

## NC to readdress some reform rules

State lawmakers will have to clarify next year some provisions of the 2011 reform legislation at the request of members of the business community, defense attorneys, some employers, and medical and rehab professionals.

Larry Baker, chair of the workers' compensation section of the North Carolina Association of Defense Attorneys, says several groups have requested legislative review of over approximately 30 rules out of the nearly 150 rules proposed by the NC Industrial Commission.

The Commission has been reviewing its entire rules as directed by the reform legislation, which brought the Industrial Commission under the Administrative Procedures Act, and the objections came when it opened its procedures for public comment.

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The objections variously contend the Commission does not have statutory authority for the rules in question, or that the rules are ambiguous, or redundant. Baker also notes that some of the 150 or so rules were sent back to the Industrial Commission by the state Rules Review Commission. The Industrial Commission is currently working to address those rules. But a number of rules must be addressed by the General Assembly.

One point of contention is over what process should be followed regarding reinstatement of compensation to an injured worker. The Industrial Commission maintains a telephonic hearing is sufficient, while employers contend there should be an evidentiary hearing, Baker notes. He adds there is disagreement also over medical motions, motions practice, appointment of guardian ad litem, and over vocational rehab rules.

The existing rules will remain in effect until addressed by the General Assembly. At a public hearing convened by the Industrial Commission in August, defense lawyers also asked for a revision in how costs and fees are levied against employers. "We would assert that any of the fees related to hearings, depositions and mediations should be taxed against the parties jointly or based on the type of deposition that may be going on," said one of the lawyers representing the NC Association of Defense Attorneys.

Another area of concern raised by the insurance industry concerned how hospital fees are determined by the Industrial Commission. The Rules Review Commission rejected the rule proposed by the Industrial Commission and requested a better approach to setting these hospital fees. The Industrial Commission has asked for additional time to change the proposed rule.

Once the legislature begins its session, legislation will have to be introduced to address the rules for which legislative review has been sought. Under the Administrative Procedures Act, if no legislation is introduced within 30 legislative days, the rules will take effect. It is unknown what form such legislation might take, but would likely be contained in one bill.

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Back to the Future

It is dawning on more and more observers the final chapter has yet to be written in the 2011 workers' compensation reform



legislation. As we report on page 1 of this issue, several groups have asked for legislative review of rules that could have a material impact on how the far-reaching legislation plays out.

One sleeper issue may well be how the North Carolina Industrial Commission eventually determines hospital fees. Insurers did not like the proposed rules from the Commission and neither did the state Rules Review Commission, which sent them back to the Industrial Commission.

Given that medical costs account for nearly 50 % of total workers' compensation costs it matters a great deal on how North Carolina grapples with this issue. Outside of workers' compensation, insurers and providers and employers are collaborating on a host of new ways to pay for healthcare, including payment based on outcomes and not just for providing healthcare services. Will some of that innovative thinking inform the discussion when legislators take up the issue next year?

More to the point, will the coalition that pushed through reform legislation in 2011 hold in the second round also? There is plenty of potential for things to go awry here if employers take their eye off the ball.

With very best wishes

Jay Norris

CASE LAW UPDATE

By Joe Austin



**Disability benefits where employee holds multiple jobs**

Over the last few months, there has been a significant drop in the number of reported decisions from North Carolina's appellate courts. Fortunately, this provides the opportunity for an in-depth review of a recent decision from the Court of Appeals involving an employee who held two jobs prior to his injury.

**Legal Background**

It is clear that, except in unusual cases, an employee's average weekly wages ("AWW") are to be calculated based on his earnings from the employment in which he was injured. In addition, the Workers' Compensation Act provides that an employee should receive compensation at the rate of two-thirds of the difference between his AWW and what he is able to earn after the injury. However, application of both principles in the same case can lead to seemingly unfair results for employees who work more than one job.

**Illustration and Prior Decision**

To illustrate, assume that (1) an employee earns \$300.00 per week in his primary job and \$100.00 per week from a second job, and (2) is injured and cannot return to work in his primary job, but is able to continue earning \$100.00 per week in his second job. Were it not for the second job, the employee would be entitled to compensation at the rate of \$200.00 per week, but because of the income from that job, the employee would only be entitled to compensation at the rate of \$133.33 per week if the language of the Act were strictly applied.

While it may seem to be unfair that the employee would receive less in compensation than if he were only working one job at the time of the injury, the Supreme Court of North Carolina recognized in a 1966 decision that this is the result mandated by the language of the Act. In reaching its decision, the Court acknowledged that "[t]he employer and his carrier thus benefit from other wages plaintiff is able to earn, but escape liability for other wages he is no longer able to earn... Notwithstanding this argument may appeal to our sense of justice, any modification of G.S. § 97-2(5) must be made by the Legislature." However, in the 46 years since that case was decided, the General Assembly has not taken action to address this scenario.

**New Decision**

Even though the Court of Appeals is theoretically required to follow precedent from the Supreme Court, it recently ruled, in the case of *Tunell v. Resource Mfg/Prologistix*, that in this situation, the employer is not entitled to consider wages from the employee's second job in determining the employee's rate of compensation. In supporting its decision, the Court failed

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## Older workers are just as safe

The National Council on Compensation Insurance says there is growing evidence an aging workforce has a far less negative impact on workers' compensation claim costs than previously thought.

"The NCCI study on the aging workforce published in 2011 concluded that costs for workers in the 35-and-older-age cohorts tend to be quite similar, although higher than costs for workers in the under-age-35 cohorts. The higher costs are largely offset by higher premiums due to higher wages of older workers," the group reports.

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### 2012 Oregon Rankings

## NC improves ranking

North Carolina improved by two places on the widely observed 2012 Oregon Workers' Compensation Premium Rate Ranking. The state is now almost exactly in the middle of the rankings, which show comp rates are the highest in Alaska and lowest in North Dakota.

North Carolina has lost considerable ground since 2000, when only eight jurisdictions in the country had lower comp rates. By 2006, 14 jurisdictions had lower rates than North Carolina and by 2008, 29 jurisdictions had lower rates.

The state improved its ranking slightly in 2010, and then again in this year's ranking. The Oregon report is released every two years.

South Carolina moved up four places on this year's report. It was the state's first improvement in the rankings since 1998, when South Carolina had the lowest workers' compensation premium rates in the country. Even then, 34 states and the District of Columbia have lower rates than South Carolina, according to the 2012 Oregon Workers' Compensation Premium Rate Ranking.

Among neighboring states, rates are lowest in Virginia, followed by rates in Georgia, North Carolina, Tennessee, and South Carolina, which has the highest rates in the region.

This study provides further evidence of similarities between younger and older workers. The distribution of diagnoses is remarkably similar, and there is little difference by age in the share of permanent partial claims across a range of leading diagnoses. "We also found similar contributions to overall severity due to changes in mix, quantity, and price by age cohort.

Older workers have more costly injuries, but now those injuries are becoming more prominent for younger-aged workers," NCCI reports.

Duration, treatments per claim, benefits paid per day, and costs per treatment are all very similar for workers in the 35 and older-age cohorts and they are higher than for workers in the under-age-35 cohorts. Employers understand workers in their mid-thirties and older need special accommodation at work and are putting in measures to reduce stress on the job, reports the **Wall Street Journal**.

"For example, some companies have changed the configuration of work areas to reduce kneeling and twisting. Vulcan Materials Company has moved water tanks from the top of delivery trucks to the side to make them easier to fill and has reduced the weight of chutes used for concrete. Duke Energy Corporation offers a stretching program for workers before their shift begins, and Harley Davidson has trainers available with ice for aches and pains between shifts," the newspaper added.

Older workers are valuable because they are more skilled and also because they are less likely to job hop. "Besides, reducing strains on workers can cut medical-insurance and workers-compensation costs arising from injuries," the newspaper notes.

The rate of sprains, strains and similar injuries among workers aged 55 through 64 in U.S. private-sector industry has declined in recent years, falling to about 42 per 10,000 full-time workers in 2010 from 48 in 2006, according to government figures. The Bureau of Labor Statistics projects that 24% of the U.S. labor force or about 40 million people will be 55 or older in 2018, up from 18% in 2008.

# coming up

March 20–22, 2013

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort, Wrightsville Beach.

April 10–12, 2013

Members-Only Forum, SC Self-Insurers Association.

Litchfield Beach & Golf Resort

NC Workers' Comp News is produced quarterly by the North Carolina Association of Self-Insurers. To be added to our distribution list, please contact Moby Salahuddin, executive director, at [MSALAHUDDIN@SC.RR.COM](mailto:MSALAHUDDIN@SC.RR.COM)

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## Loss costs decline in North Carolina

The state insurance department has approved North Carolina Rate Bureau's loss costs filing which foresees an overall 0.5% decrease from loss costs approved in April 2011. The new filing is effective as of April 1, 2013.

By industry group, the changes are:

- Manufacturing 0.0% increase
- Contracting 1.4% decrease
- Office & Clerical 4.9% decrease
- Goods & Services 1.7% increase and
- Miscellaneous 0.9% decrease.

Within each industry group, the change will vary from the average by classification depending upon the volume and character of the particular classification experience, the rate bureau adds

The agency says one unknown is the impact of new and revised rules from the North Carolina Industrial Commission. "Once any new rules and regulations are finalized, we will review them to determine whether they impact loss costs and whether a separate filing to reflect any such impact is required," the rate bureau says.

## CASE LAW UPDATE

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to discuss how the Supreme Court had addressed this issue. The Court did provide some consolation for employers, indicating that its ruling might not apply if the employee's earnings from the second job increased after the injury took place.

### Conclusion

Given the current state of the economy, we are seeing more claims by employees who hold down more than one job. Unfortunately, employers' potential liability to such employees may have just increased as a result of the *Tunell* decision.