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Audit faults Commission for lax enforcement

A report from the state auditor says the North Carolina Industrial Commission is not doing all it can to assess penalties and collect fines from employers not carrying workers' compensation insurance.

The audit, which reviewed policies and procedures in place at the Commission for the period July 1, 2011 through June 30, 2012, reached three broad conclusions:

- The Commission does not have the complete, accurate, and reliable data necessary to proactively identify noncompliant businesses
- The Commission does not use available data to investigate potential noncompliance
- The Commission has not strictly enforced penalty assessments and collections on businesses that fail to comply with the Workers' Compensation Act. This means a loss of about \$2 million or as much as \$4.9 million, depending upon whether North Carolina achieves the same collection rate as Florida, Utah, Wisconsin, or South Carolina.

The industrial commission by and large agreed with the findings and said it has initiated improvements.

As regards its first finding, the audit said the Commission could potentially match data from two sources, the Division of Employment Security and the North Carolina Rate Bureau to identify noncompliant businesses. A match between the two data sources could help identify businesses in North Carolina that do not have workers' compensation coverage.

"However, significant differences in the data files prevent reliable data matching and identification of noncompliant businesses. During our audit the Commission started working with Employment Security and the Rate Bureau to obtain the necessary data; however, employees of

noncompliant businesses will remain at risk until data improvements are achieved," the auditor said.

Even when data is available, the Commission is lax about enforcement. "Specifically, the Commission does not follow up on workers' compensation insurance cancellations and lapses that the Rate Bureau reports to the Commission," the report says. It notes for fiscal 2012 the Rate Bureau reported 11,323 businesses either cancelled their coverage or let it lapse.

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"As a result, the Commission has not only failed to punish noncompliant businesses, but North Carolina schools may have been deprived of millions of dollars of needed funds," the report says.

It notes in fiscal 2011 the Commission assessed \$79,025 in penalties of which it collected \$59,925. In May 2012, the Commission changed its procedures and began assessing penalties as soon as a potential uninsured case was identified by its

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CASE LAW UPDATE

By Joe Austin

Notice

The Workers' Compensation Act provides that an employee is not entitled to recover compensation if the employee does not give written notice within 30 days, "unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby."

In the case of *Yingling v. Bank of America*, the employee had delivered refreshments to a meeting and was in the process of returning his car to his regular parking space when he collided with another vehicle and was injured. The employee called his supervisor when the accident occurred, and the supervisor came to the scene and helped the employee retrieve items from his vehicle. Although he did not immediately seek medical treatment, the employee did so later, and it does not appear that there was any doubt the employer was aware that the employee was treating for injuries sustained in the accident.

Nearly two years later, the employee filed a workers' compensation claim. The employer denied the claim on the grounds that the employee had not provided written notice within 30 days. The Commission awarded compensation, and on appeal, the employer argued that even though it was aware of the accident, it was prejudiced because the employee failed to give notice that he was pursuing a claim. The Court of Appeals rejected this argument, ruling that the language of the Act only requires the employer be given notice of the accident, not notice that the employee is actually seeking benefits. Thus, for any case in which it is unclear as to whether an injury might be covered under the Act, an employer should not wait for the employee to file a claim before initiating the process of investigating the claim.

Vocational Rehabilitation and Disability

It is settled law that payment of disability benefits documented with a Form 60 does not constitute an admission that an employee has been disabled: to the contrary, the employee must prove the existence and degree of any disability. In *Powe v. Centerpoint Human Services*, the employer initiated payment of compensation with a Form 60. Litigation ensued, and the employer took the position that the employee was not disabled. The Commission ordered the employer (a) to

pay compensation for total disability and (b) to provide vocational rehabilitation services to the employee. In

reaching its decision, the Commission seemingly assumed that the employee was disabled, and never squarely addressed the question of disability, even though the employer had clearly raised the issue. Reasoning that the issue of vocational rehabilitation would be moot if the employee were not disabled in the first place, the Court remanded the case back to Commission to reconsider both issues in light of the correct application of the burden of proof.

Exclusive Remedy

The Act provides the "exclusive remedy" for employees to recover from employers for injuries which arise out of the employment relationship. However, the exclusive remedy protections do not limit an employee to workers' compensation benefits for injuries which are attributable to intentional acts by the employer or which are beyond the scope of the Act.

The Court issued an opinion earlier this year which illustrates the value of this principle for employers. In *Shaw v. Goodyear Tire & Rubber Co.*, the employee filed a lawsuit against her former employer, alleging that (1) the employer had negligently handled the employee's complaints that a supervisor had been harassing her, and (2) she experienced emotional distress as a result of the employer's improper handling of those complaints. The case went to trial, and a jury awarded the employee \$450,000.00.

On appeal, the Court reasoned that because (a) the employee had not alleged intentional conduct on the part of the employer, and (b) emotional distress resulting from the negligent handling of the employee's complaints would constitute an "injury by accident" and therefore fall within the Act. As a result, the case should have never gone to trial, and the judgment was vacated.

Joe Austin is a senior attorney at Young Moore and Henderson in Raleigh. A graduate of Davidson College, he received his law degree from Wake Forest University.

President's Note

Speakers & topics for 2014

We have started planning next year's conference and are looking for topics and speakers for the three-day event. If you have specific ideas, please contact me or our executive director Moby Salahuddin.

As I have mentioned on earlier occasions, most of our presentations are between 45 minutes and an hour, although we do have 90-minute presentations also. I would add we are particularly interested in learning about any issues employers might have add in finding healthcare providers for injured workers, and if employers are seeing sharp increases in charges.



With some major provisions of the Affordable Care Act going into effect in 2014 we are likely to see massive changes in healthcare delivery systems throughout the state and indeed nationwide. It remains too early to gauge the impact on workers' compensation. We would love to hear first-hand reports from the field.

NCCI says things are looking up for workers' compensation. Written premium for private carriers is showing a second consecutive year of growth, continuing a turnaround from several years of declining premiums. Estimated premium increased to over \$35 billion in 2012—a more than 10% rate of growth.

The average indemnity cost per claim increased by just 2% in 2011—less than the change in the average weekly wage and less than the change in most years since the 1990s. Changes in medical costs in 2011 also showed favorable results due to the shift in the mix of claims (i.e., the increase in small lost-time claims). The medical average cost per lost time claim increased by almost 4% in 2011.

But combined ratios are still too high. "In 2011, for the third straight year, workers compensation held the distinction of having the highest combined ratio of all of the major commercial lines. Our preliminary analysis indicates that the combined ratio may come down slightly for 2012. However, we are not convinced that this will indicate a meaningful improvement in underlying results," NCCI says.

With very best wishes,

Jay Norris

Little impact seen because of aging workers

Employers need not worry older workers will raise their workers' compensation costs, according to an update from the National Council on Compensation Insurance. Injuries due to high-severity diagnoses have historically been more common for older workers, but those high-severity diagnoses are now becoming common in younger-age cohorts as well, the group reports. "There is growing evidence that an aging workforce has a far less negative impact on workers' compensation claim costs than might have been thought," NCCI says.

An NCCI study on the aging workforce published in 2011 concluded 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 bottom line is the distribution of diagnoses across age groups is remarkably similar, and there is little difference by age in the share of permanent partial claims across a range of leading diagnoses. "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," NCCI reports.

The group notes employers are aware of the value of older workers and have adopted safety and loss control programs to reduce injuries among them. NCCI also points to research which shows that although physical and mental performance deteriorates with age, the rate of deterioration is far less dramatic than many think. For instance, Yale economist Ray Fair calculates long distance runners lose only 27% of their capacity between ages 35 to 65; for sprinters, the loss is only 19% over 30 years, while chess players lose only 6% of their capacity between ages 35 and 65. "I am struck by how small the deterioration rates are. Given these numbers, societies may have been too pessimistic about losses from aging for individuals who stay healthy and fit," Dr. Fair says.

coming up

October 9–11, 2013

The 18th Annual Workers' Compensation Educational Conference.

Raleigh Convention Center.

October 20–23, 2013

The 37th Annual Educational Conference on Workers' Compensation

Myrtle Beach Resort & Spa at Grande Dunes.

March 26–28, 2014

NC Association of Self Insurers' Annual Conference

Holiday Inn Resort, Wrightsville Beach.

April 2–4, 2014

Members-Only Forum, SC Self-Insurers Association.

Litchfield Beach & Golf Resort.

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claims department. As a result of the operational change, assessed penalties increased to \$6.5 million (8,125% increase) in state fiscal year 2012.

"Nothing prevented the Commission from operating that way in the past," the auditor reported. However, the Commission has collected only 2% of the assessments. In contrast, Florida collected 31% of the \$40 million it assessed, Utah collected 40% of \$5.9 million, Wisconsin collected 48% of \$4.6 million, and South Carolina collected 75% of the \$2.8 million it assessed.

The Commission says it has stepped up enforcement, but notes a portion of the \$6.5 million mentioned in the audit is not final because of appeals by employers. The agency adds in many cases enforcement has been put on hold pending an employers' agreement to pay compensation due the injured worker. Under North Carolina statute, the Commission may suspend collection of penalties if the employer pays due compensation.

Road deaths increased in 2012

Road deaths claimed 34,080 lives in 2012, an increase of 5.3% over 2011 and the first year-to-year increase in traffic fatalities since 2005, according to the National Highway Traffic Safety Administration. Traffic fatalities had been declining in recent years since reaching a near-term high in 2005. Traffic deaths decreased by about 26% between 2005 and 2011, recording a 60-year low in 2011.

Not surprisingly, traffic accidents are a leading cause of high-severity injuries in workers' compensation. Moreover, they are pervasive; a study by NCCI published in December 2006 noted even the clerical classification has surprisingly high exposure to traffic accidents. Distracted driving continues to be a leading cause of accidents and near-accidents, and employers can play a big part in encouraging safe practices and procedures.