

Surprising deterioration in comp outlook

Workers' compensation combined ratio jumped up nine points in 2009, rising from 101 in 2008 to 110 last year, reports the National Council on Compensation Insurance. The increase was the largest in nearly 25 years.

NCCI President and CEO Steve Klingel says uncertainties about the pace of economic recovery and the long-term impact of the new healthcare law, "leave the line in a precarious position." The group adds the deteriorating underwriting results, combined with record low interest rates, left the workers' compensation line at only slightly better than breakeven after investment income is considered.

On the bright side, NCCI reports that thanks to sharp declines in frequency of accidents and moderate increases in medical and indemnity payments, workers' compensation insurance prices continued to decline in 2009 in most jurisdictions, including North Carolina and South Carolina.

Effective April 1, 2010 employers in North Carolina saw a 9.6% drop in workers' compensation rates, while rates in South Carolina would decline 9.8% if the state approves NCCI's rate filing.

Claims frequency nationwide has been declining and the trend continued with a four percent decline nationwide in 2009, compared to declines of 3.4% in 2008 and three percent in 2007. NCCI's research indicates there are fewer accidents during a recession because inexperienced workers, who are more prone to injuries and accidents, are often the first to be terminated.

There is good news of sorts on the medical front also. Medical costs in four of the last six years increased "only" about five percent, compared to near double-digit increases in the late 1990s and early 2000s. Even then, medical costs now account for nearly 58% of total workers' compensation costs in most jurisdictions. Some observers note workers' compensation industry is turning into a healthcare-costs management industry.

The favorable trends are having a beneficial impact on the residual market as well. Residual market premiums dropped by nearly 30% in 2009 and are now about \$500 million. Premiums have dropped by two-thirds since 2004. Overall, the market share of the residual market pools serviced by NCCI for 2009 stayed steady at 6%, due to the drop in premiums in the voluntary market from the recession and loss/cost rate decreases.

It is all adding up to too much of a good thing, NCCI says. "The calendar year net written premium declined precipitously again in 2009, for both private carriers and the state funds," because of the recession and because of price decreases. All told, workers' compensation written premium has declined 23% over the last two years.

Given the current combined ratio and low investment yields, which do not come close to providing an adequate return on the industry's capital, conditions seem ripe for the beginning of a hard market in workers' compensation. "But the early signs are still faint," NCCI concludes.

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President's Note

A word to employers



Given the state of the economy, our recently held annual conference at Wrightsville Beach (March 24-26) could be considered a success because we had more registrants and more exhibitors than in 2009.

But yet again, the number of employer representatives was woefully low. Some of that was likely related to the recession but c'mon folks. It costs only \$350 a year to be a member of our association, and we devote part of your membership dues to lobbying services.

Almost every year our lobbyist Bob Kaylor beats back some ill-founded proposal in the General Assembly, and we are active also in building collaborations with business groups like the North Carolina Chamber. This year we are exploring the feasibility of a study of the state's workers' compensation system to understand what improvements would make the system better.

We very much need the support of additional employers if our voice is to be heard. An excellent venue for networking and learning about emerging forces in workers' compensation is our annual conference. Our 2011 conference is scheduled for March 23-25 at Wrightsville Beach. I hope to see you there.

With very best wishes,

Jay Norris, *president*

CASE LAW UPDATE

By Joe Austin



Medical Motions

In most cases, a ruling handed down via the Commission's newly implemented Expedited Medical Motions Procedure is not immediately appealable. In *Beradi v. Craven County Schools*, the employer appealed an order on an Expedited Medical Motion, which required the employer to authorize treatment within 10 days. The Court of Appeals held that the employer was not entitled to pursue an immediate appeal because the order was not a final ruling.

However, since the employer would almost certainly be required to pay for the treatment before the Commission issued any final ruling, and since the prospects of securing reimbursement for the disputed medical treatment are not favorable, a reversal on appeal would likely provide a hollow victory. As a result, it is incredibly important for employers to anticipate, prepare for and respond to expedited medical motions because in most cases, once the Commission orders that treatment be authorized, the employer has very little chance of any meaningful remedy.

Unauthorized Attendant Care

In *Boylan v. Verizon Wireless*, the Court of Appeals affirmed the Industrial Commission's determination that an employer was responsible for payment of attendant care services provided by family members, even though the request for payment was not submitted until years after the services began.

In reaching its decision, the Court determined that prior approval for the attendant care services was not required. As a result, the employer was required to pay for attendant care services, including payment to a daughter for 56 hours per week over the 8 years before the request for payment was submitted.

In light of this decision, employers would be well-advised to investigate claims where attendant care services may be needed, not only to ensure that such services are being provided by a competent vendor, but also to prevent the accrual of a claim for such services without the employer's knowledge.

Terminating Compensation

Employers must follow the Industrial Commission's procedures in order to stop payments of disability compensation. In *Fonville v. General Motors Corp.*, the employer terminated the employee's compensation for total disability without any Industrial Commission action, even though the employee had not returned to work.

Although the Commission subsequently determined that the employee was not still disabled, the Court of Appeals held that the employee was

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Joe Austin leads the workers' compensation practice group at Young Moore and Henderson in Raleigh. A graduate of Davidson College, Joe received his law degree from Wake Forest University.

Healthcare reform's impact unclear on comp

Given that healthcare costs account for nearly 50% of total workers' compensation costs in most jurisdictions, it follows that the impact of wholesale changes in healthcare would also be felt in workers' compensation. But it is too early to say what that impact will be, according to the National Council on Compensation Insurance and other think tanks.

The NCCI does anticipate direct effects from changes to federal black lung benefit entitlement provisions, enacted as part of healthcare reform legislation. Recent changes make it easier to get federal black lung benefit claims filed and approved and will increase the benefits payable.

"These provisions will also increase future insurance premium costs (prospective costs) and will give rise to a significant increase in liabilities for claims from prior periods of time (retroactive costs) for which premiums did not reflect the new and higher costs required by these changes. NCCI is analyzing the prospective cost impact by state in consideration of upcoming rate filings," the group says.

But beyond these specifics, the crystal ball is hazy. "The ultimate impacts depend on behavioral changes and actions by claimants, attorneys, healthcare providers, insurers, and regulators," NCCI says. Widely anticipated changes in Medicare payments to providers are one illustration why observers are unsure how it will all play out.

NCCI notes that if the Centers for Medicare & Medicaid Services reduces the payments, there may be a ripple effect in states that "utilize Medicare as a basis for the reimbursements in their state workers' compensation fee schedules. This may affect both Physician Fee Schedules and Hospital Fee Schedules (Inpatient, Outpatient, and Ambulatory Surgical Centers)."

But, as NCCI points out, the magnitude and extent of the impacts on state workers' compensation costs will depend on how and when the federal government makes modifications to Medicare payments, and how states adopt the revised Medicare payment formula for their workers' compensation fee schedules. In other words: too many unknowns.

One popular area for speculation is the potential impact of increased healthcare coverage. Some observers are convinced workers without health insurance or with non-work-related preexisting conditions are exploiting workers' compensation benefits. "Since the Health Care Bill expands the number of people covered and requires coverage for preexisting conditions, there may be a decline in workers' compensation funding of treatments for preexisting non-work-related conditions," according to the NCCI.

Such musings bring a sharp rejoinder from Robert Reville, a labor economist and researcher at Rand known for his research in workers' compensation. "Whether healthcare coverage encourages or discourages comp claims is something comp observers talk a lot about, but don't have much evidence to go on," he told *Business Insurance*.

"You need to look for critical mass (of evidence) and this is definitely not a literature (or subject) with critical mass," he says.

Joseph Paduda, principal, Health Strategy Associates, LLC and writer of the blog *Managed Care Matters*, says workers' compensation will benefit from improvements in diagnosis and clinical care spurred by the stimulus bill, specifically by funding for electronic health records.

"Providers will all have access to the same amount of information instantly," he said, in a story by *Insurance Journal*.

The stimulus bill also calls for an estimated \$1.3 billion investment in comparative effectiveness research; i.e. how effective is one procedure versus another in restoring functionality or improving quality of life.

"In my view this is a strong positive for workers' comp. A lot of medicine is more of an art than a science, so adding more science to medicine will dramatically improve outcomes and potentially reduce costs," Paduda says.

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coming up

October 13–15, 2010

15th Annual North Carolina Workers' Compensation Educational Conference.

Raleigh Convention Center, Raleigh.

October 17–20, 2010

34th Annual Educational Conference on Workers' Compensation. Sponsored by the South Carolina Workers'

Compensation Education Association.

Embassy Suites at Kingston Plantation, Myrtle Beach, SC.

March 23-15, 2011

North Carolina Association of Self-Insurers Annual Meeting
& Educational Conference.

Holiday Inn Resort, Wrightsville, Beach.

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The employers' voice in workers' comp

OSHA makes workplace injury data available to the public

Employers should be aware that the Occupational Safety and Health Administration is making available to the public a searchable online database which tracks employer-specific or industry-specific injury and illness data. The workplace injury and illness data is available at:

[WWW.OSHA.GOV/PLS/ODI/ESTABLISHMENT _ SEARCH.HTML](http://WWW.OSHA.GOV/PLS/ODI/ESTABLISHMENT_SEARCH.HTML) as well as WWW.DATA.GOV.

“Making injury and illness information available to the public is part of OSHA’s response to the administration’s commitment to make government more transparent to the American people,” said David Michaels, Assistant Secretary of Labor for OSHA. “This effort will improve the public’s accessibility to workplace safety and health data and ensure the Agency can function more effectively for American workers.”

Information available at the DATA.GOV and WWW.OSHA.GOV websites includes an establishment’s name, address, industry, associated Total Case Rate (TCR), Days Away, Restricted, Transfer (DART) case rate, and the Days Away From Work (DAFWII) case rate. The data is specific to the establishments that provided OSHA with valid data through the 2008 data collection (collection of CY 2007 data). This database does not contain rates calculated by OSHA for establishments that submitted suspect or unreliable data.

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entitled to compensation until the Commission filed its decision, since the employer had no legal right to cease paying compensation until the decision was filed.

Establishing Disability

In order to prove disability and establish the right to receive compensation, an employee is required to pursue not only those jobs that might be within his past experience, but also other lines of work the employee is capable of performing.

In *Barrett v. All Payment Services*, the Court of Appeals held that while the employee had established that he was no longer capable of earning wages as a stuntman, he had failed to establish disability because there was no evidence he had sought employment in other fields. This ruling should help to bolster the defense of claims for compensation where the employee has not put forth a diligent effort to find other work.