NH Dept. of Labor Compensation Appeals Board), No. 92-723, Supreme Court of New Hampshire 1994, 648 A.2d 472, which found that "MCS Syndrome" due to workplace exposure is an occupational disease compensable under NH's workers' compensation statute and remanded to the Compensation Appeals Board "for a determination of whether the claimant suffers from MCS and, if she does, whether the workplace caused or contributed to the disease" [3 pages, R-71, see also]; (2nd) *Appeal of Denise Kohoe* (NH Dept. of Labor Compensation Appeals Board), No. 95-316, Supreme Court of New Hampshire 13 November 1996, in which the Court again reversed the Compensation Appeals Board, finding both that the claimant had MCS (legal causation) and that "her work environment probably contributed to or aggravated her MCS" (medical causation) [5 pages, R-127];

Oregon: *Robinson v. Saif Corp.*, 69 Or. App. 534; petition for review denied by 298 Ore. 238, 691 P.2d 482 [5 pages, R-67]; *Saif Corporation and General Tree v. Thomas F. Scott*, 824 P.2d 1188, Ore.App. 1992 [6 pages, R-89];

South Carolina: *Grayson v. Gulf Oil Co.*, 357 S.E.2d 479, S.C. App. 1987 [6 pages, R-88];

West Virginia: *Arlene White v. Randolph County Board of Education*, No. 93-11878, 18 November 1994 decision of Administrative Law Judge Marshall Riley, Workers' Compensation Office of Judges, reversing denial of MCS claim for temporary total disability and medical payments by Workers' Compensation Division [7p, R-131]; *Julie Likens v. Randolph County Board of Education*, No. 93-14740, 4 April 1995 decision of Chief Administrative Law Judge Robert J. Smith, Workers' Compensation Office of Judges, reversing denial of MCS claim for temporary total and medical disability by Workers' Compensation Division [8p, R-132]; and *Barbara H. Trimboli v. Randolph County Board of Education*, No. 92-65342-OD, 10 June 1996 decision of Administrative Law Judge Terry Ridenour, Workers' Compensation Office of Judges, reversing denial of MCS claim for temporary total disability and medical payments by Workers' Compensation Division [5 pages, R-133].

RECOGNITION OF MCS IN 14 WORKERS' COMPENSATION BOARD DECISIONS

In decisions affirming MCS illness (by this or some other name) as a work-related injury or illness in:

Alaska: *Hoyt, Virginia v. Safeway Stores, Inc.*, Case 9203051, Decision 95-0125, Alaska

Workers' Compensation Board 1995 [21 pages, R-73].

Connecticut: *Sinnamon v. State of Connecticut, Dept. of Mental Health*, 1 October 1993 Decision of Nancy A. Brouillet, Compensation Commissioner, Acting for the First District, Conn. Workers' Compensation Commission. [10 pages, R-106]. The commissioner, citing testimony from Dr. Mark Cullen, among others, found "the great weight of medical evidence supports the diagnosis of MCS syndrome causally related to the Claimant's exposure while in the course of her employment" in state office buildings with poor indoor air quality. She ordered payment of temporary permanent disability benefits as well as payment "for all reasonable and necessary medical treatment of the Claimant's MCS syndrome."; *O'Donnell v. State of Connecticut, Judicial Department*, 22 May 1996 Decision of Robert Smith Tracy, Compensation Commissioner, Fourth District, Conn. Workers' Compensation Commission. [5 pages, including cover letter from plaintiff's attorney, R-107]. The commissioner recognized MCS "caused by numerous exposures to pesticides at work . . . and exacerbated by repeated exposure to other odors and irritants at work" in a Juvenile Court building. Because "this claimant has been given special accommodations since March 1992 when she was granted an isolated office and the stoppage of spraying of pesticides" that allowed her to continue working full-time, no monetary benefits were awarded.

Delaware: *Elizanne Shackle v. State of Delaware*, Hearing No. 967713, Delaware Industrial Accident Board in and for New Castle County, December 1993 [21 pages, R-142] awarding total temporary disability benefits and "one attorney's fee" based on the IAB's finding that the claimant's work exposure (in a state correctional facility built by prison labor) had "caused her present respiratory symptoms" and that this "has sensitized her to other odors."

Maryland: *Kinnear v. Board of Education Baltimore County*, No. B240480, Md. Workers' Compensation Commission, 28 June 1994 [1 page, R-75].

Massachusetts: *Sutherland, Karen v. Home Comfort Systems by Reidy and Fidelity & Casualty Insurance of New York*, Case No. 023589-91, 8 February 1995 decision of Mass. Department of Industrial Accidents [21 pages, R-74]; *Steven Martineau v. Fireman's Fund Insurance Co.*, Case No. 9682387, 15 May 1990 decision of Administrative Judge James McGuinness, Jr., Mass. Industrial Accident Board, ordering that the employer pay for disability benefits as well as "all costs, including transportation, lodging and meals, incurred or to be incurred in the course of seeking and obtaining reasonable medical and related care . . . including treatment rendered by and at the Center for Environmental Medicine." [18 pages, R-125]; *Elaine Skeats v. Brigham & Women's Hospital*, Case No. 02698693, 24 October 1996, decision of Administrative Judge James McGuinness, Jr., Mass. Industrial Accident Board, ordering that the employee "compensate the employee for expenses incurred in the course of satisfying the historic and prospective prescriptions of Doctors . . . prompted by her industrial injury and relative to: intravenous therapy, vitamin and nutritional supplements, message therapy, air conditioning, air purification, air filtration, masking, water filtration, allergy bedding, laboratory testing and mileage travelled." [14 pages, R-126].

New Mexico: *Elliott, Erica v. Lovelace Health Systems and Cigna Associates Inc.*, No. 93-17355, 8 November 1994, decision of Rosa Valencia, Workers' Compensation Judge, finding that MCS was triggered by glutaraldehyde and Sick Building Syndrome for which employer had been given timely notice. Also supported

Elliott's refusal to return to work in the buildings that made her sick buildings as "reasonable under the circumstances." Decision granted 3 months of temporary total disability pay followed by permanent partial disability for "500 weeks or until further order of the Court" [15 pages, R-113].

New York: *Crook v. Camillus Central School District #1*, No. W998009, 11 May 1990, decision of Barbara Patton, Chairwoman, NY State Workers' Compensation Board specifies "modify accident, notice and causal relationship to multiple chemical sensitivity" and awarded continuing benefits of \$143.70 per week [1 page, R-108].

Ohio: *Saks v. Chagrin Vly. Exterminating Co Inc.*, No. 97-310968, 18 September 1997 [2 pages, R-151], decision of District Hearing Officer Arthur Shantz, recognizing claim of chemical sensitivity; and *Kelvin v. Hewitt Soap Company*, No. 95-599131, 5 June 1996 [2 pages, R-152], decision of District Hearing Officer Steven Ward, recognizing claim of multiple chemical sensitivity as "occupational disease" contracted "in the course of and arising out of employment."

Washington: *Karen B. McDonnell v. Gordon Thomas Honeywell*, No. 95-5670, 22 October 1996 decision of Judge Stewart, WA State Board of Industrial Appeals, recognizing "toxic encephalopathy" as an acceptable diagnosis for MCS-induced permanent partial disability [2 p, R-118].

THE CAP ON MEDICARE THERAPY SERVICES MUST BE REMOVED

HON. ELTON GALLEGLY

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, October 20, 1998

Mr. GALLEGLY. Mr. Speaker, It has come to my attention that a pending change to Medicare policy enacted as part of the 1997 Balanced Budget Act will curtail access to needed outpatient therapy services for persons with severe disabilities and chronic health conditions. Effective January 1, 1999, this change limits payments for Medicare outpatient occupational therapy and physical therapy/speech-language pathology services (combined) to \$1,500 per beneficiary per year. This is an arbitrary limit that will cause thousands of Medicare beneficiaries with disabilities to forfeit necessary care in excess of the \$1,500 level, force them to switch health care providers when the \$1,500 cap is reached, or require them to struggle to pay for continuing services out-of-pocket. Individuals recovering from stroke, who have Alzheimer's Disease, or who have advanced multiple sclerosis are among the Medicare beneficiaries that often need therapy services beyond that available under the \$1,500 cap. It is these individuals and their families who will be hurt by this pending provision.

I know that major national consumer, professional, and provider organizations are calling for the repeal of this provision or, at a minimum, for a delay in its implementation. For the past six months, these groups have explained that such limits on rehabilitation services are necessary, are not grounded in rational policy, and will carry harmful consequences for Medicare beneficiaries. Despite much discussion, it appears that this Congress will conclude its work without addressing the \$1,500 Medicare cap issue.

I share the concern that many Medicare beneficiaries are at risk of losing access to

need outpatient therapy services after January 1, 1999. I urge my colleagues to investigate the consequences of this pending change in Medicare payment and remedy the situation before it begins to cause serious harm to beneficiaries with disabilities and chronic health conditions and their families.

MISPRINT ON THE STATEMENT OF
MANAGERS ON S. 1260

HON. JOHN D. DINGELL

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

Tuesday, October 20, 1998

Mr. DINGELL. Mr. Speaker, as Ranking Member of the Committee on Commerce and one of the conferees appointed on behalf of the House (September 16, 1998, CONGRESSIONAL RECORD at H7888), I rise to bring to the attention of the House a matter involving the conference report on S. 1260, the Securities Litigation Uniform Standards Act of 1998, and to correct the record.

The circumstances surrounding the publication—first of an incomplete conference report, and then of a conference report appending extraneous material—may be just another mix-up by the gang that couldn't shoot straight. On the other hand, worse.

To wit, the joint explanatory statement of the committee of conference on S. 1260, both as printed by the Government Printing Office (GPO) in Report No. 105-803 and as it appeared in the CONGRESSIONAL RECORD for Friday, October 9, 1998 at H10270, was incomplete. The final page mysteriously disappeared. Curiously, this page contained important language regarding scienter, recklessness, and the pleading standard applied by the Second Circuit Court of Appeals, language essential to the conference agreement. Even more mysterious, the official papers filed in the Senate on October 9th were complete and did contain the final page.

In order to clarify this situation, a star print of the complete conference report has been ordered from GPO. Also, during House consideration on October 13th, Commerce Committee Chairman BLILEY asked unanimous consent to include in the RECORD "a complete copy of the conference report on S. 1260" and made the following remarks:

When the conference report was filed in the House, a page from the statement of managers was inadvertently omitted. That page was included in the copy filed in the Senate, reflecting the agreement of the managers. We are considering today the entire report and statement of managers as agreed to by conferees and inserted in the RECORD.

Therefore, the complete joint explanatory statement of the committee of conference begins on page H10774 of the CONGRESSIONAL RECORD for October 13, 1998 and concludes on page H10775 where the names of the House and Senate Managers appear. The unidentified material that follows the names of the Managers, although erroneously printed in the same typeface as the conference report, an error that has been corrected by reprinting the material in the appropriate typeface and identifying its source in the October 15, 1998 CONGRESSIONAL RECORD at H11021-22, is not part of the conference report's joint explanatory statement and does not represent the

views of the Managers. In point of fact, the phantom language directly contradicts the joint explanatory statement (the Statement of Managers).

In any event, it is the conference report itself, in particular the Statement of Managers, and not the dissenting views expressed by one or more Members, that reflects the agreement of both Senate and House conferees as to the bill's intended operation and consequences. The language of the Statement of Managers could not have been more clear and direct as to the bill's ratification of uniform pleading and liability standards:

It is the clear understanding of the Managers that Congress did not, in adopting the Reform Act, intend to alter the standards of liability under the Exchange Act . . . Additionally, it was the intent of Congress, as was expressly stated during the legislative debate on the Reform Act, and particularly during the debate on overriding the President's veto, that the Reform Act establish a heightened uniform Federal standard on pleading requirements based upon the pleading standard applied by the Second Circuit Court of Appeals.

The Statement of Managers on S. 1260 clarified confusion arising from the Statement of Managers on the 1995 Securities Litigation Reform Act. The 1995 Statement of Managers noted that the language of the pleading standard was "based in part on the pleading standard of the Second Circuit." However, the 1995 Statement of Managers also contained some murky language which, as the gentleman from Massachusetts, Mr. MARKEY, has correctly noted was slipped into a footnote by a staffer at the last minute without our knowledge or concurrence (October 13, 1998 CONGRESSIONAL RECORD at H 10782), to the effect that the conferees "chose not to include in the pleading standard certain language relating to motive, opportunity, and recklessness." Largely, as a result of this language, the President vetoed the 1995 Reform Act for fear that it might be construed to mean that Congress was adopting a pleading standard even higher than that of the Second Circuit. Congress overrode the President's veto. As is apparent from the post-veto debate in both the House and the Senate, Congress did so, not because Congress wanted a pleading standard higher than the Second Circuit's, but because the pleading standard adopted in the Reform Act was, in fact, the Second Circuit standard.

Nevertheless, uncertainty and confusion quickly emerged in various District Court cases, to the delight of those who sought to undermine what the majority of Congress had concluded the pleading standard should be, but to the grave disadvantage of investors. Because of this uncertainty, the Administration and the SEC insisted that Congress restate the applicable liability and pleading standards of the 1995 Reform Act in the legislative history of this bill. That restatement was necessary to the legislative history of this bill because the liability and pleading standards from the 1995 Reform Act will apply to the class actions that are covered by S. 1260. The White House wrote to Senators D'AMATO, GRAMM, and DODD on April 28, 1998 that the Administration would support enactment of S. 1260 only "so long as amendments designed to address the SEC's concern are added to the legislation and the appropriate legislative history and floor statements of legislative intent are included in the legislative record," noting that

"it is particularly important to the President that you be clear that the federal law to be applied includes recklessness as a basis for pleading and liability in securities fraud class actions." Only after the Managers clarified that the 1995 Reform Act had not altered the substantive liability standards that allow investors to recover for reckless misconduct and that the Reform Act had adopted the Second Circuit pleading standard did the SEC agree to support enactment of S. 1260. The SEC's letter of October 9, 1998 to Senators D'AMATO and SARBANES states:

We support this bill based on important assurances in the Statement of Managers that investors will be protected. . . . The strong statement in the Statement of Managers that neither this bill nor the Reform Act was intended to alter existing liability standards under the Securities Exchange Act of 1934 will provide important assurances for investors that the uniform national standards created by this bill continue to allow them to recover losses caused by reckless misconduct. The additional statement clarifying that the uniform pleading requirement in the Reform Act is the standard applied by the Second Circuit Court of Appeals will likewise benefit investors by helping to end confusion in the courts about the proper interpretation of that Act. Together, these statements will operate to assure that investors' rights will not be compromised in the pursuit of uniformity.

The Second Circuit standard allows plaintiffs to allege facts showing either (a) the defendant had a motive and opportunity to engage in the fraud, or (b) the defendant acted either recklessly or knowingly. Dissenters argue that Congress meant to eliminate allegations of motive, opportunity and recklessness. This is flat wrong. It is simply not logical or believable to argue that we adopted a pleading standard "based upon" the Second Circuit standard, but yet rejected allegations of motive, opportunity, and recklessness—core elements of that standard. Allegations of recklessness or motive and opportunity continue to suffice as a basis to plead fraud. This is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and honest securities markets.

TRANSFERRING THE OFFICE OF
MOTOR CARRIERS

HON. FRANK R. WOLF

OF VIRGINIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, October 20, 1998

Mr. WOLF. Mr. Speaker, I rise today to bring to the attention of the House an important development in the safety of our nation's highways: transferring the Office of Motor Carriers (OMC) from the Federal Highway Administration (FHWA) to the National Highway Traffic Safety Administration (NHTSA).

Mr. Speaker, as the members of the body know, the Office of Motor Carriers monitors an important component of our country's economy: the trucking industry. Not only does OMC monitor and enforce compliance with rules, regulations, and laws, it is expected to improve the safety of trucks that share the road with passenger vehicles.

After learning alarming statistics about truck safety violations and truck accident rates, the House transportation appropriations subcommittee included a provision in the FY 1999