

WCRI study

Claimants who fear being fired less likely to return to work

Injured workers who fear being fired are less likely to return to work, reports the Workers Compensation Research Institute in its recent studies on worker outcomes in eight states, which included North Carolina.

The studies, *Predictors of Worker Outcomes*, found trust in the workplace to be one of the more important predictors that has not been examined before. Specifically:

- Workers who were strongly concerned about being fired after the injury experienced poorer return-to-work outcomes than workers without those concerns.
- One in five workers who were concerned about being fired reported that they were not working at the time of the interview. This was double the rate that was observed for workers without such concerns. Among workers who were not concerned about being fired, one in ten workers was not working at the time of the interview.
- Concerns about being fired were associated with a four-week increase in the average duration of disability.

The studies also identified workers with specific comorbid medical conditions (existing simultaneously with and usually independently of another medical condition) by asking whether the worker had received treatment for hypertension, diabetes, and heart problems. The medical condition may have been present at the time of the injury or may have manifested during the recovery period. Among those findings:

- Workers with hypertension (when compared with workers without hypertension) had a 3% higher rate of not working at the time of the interview predominantly due to injury.
- Workers with heart problems reported an 8% higher rate of not working at the time of interview predominantly due to injury and had disability duration that was four weeks longer.

- Workers with diabetes had a 4% higher rate of not working at the time of the interview predominantly due to injury than workers without diabetes.

The studies are based on telephone interviews with 3,200 injured workers in North Carolina, Indiana, Massachusetts, Michigan, Minnesota, Pennsylvania, Virginia, and Wisconsin. The studies interviewed workers who suffered a work place injury in 2010 and received workers' compensation income benefits. The surveys were conducted during February through June 2013—on average, about three years after these workers sustained their injuries.

“Better information about the predictors of poorer worker outcomes may allow payors and doctors to better target health care and return-to-work interventions to those most at risk,” said Dr. Richard Victor, WCRI’s executive director.

In addition to the factors discussed above, WCRI notes other predictors of outcomes are injury type and severity, the injured worker’s age, educational attainment, and even proficiency in English. Its recent study also provides a profile of North Carolina workers and workplace injuries. For instance:

- Twenty three percent of injured workers were age 55 or older
- Nearly 50% had no education beyond high school. Thirty five percent had high school diplomas and 17% did not graduate from high school
- Twenty five percent of injured workers reported smoking for 20 or more years

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CASE LAW UPDATE

By Joe Austin



As many of us know from experience, a suspension of compensation based on an employee's failure to cooperate with treatment or vocational rehabilitation is frequently a hollow victory, because the employer is required to reinstate compensation once the employee takes even nominal steps to cooperate. However, a May 6 opinion from the North Carolina Court of Appeals demonstrates one scenario in which the outcome is far better for the employer.

In *Johnson v. Southern Tire Sales and Service*, the employer initiated payment of compensation after the employee had been injured. The employee was unable to return to his former job as a mechanic, and a vocational consultant began working with him to help him find a different line of work. At the employer's request, the Commission ordered the employee to cooperate with vocational rehabilitation.

Still not satisfied the employee was putting forth a reasonable effort to cooperate, the employer sought to terminate compensation, arguing the employee (a) failed to comply with the order to cooperate, (b) was no longer disabled and (c) had constructively refused suitable employment. In 2000, a deputy commissioner ruled the employer was entitled to suspend compensation under G.S. § 97-25 because the employee had not cooperated with vocational rehabilitation, at which point the employer ceased paying compensation.

A series of appeals ensued, culminating with an opinion from the Supreme Court of North Carolina in 2004 which remanded the case to the Commission to deal with the issue of constructive refusal of suitable employment. Finally, in 2010, the Commission ruled the employee had constructively refused suitable employment, which justified suspension of compensation under G.S. § 97-32, in addition to the suspension under § 97-25 for failing to cooperate with vocational rehabilitation.

The following year, the employee sought reinstatement of vocational rehabilitation. The employer argued the employee was not entitled to vocational rehabilitation because (1) the employee had not demonstrated he was disabled, and (2) the statute of limitations precluded the employee from recovering additional compensation for disability.

Noting it had determined the employee was capable of performing some work in 2010, the Commission ruled the employee had not proven additional disability. In particular, the Commission was not persuaded the employee had made a reasonable effort to find work within his restrictions during the 10 years that had passed after the last payment of compensation in 2000, given the only action the employee had undertaken was a one-time meeting with a vocational consultant, to whom

the employee had been referred by his attorney, during the days leading up to the 2011 hearing.

Because the employee had not established additional disability, the Commission ruled he was not entitled to vocational rehabilitation. In addition, the Commission ruled the statute of limitations barred any claim to additional compensation for disability.

On appeal, the Court agreed an employee is not entitled to vocational rehabilitation unless the employee can establish disability.

With respect to the statute of limitations, the Act allows an employee two years from the last payment of compensation under a "final" award within which to request additional compensation, but the employee argued there had not been a final award because the effect of the prior rulings was to "suspend" compensation. Rejecting that argument, the Court held that unlike a suspension of compensation for merely failing to comply with the terms of an order of the Commission under § 97-25, a suspension of compensation for constructive refusal of suitable employment under § 97-32 causes the time frame for the statute of limitations to begin.

The rationale behind this logic is intuitive: when an employee is no longer entitled to compensation because he is able to return to work, compensation ceases because disability has ended. On the other hand, a suspension for failure to comply with an order is not premised on the restoration of the employee's capacity to earn wages.

Takeaways: If the only reason for terminating payment of compensation is failure to comply with an order, an employee can usually remedy that by taking steps to give the appearance of cooperation. However, a suspension of compensation for refusal of suitable employment is far more effective: it not only triggers the application of the statute of limitations on a claim for additional compensation, but also resolves the issue of wage-earning capacity.

As a result, it is far more difficult for an employee to overcome the effect of a suspension of compensation for refusal of suitable employment than a suspension for simply failing to cooperate with treatment or rehabilitation.

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

Healthcare reform & workers' comp

Probably the quickest way these days to get invited to be a speaker at any conference is to propose a presentation on the *Affordable Care Act and Workers' Compensation*. WCRI played it up at its March program, NCCI devoted three presentations to it at its May symposium, and it is on the agenda for the October comp conference in Raleigh.

Invariably, the speakers conclude it is too early to say what the impact will be. "Frankly, this could go either way. Indeed, healthcare reform may end up being both a plus and a minus for workers' comp carriers," writes Sam Friedman, insurance research leader with Deloitte's Center for Financial Services, in NCCI's *Workers Compensation 2014 Issues Report*.

NCCI is as well-positioned as any organization in the country to express an opinion and, to its credit, it has not ventured deep into speculation. Indeed, NCCI has not hesitated to splash cold water on theories the Affordable Care Act will have a favorable impact on workers' comp because injured workers will have less of an incentive to use comp benefits for non-work-related conditions.

NCCI chief actuary Kathy Antonello says it is the workers' comp system that is adept at pushing work-related injuries onto the public health system. "The long-standing provisions related to Medicare set asides are directly related to concerns of cost shifting from workers compensation to Medicare," she notes in the group's 2014 issues report.

It will probably take another couple of years before the dust settles and analysts can see clearly how healthcare reform is helping or harming the workers' comp system. In the meanwhile, the North Carolina Association of Self-Insurers is very interested in hearing from you if you are seeing evidence of changes in healthcare delivery.

Write to us. You will be invited to be a speaker at our conference and you would be performing a public service by giving us all a heads-up on changes taking place in North Carolina.



Increased concerns about compounded drugs

Compounded drugs account for less than 3% of prescribed medications in workers' compensation but their use is expanding rapidly and prices are skyrocketing, according to a report from Express Scripts, the largest pharmacy benefits manager in the country.

The company reports per-user-per-year costs rose 126% between 2012 and 2013, with the average cost of compounds per prescription around \$1,300. Analysts note compounding is growing rapidly in group health and workers' compensation as states have controlled other cost drivers, such as drug repackaging and physician dispensing.

"Even though the absolute percentage of users is small, the doubling in the percentage of injured workers obtaining medications that, on average, cost \$1,299.13 per prescription, will undoubtedly impact payers financially," Express Scripts says in its *Workers' Compensation 2013 Drug Trend* report.

Compounded medications, used primarily for pain management, are prepared and dispensed by compounding pharmacies, which are licensed by the board of pharmacy in the state in which they are located, with limited FDA oversight. "Compounded medications are not subject to the rigorous drug review process that all commercially available prescription drugs must undergo to demonstrate safety and effectiveness prior to FDA approval. Further, compounded medications generally do not have standardized dosages and duration for use, and the protocols for preparing each compound are not necessarily standardized," the company adds.

"For all of these reasons, compounded preparations are likely to have batch-to-batch variability, and their sterility and purity cannot be guaranteed. Yet because of the time, effort and expertise necessary for pharmacists to create compounded products, their costs are often much higher than those of standard medications," it notes.

One argument in favor of compounded analgesic drugs is they have the potential to offer pain relief when a commonly used drug does not work, or when a patient cannot tolerate its side effects. But Express Scripts reports that in at least 25% of cases in 2013, injured workers were prescribed compounded medications before they had even tried commonly used drugs.

The difference in price is striking. For instance, the average cost per prescription for compounded versions of diclofenac, a widely used anti-inflammatory drug, was \$770 in 2013, versus \$46 per prescription for a commercially available alternative. Diclofenac

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coming up

October 8 – 10, 2014

19th Annual NC Workers' Compensation Educational Conference.

Raleigh Convention Center

March 25-27, 2015

Annual Conference, NC Association of Self-Insurers.

Holiday Inn Resort, Wrightsville Beach

April 15-17, 2015

Members-Only Forum, SC Self-Insurers Association.

Litchfield Beach & Golf Resort

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Association of Self-Insurers

The employers' voice in workers' comp

Increased concerns about compounded drugs

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often is compounded in strengths other than those in commercial preparations.

Compounded drugs, which typically are customized for each patient, include topical creams and gels, injections and oral liquids, anesthetics, anticonvulsants, analgesics, and muscle relaxants. "In the past compounds would typically combine two or three different ingredients. Today, it's not unusual for us to see claims for compounds that combine up to a dozen or more active ingredients," David Calabrese, vice president and chief pharmacy officer at pharmacy benefit manager Catamaran Corp., commented to *Business Insurance*.

"And that's obviously going to increase the cost of the compound, but simultaneously increase some of the safety concerns that we have relative to these products," he added.

Claimants who fear being fired

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- Multiple comorbidities were reported by 24% of workers. Thirty percent reported being treated for hypertension
- Attorneys represented workers in 30% of the cases
- Most workers reported high levels of job satisfaction. Eighty two percent reported being completely or mostly satisfied. Only 3% reported being "not at all" satisfied
- Nearly 50% reported they were somewhat or very concerned they would be fired or laid off after their injury.

WCRI cautions it is possible some workers expressed fears about being fired because they had poor outcomes. That is, the fears were in retrospect and colored the workers' view of most events in the course of the claim.

Based in Cambridge, Massachusetts, WCRI provides objective information about public policy issues involving workers' compensation systems. To purchase its recent report on North Carolina, visit http://www.wcrinet.org/recent_pub.html.