

## WCRI study

### Reform measures working in NC

Medical and indemnity payments per claim with more than seven days of lost time remained stable in North Carolina between 2011 and 2015, in contrast to annual increases of 6% or more between 2004 and 2009, according to a recently released study by the Cambridge, MA-based Workers Compensation Research Institute.

The study is available for purchase at <https://www.wcrinet.org/reports/monitoring-the-north-carolina-system-compscope-benchmarks-17th-edition>. Founded in 1983, WCRI is an independent, not-for-profit research organization.

WCRI looked at claims occurring between 2011 and 2015, during which period North Carolina enacted measures aimed at decreasing indemnity claims and hospital payments per claim. Prior to the recent reforms, indemnity benefits per claim in North Carolina were among the highest of 18 large states routinely monitored by WCRI, and hospital payments per claim were also higher.

“Taken together, the income benefit provisions in HB 709 (passed in 2011) and the hospital fee schedule reductions targeted the key cost drivers in North Carolina – slower return to work (hence longer duration of temporary disability), larger lump-sum settlements, and higher payments for hospital outpatient care,” the group reports.

North Carolina phased in decreases in reimbursement for hospitals and ambulatory surgery centers in April 2015, and the impact of those cuts is reflected in the recent study, which includes up to 12 months of experience under the reduced fee schedules.

Other contributing factors to the decline seen in hospital payments per claim include decreases in utilization of some medical services, stable payments per hospital inpatient episode, and less frequent inpatient care, WCRI says. It attributes the decline in indemnity payments primarily to decreases in duration of temporary disability.

HB 709 made several important changes that both increased and decreased income benefits applicable to injuries occurring on or after June 24, 2011. These include:

- Capping temporary total disability benefits at 500 weeks in most instances (previously there was no cap)
- Increasing duration of temporary partial disability benefits from 300 weeks to 500 weeks
- Clearly defining suitable employment for cases both before and after maximum medical improvement is established
- Improving injured workers’ access to vocational rehabilitation services
- Increasing benefits in death cases.

In recent developments, North Carolina’s changes to fee schedules for hospitals and ambulatory surgery centers have been contested by the surgery centers and the matter is tied up in litigation. The surgery centers have sued the Industrial Commission arguing the General Assembly mandated new fee schedules only for hospitals and physicians and, because the surgical centers are legally distinct from hospitals, the Commission did not have statutory authority to impose new fee schedules on them.

The Commission has warned that should the surgery centers succeed in their demand for increased rates it would raise workers’ compensation premiums in the state by \$21 - \$28 million.

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## CASE LAW UPDATE

By Courtney Britt



### Attendant Care

Attendant care has received attention in appellate courts and at the General Assembly in recent years. The Court of Appeals' 2011 decision in *Shackleton v. Southern Flooring & Acoustical Company* was particularly challenging for employers. Reversing the Commission's denial of an attendant care claim by the injured worker's spouse, *Shackleton* adopted a "flexible case-by-case approach," which allowed the Commission to consider a wide variety of evidence, including: "a prescription or report of a healthcare provider; the testimony or a statement of a physician, nurse, or life care planner; the testimony of the claimant or the claimant's family member; or the very nature of the injury."

*Shackleton* was seen as a departure because attendant care claims could be proven with only the testimony of the claimant or the claimant's family, or the nature of the injury itself. The decision also suggested there was no time limit on when attendant care services could be requested, causing concern for significant retroactive attendant care awards.

Partly in response to *Shackleton*, the General Assembly revised N.C.G.S. § 97-2 (19) in 2011 to require that attendant care be "prescribed by a health care provider authorized by the employer or subsequently by the Commission[.]"

Recent decisions by the Court of Appeals, in *Thompson v. International Paper Co. and Reed v. Carolina Holdings, Wolseley Mgmt.*, reveal how the courts may treat attendant care going forward, but leave many questions for employers.

On February 23, 2012, Darrell Thompson suffered severe burns which required three major skin graft surgeries. His doctor testified that Thompson would require some level of attendant care indefinitely, but confirmed he had never written a prescription for attendant care. Instead, the doctor testified that he left these decisions to the hospital social worker who wrote that the injured workers' wife would provide his "attendant and wound care."

Ms. Thompson was awarded attendant care services by the Deputy Commissioner, and the Full Commission affirmed, but terminated attendant care services in 2012. On January 17, 2017, in *Thompson v. International Paper Co.*, the Court of Appeals reversed the termination of attendant care, holding that a written prescription for attendant care services is not required under N.C.G.S. § 97-2(19) and a verbal prescription can suffice.

The Court acknowledged the Commission cannot rely solely on lay testimony to award for attendant care, but concluded

that the social worker's letter was a "written expression" of the verbal directive for attendant care from Thompson's physician.

The other case, *Reed v. Carolina Holdings*, involves a traumatic brain injury suffered by Christopher Reed in 1998, which defendants accepted as compensable. On March 18, 2011, the injured worker filed a hearing request seeking attendant care. Based on lay and medical testimony, the Deputy Commissioner awarded attendant care reimbursement to his mother from the date of injury to present and ongoing.

The Full Commission denied the claimant's request for attendant services received before the hearing on grounds he did not seek approval or provide defendants with notice of this request until the hearing request. Attendant care was awarded from March 18, 2011 and ongoing.

On February 7, 2017, citing *Shackleton*, the Court of Appeals affirmed, relying on hearing testimony by the claimant's mother and post-hearing deposition testimony by his doctor.

Thompson and Reed demonstrate the tension between the 2011 reforms to § 97-2 (19) and the Court of Appeals' prior decision in *Shackleton*. *Thompson* acknowledges that § 97-2 (19) rejects the flexible case-by-case approach announced in *Shackleton*. However, in *Reed*, the Court did not discuss and it does not appear the parties argued that § 97-2 (19) changes the law. Also, both cases suggest a written prescription is not necessary for attendant care and the Commission may rely on lay and physician testimony to establish that ongoing attendant care is necessary.

Until the appellate courts clarify the application of § 97-2 (19), employers and insurers will continue to face uncertainty. Where attendant care issues arise, or are anticipated, employers should consult with defense counsel to proactively develop strategies to reasonably resolve these issues.

*Courtney Britt, a partner in Teague Campbell's Raleigh office, has been recognized as a "Rising Star" by her peers in the 2010-2013 North Carolina editions of Super Lawyers and has been listed in Best Lawyers in America for Workers' Compensation-Employers since 2013.*

## President's Note

### Comments from the Conference

Our 2017 annual conference drew more registrants and vendors than ever before, and we are determined to improve upon that in 2018. We are not sure what made 2017 so exceptional - perhaps it was because of an improving economy, more focus by employers on reducing losses, a well-thought out conference program, and perhaps even word-of-mouth publicity from our regular attendees.

Below are some of the remarks from the evaluation sheets we handed out. A few of them sound as if we've made them up ourselves but I have been assured these are all legit comments:

- "Great conference. First time attending and met some great people."
- "Wonderful first impression – both officers and vendors were welcoming and friendly."
- "Very well conducted. Good content during sessions. Excellent organization of schedule & breaks."

- "Informative. Well-organized. Great location."

Among the suggestions on how we can improve the conference - provide more reference materials to take away; conclude early on Friday; provide snacks and drinks in the classroom. Also, participants suggested presentations on violence in the workplace, how to cope with an active-shooter scenario, subrogation issues, and a model for improving communications with TPAs.

Please send us more suggestions, and let us also know if you are interested in being a presenter at the 2018 conference.

With very best wishes,  
Jay Norris



## Higher attorney involvement in NC

Injured workers in North Carolina are more likely to engage attorneys, which prompts employers to do the same, according to a WCRI study which looked at workers' compensation claims in 18 states.

The percentage of claims with worker attorney involvement was highest in Illinois and New Jersey, at 52% and 49% of claims, followed by Georgia, California, and North Carolina, where the percentage of claims with worker attorney involvement ranged from 41% to 38%.

At the low end, only 13% to 17% of claims in Wisconsin, Texas, and Michigan had worker attorney involvement. WCRI analyzed claims with more than seven days of lost time and experience between 2013 and 2016. Other states included in the study were Indiana, Arkansas, Minnesota, Massachusetts, Virginia, Kentucky, Iowa, Pennsylvania, Louisiana, and Florida.

The study can be purchased at <https://www.wcrinet.org/reports/wcri-flashreport-worker-attorney-involvement-a-new-measure>.

WCRI does not address whether there is a relationship between the percentage of claims that have worker attorney involvement and eventual health outcomes and total costs, and nor does it reach any conclusions about the optimal level of attorney involvement.

Researchers do suggest why Wisconsin and Texas tend to

have lower attorney involvement, and why New Jersey and Illinois are at the opposite end. For one, Wisconsin has clear standards for terminating TD benefits without a hearing if the injured worker has returned to work, refused an offer for suitable work, and /or reached the end of the healing period.

"This feature may provide more certainty in the process," the researchers say. Other features in Wisconsin provide employers with stronger incentive to help claimants return to work.

Texas has lower attorney involvement perhaps because, among other reasons, the state set the maximum hourly rate for both sides at \$150 per hour in 1991 and that rate remained unchanged until 2017, when it was increased to \$200 per hour. Texas also regulates the maximum number of hours for various types of attorney services, and prohibits lump-sum settlements.

"In addition, Texas has an efficient process for resolving disputes without attorney involvement," WCRI says, noting the state's ombudsman services help claimants injured navigate dispute-resolution and its benefit-review conferences are designed to discourage attorney involvement.

Higher attorney involvement in Illinois may be because of the state's complex system, and because terminating TTD benefits is cumbersome. In New Jersey, permanency benefits typically involve dueling medical experts as the injured worker must go through two exams, one performed on behalf of the worker and other on behalf of the payor.

# coming up

October 4-7, 2017

NC Workers' Compensation Educational Conference.

Raleigh Convention Center

March 21-23, 2018

Annual Conference, NC Association of Self-Insurers.

Holiday Inn Resort, Wrightsville Beach

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*The employers' voice in workers' comp*

## North Carolina Industrial Commission Updates

By Bruce Hamilton

On April 6, 2017, the North Carolina Workers' Compensation Opioid Task Force held its first organizational meeting to study and recommend solutions for the problems arising from the intersection of the opioid epidemic and related issues in worker's Compensation claims. A second meeting was held on May 4. No timeline has been announced as to when a report might be issued.

On April 24, 2017, Gov. Cooper appointed Judge John Arrowood to the North Carolina Court of Appeals to fill the vacancy created by the resignation of Judge Douglas McCullough. The appointment of Judge Arrowood took place following Gov. Cooper's veto of a bill to reduce the size of the Court of Appeals from 15 judges to 12 judges. The legislation reduced the number of judges on the Court of Appeals by not replacing incumbent judges whose seats became vacant prior to the expiration of the judge's term due to death, resignation, retirement, impeachment, or removal.

Gov. Cooper nominated Deputy Commissioner Philip Baddour to a six-year term as the next Commissioner of the North Carolina Industrial Commission. Commissioner Bernadine Ballance's term ended on April 30, 2017. The Baddour nomination is subject to confirmation by the North Carolina General Assembly and, as of April 26, 2017, the General Assembly had not yet approved Deputy Commissioner Baddour's appointment.

The North Carolina Workers' Compensation Educational Conference is scheduled for Wednesday, October 4 through Friday, October 6, 2017. The Industrial Commission announced a Twitter account that will provide updates on breaking news and important announcements from the Commission. Twitter @IC\_NC\_GOV.