NC Workers' Comp NEWS

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NC reviews comp rules

The NC Industrial Commission is seeking public comment as it reviews its entire rules and prepares to submit them for approval by the state Rules Review Commission. The rules commission can reject rules it deems vague or ambiguous or lacking statutory authority.

This is the first time in recent memory, if not the first-time ever, the Industrial Commission has opened its entire rules to public comment. The commission is required to do so under last year's reform legislation which compels it to follow the Administrative Procedures Act, and, like other state agencies, give the public a chance to respond to a proposed rule(s).

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"This is a golden opportunity for employers to suggest improvements to the system. This may be our best opportunity for years to come," says Larry Baker, an attorney at Cranfill, Sumner & Hartzog, and head of the NC Association of Defense Attorneys' workers' compensation section. The group commented on the proposed rules at a recent public hearing and has put its concerns and suggestions in a memo to the commission.

"We have pointed out to the Industrial Commission that several of its proposed rules might not pass muster with the Rules Review Commission because there is no statutory authority for them. In addition, several of the proposed rules are vague or ambiguous," Mr. Baker added.

For instance, he notes, there is no statutory authority for the proposed rule which establishes an informal telephonic procedure for reinstatement of benefits. The defense attorneys also contend there is no statutory authority to charge all deposition fees against the employer, nor for the proposed rule which sets a 10% penalty for failure to make payment to an expert witness within 30 days.

The group also takes issue with several proposed rules pertaining to rehabilitation. It says there is no statutory authority for defining "Vocational Rehabilitation" to require the goal be to "substantially increase the employee's wage earning capacity." The definition is vague and ambiguous. The proposed rule is also unnecessary, redundant, and repeats the content of a law in violation of the Administrative Procedures Act.

Also, there is no statutory authority for the proposed definition of "suitable employment" for claims arising before June 24, 2011. In addition, the defense attorneys question the rule regarding rehab professionals' qualifications.

"As written, this rule appears to require both that the rehabilitation professional possess one of the professional certifications listed and have prior employment experience with the North Carolina Department of Health and Human Services as a vocational rehabilitation provider. It would not make sense for qualified medical rehabilitation professionals to have prior experience as vocational rehabilitation professionals for the State," the group says.

All parties have until September 14, 2012 to submit comments to the Industrial Commission. The agency may modify its proposed rules before submitting them for review by the Rules Review Commission. The Industrial Commission is required to have its rules in place by January 1, 2013.

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President's Note

New rules of the game

In this issue of our newsletter we highlight two developments that will likely have a broad impact on workers' compensation in North Carolina. We report on the Industrial Commission's plans to submit its rules for approval by the state Rules Review Commission, and we highlight NCCI's new methodology for computing the experience modification factor. The mod factor largely determines what employers pay for workers' compensation insurance.

It will probably occur to many readers that last year's reform legislation was an even bigger deal than it seemed at the time. Every rule by the commission now must satisfy an objective third party that it is clear and unambiguous and legally sound. This is a most opportune time for employers and others to speak up as they may not have such a chance again to amend or influence the system.

The impact of NCCI's revised methodology for determining the experience modification factor will also ripple through the system for quite some time. This is the group's first revision in twenty years. Ostensibly it affects only employers who purchase commercial insurance but, sooner or later, self-insured entities will feel the impact too.

We are pleased to draw your attention to two emerging developments in workers' compensation. We will be talking about them a great deal. .

With very best wishes,

Jay Norris

CASE LAW UPDATE

By Joe Austin

Permanent Total Disability and Death Benefits

Under the Workers' Compensation Act, an employer is liable for payment of death benefits when an employee dies as a result of a compensable injury or occupational disease, provided that the employee's death occurs within six years of the date of injury or within two years of the final determination of disability, whichever is later. However, if the Industrial Commission has not made a final determination of disability, the statute of limitations never begins to run. This nuance in the law led to an interesting series of developments in a recent case.

In *Pait v. Southeastern General Hospital*, the employee was exposed to hazardous fumes in 1994 and developed a respiratory condition which prevented her from working in any capacity for a number of years. In 2006, the employer requested a hearing, seeking to have the employee declared permanently and totally disabled. In turn, the employee sought sanctions on the grounds that the employer did not have a reasonable basis to request a hearing, arguing that the employer had requested the hearing in an effort to prevent a future claim for payment of death benefits.

The employee's treating physician testified that he was not aware of anything that could be done to improve the employee's condition, but acknowledged that new drugs that could improve the employee's condition might be developed in the future. Based on that testimony, the Commission ruled that the employee had not reached maximum medical improvement and therefore, could not be found to be permanently and totally disabled.

On appeal, the Court of Appeals ruled that the Commission was not entitled to rely on speculative testimony about new drugs that might be developed as a basis for concluding that the employee had not reached maximum medical improvement. As for the issue of sanctions, the Court ruled that it was not improper for the employer to request a hearing since any party to a workers' compensation claim is entitled to request a hearing to determine the extent of permanent disability.

Thus, in order to ensure that the statute of limitations for a death claim does begin to run in claims in which the employee is likely to remain totally disabled for a lifetime, it may be advisable for the employer to either (a) prepare a form agreement stipulating permanent and total disability or (b) request a hearing to have the Commission make a final determination of disability.

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.

Broad concerns over painkillers

At least half a dozen well-known entities have noted problems or suggested solutions in recent months regarding widespread use of powerful painkillers, which kill nearly 15,000 people in the U.S. each year.

The Food and Drug Administration announced in July it will require manufacturers of opioid analgesics to make education programs available to prescribers based on an FDA Blueprint. It is expected that companies will meet this obligation by providing educational grants to continuing education providers, such as hospitals, who will develop and deliver the training to prescribing physicians.

The drug manufacturers will also be required to make available FDA-approved patient education materials on the safe use of these drugs, and to monitor and evaluate these initiatives to see if they are working. The training sessions are slated to being in March 2013. The FDA said it may require additional elements.

As **American Medical News** reported, the FDA hopes to achieve five key outcomes with the program.

- Understand how to assess patients for treatment with extended-release and long-acting opioids.
- Be familiar with how to initiate therapy, modify dose and discontinue use of the drugs.
- Be knowledgeable about managing ongoing therapy with the medications.
- Know how to counsel patients and caregivers about the safe use of the drugs, including proper storage and disposal.
- Be familiar with general and product-specific drug information.

Separately, in July a group of doctors and public health officials urged the FDA to curtail the overuse and abuse of prescription painkillers by changing labeling directions on how and when physicians should prescribe them. Narcotic painkillers are the most widely prescribed class of drugs in this country.

According to the Centers for Disease Control and Prevention, deaths from prescription painkiller overdoses increased from 4,000 in 1999 to nearly 15,000 in 2008. About 12 million people in the U.S. report taking prescription painkillers for non-medical reasons, and nearly 500,000 emergency department visits a year are attributed to these drugs.

Several groups have voiced alarm over their growing use in workers' compensation. The National Conference of Insurance Legislators is looking for ways to address the problem, including screening injured workers for prior drug abuse, requiring disclosures outlining the risks of opioids, and utilizing prescription monitoring programs.

Earlier in the summer, in testimony before NCOIL's workers' compensation committee the American Insurance Association noted the staggering growth of opioids in workers' compensation. A recent study by NCCI found the percentage of medical claims receiving narcotics within one year after injury increased from 8% in 2001 to 13% in 2008.

"Initial narcotic use is indicative of future use," the group says. Most troubling, insurers have found workers who received high doses of opioid painkillers to treat injuries like back strain stayed out of work three times longer than those with similar injuries who took lower dose, the **New York Times** reported recently.

The newspaper noted use of narcotics for workplace injuries is drawing scrutiny because there is little evidence they provide long-term benefits. The **Times** cited a study by Accident Fund Holdings, an insurer that operates in 18 states, which found when medical care and disability payments are combined, the cost of a workplace injury is nine times higher when a strong narcotic like OxyContin is used than when a narcotic is not used.

Specifically, the insurer found the cost of a typical workplace injury increased from about $13,000 to $39,000 when a worker was prescribed a short-acting painkiller like Percocet. The cost jumped to $117,000 when a stronger longer-acting opioid like OxyContin was prescribed.

The Workers' Compensation Research Institute has also sounded the alarm over use of narcotics, and poor follow-up by prescribing physicians. .WCRI notes medical treatment guidelines recommend that patients who receive ongoing narcotics prescriptions be actively monitored by the physician using urine tests and given psychological evaluations.

"Few longer-term users of narcotics received the recommended services for monitoring, contrary to medical guideline recommendations," WCRI concluded, based on its study of 17 states.

How should workers' compensation managers handle this complex problem? **Business Insurance** offers some suggestions in its white paper on *Opioid Abuse & Workers Comp*:

- Monitor claims and intervene when inappropriate use is detected
- Develop and adhere to a formulary approach that triggers red flags when opioids are prescribed
- Conduct physician peer review, which can be useful in addressing individual claims and in educating physicians
- Implement screening and drug testing.

coming up

October 9–12, 2012
17th Annual North Carolina Workers' Compensation Educational Conference. Raleigh Convention Center.

March 20–22, 2013
NC Association of Self-Insurers' Annual Conference. Holiday Inn Resort, Wrightsville Beach.

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NCASI
NORTH CAROLINA
Association of Self-Insurers
The employers' voice in workers' comp

NCCI

New rating plan in January

Employers with poor loss histories would pay more for comp coverage under NCCI's revised experience rating plan, while employers with above-average experience will benefit from the change next January.

The revision could have a "material" impact on individual employers' premiums, Pamela F. Ferrandino, casualty practice leader, placement for Willis North America Inc. in New York, told **Business Insurance**.

"What we will see this do is really reward companies that have worked hard to improve and maintain their loss profile," Ms. Ferrandino said. "Those risks that really have better-than-average experience benefit from being better than average," she added.

Last year NCCI completed a comprehensive review of its Experience Rating Plan and, consequently, proposed an increase to the primary/excess split point from the current value. The split point is the value at which a claim is split in the experience rating formula between primary and excess loss amounts, the group explains

"The last split point update occurred two decades ago, and since that time, the average cost of a claim has tripled. Because of this, the portion of each claim that flows into the experience rating formula at full value (primary loss amount) is much smaller than what it used to be 20 years ago," it adds.

NCCI helps 38 states set their workers' compensation rates. The changes to the experience modification factor would become effective with Jan. 1, 2013, policy purchases or renewals. Every NCCI state has approved the split-point adjustment, Business Insurance reports.

NCCI says the change will occur over three years. In Year1, the split point will increase from the current $5,000 to $10,000, moving up to $13,500 the following year, and to $15,000 in 2015, plus two years of inflation adjustment (rounded to the nearest $500).

"Under this split-rating method, actual primary losses are given full weight in the experience rating formula while actual excess losses only receive partial weight," the group explains. **Business Insurance** notes the biggest impact will be on employers experiencing high-frequency, low-severity workers' comp claims.

NCCI agrees. "It is a plan that is heavily leveraged on frequency of loss vs. severity of loss because those are the types of injuries that get controlled by employers through their safety programs," a NCCI official commented to the publication.