

Wilkes v. City of Greenville & House Bill 26

by Bruce Hamilton

On Friday, June 9, 2017, the North Carolina Supreme Court issued its eagerly anticipated decision in *Wilkes v. City of Greenville*, in significant part, unanimously affirming the Court of Appeals.

Wilkes involves two primary issues. First, whether Johnnie Wilkes failed to meet his burden of establishing that his anxiety and depression were the result of a work-related accident and, more specifically, whether the *Parsons* presumption applied, giving Mr. Wilkes the benefit of a presumption that these conditions were related to his accident.

On the first issue, the Supreme Court agreed with the Court of Appeals that Mr. Wilkes was entitled to a presumption that his continued medical treatment was related to his work accident. The impact of *Wilkes* was that when a claim was accepted as compensable pursuant to a Form 60 or section 1 of a Form 63 that a rebuttable presumption was created that any additional medical treatment was related to the compensable condition. The rebuttable presumption was not limited to the specific body part or medical condition accepted in the Form 60 or 63.

Limitation on the New Medical Presumption

To address the new medical presumption created by *Wilkes*, on June 29, 2017 the North Carolina General Assembly passed House Bill 26 which amends G.S. § 97-82(b) of the Workers' Compensation Act. The overall impact of the legislature's change is to limit the scope of any medical presumption. The legislation has been passed by the General Assembly and is now awaiting approval by Governor Cooper and is anticipated to become law.

The reformed G.S. § 97-82(b) expressly states that filing a Form 60 or 63 shall not create a presumption that medical treatment for an injury or condition not identified in the Form 60 or Form 63 is causally related to the compensable injury. The amendment applies to all accrued or pending claims. A claimant can request a full evidentiary hearing to prove that any additional injury or condition is causally related to the compensable injury.

New Framework for Proving Disability

The second issue in *Wilkes* is whether Mr. Wilkes was entitled to disability payments made after January 18, 2011. Here, the North Carolina Supreme Court potentially significantly altered the landscape for proving disability. Specifically, the Court concluded that the Commission failed to address the effects of Mr. Wilkes' tinnitus on his ability to work.

The Court held that an employee can prove a disability outside of the four methods outlined in *Russell v. Lowes Product Distribution*. The Court also stated that lay testimony is competent regarding a disability issue, specifically addressing how the employee's injury and related symptoms have affected his activities. In addition, the Court held that if an employee demonstrates an inability to work after taking into account his work-related conditions and pre-existing limitations, expert testimony is not required to prove a job search is futile.

Wilkes calls into question the framework parties have used to evaluate disability in workers' compensation claims for more than two decades and leaves employers and carriers

Continued on page 3



Bruce Hamilton

INSIDE THIS ISSUE

OPIOID PRESCRIPTIONS DECLINE	TWO
COMP INSURERS PROFITABLE	TWO
NEW COMMISSIONER	FOUR

Still too high *Opioid prescriptions declining*

The amount of opioid painkillers prescribed in the United States peaked in 2010 and has been declining since then, according to a recent report from the Centers for Disease Control and Prevention.

CDC reports the amount of opioids prescribed fell 18% between 2010 and 2015. However, the agency notes that even with the decline, nearly three times as many prescriptions were written for opioids in 2015 as in 1999.

Also, opioid use varies considerably from one region to the next, and opioid use increased in 23 counties. The top-prescribing counties as measured by the amount of opioids prescribed per capita — including Surry County, N.C. (north of Winston-Salem) and Claiborne County, Tenn. (along the Kentucky border) — prescribed six times more opioids per capita in 2015 than the lowest-prescribing counties.

“An enormous amount of opioid volume is driven by a very small number of prescribers. They need to be intervened upon, targeted with educational outreach and, if necessary, professional or regulatory sanction. My sense is that’s not yet happening enough,” says Dr. Caleb Alexander, co-director of the Johns Hopkins Center for Drug Safety and Effectiveness. He made his remarks to the **New York Times**.

CDC’s analysis shows counties with high rates of opioid prescriptions share the following characteristics:

- A greater percentage of non-Hispanic white residents
- A greater prevalence of diabetes and arthritis
- Metropolitan areas (non-metro small cities and big towns)
- Higher unemployment.

The newspaper notes that the ongoing intense focus on opioid use is harming patients who have a clear need for the drugs and have been managed appropriately. Some of these patients now find they can’t get the drugs that allowed them to function. In some cases, insurers are placing new restrictions on opioid prescribing but strictly limiting or not yet covering alternative treatments for pain, such as physical therapy and acupuncture, or even other types of medication that could help.

Separately, the *Times* reported that deaths from overdose of prescription painkillers and illegal drugs increased 20% between 2015 and 2016 - the largest annual jump ever in the U.S. The newspaper estimates deaths rose from 52,404 to 62,497, and anticipates there will probably be more deaths in 2017. The CDC won’t have the official tally for 2016 until December this year.

The Times compiled estimates for 2016 from hundreds of county coroners and medical examiners and state health departments. The data reports a grim picture of a modern plague now turning even deadlier because of illicitly manufactured fentanyl and similar drugs.

Drug overdoses have become the leading cause of death among Americans under 50. Overall, nearly 95 million Americans used prescription painkillers in the past year, and estimates indicate more than two million are dependent on opioids.

Workers’ comp insurers profitable

Workers’ compensation insurers reported a combined ratio of 94% for 2016, the second consecutive year the industry has posted a six-point underwriting gain, reports the National Council on Compensation Insurance.

“The workers’ compensation underwriting results for 2016 were very strong, especially relative to other property and casualty lines of business,” said NCCI Chief Actuary Kathy Antonello, FCAS, FSA, MAAA. “A decline in frequency, paired with increases in indemnity and medical severity, contributed to a preliminary combined ratio of 94%. While faced with continued, historically low interest rates, the industry seems to be responding with diligence on the underwriting side,” he added.

On an accident-year basis, the 2016 workers’ compensation combined ratio was 98%. Other market indicators and trends highlighted in NCCI’s 2017 State of the Line Report include:

- The overall reserve position for private carriers improved

in 2016. NCCI estimates the year-end 2016 reserve position to be a \$5 billion deficiency—down from \$7 billion in 2015. Estimated reserve redundancy in Accident Year 2016 contributed to this reduction.

- Average lost-time claim frequency across NCCI states declined by 4% in 2016, on a preliminary basis.
- In NCCI states, the preliminary Accident Year 2016 average indemnity claim severity increased by 3% relative to the corresponding 2015 value. For medical, the preliminary average lost-time claim severity increased by 5% relative to that observed in 2015.

The workers’ compensation Residual Market Pool premium volume remained flat between 2015 and 2016, and the average residual market share remained stable at 8%. The latest NCCI data shows that total residual market premium declined in the first quarter of 2017 compared with the first quarter of 2016.

President's Note

Scenes from the drug epidemic

Workers' compensation professionals have more than a passing interest in the drug overdose/opioid epidemic raging across our country. Many injured workers are prescribed the type of drugs wreaking havoc across America and, as a result, policymakers from coast to coast are grappling with how to come to terms with a complex problem.

An Opioid Task Force appointed by the North Carolina Industrial Commission has met several times this year, attesting to the issue's importance for the agency. We don't know quite what to make of the recent report from the Centers for Disease Control and Prevention that more opioid prescriptions are written in Surry County, NC (northwest of Winston -Salem) than almost anywhere else in the country.

The wide regional variations in the number of opioid prescriptions written don't make sense, and it is clear medical necessity has only a little to do with it. But very rapidly, the problem is spilling over onto our streets and public places. In at least three major cities -- Philadelphia, Denver, and San Francisco -- library employees now know, or are set to learn, how to administer Narcan to help reverse overdoses.

The Philadelphia Inquirer reports overdoses at the McPherson Square library in Philadelphia have become so routine that the staff practices overdose drills. On one memorable occasion last year, the staff had to call 911 five times in one day.



A recent issue of the **New Yorker** provides more harrowing details. "At this stage of the American opioid epidemic, many addicts are collapsing in public—in gas stations, in restaurant bathrooms, in the aisles of big-box stores." Emergency responders say addicts are using drugs in public places so they can receive medical help if they overdose.

Emergency paramedics in Berkeley County, West Virginia, recently got a call that sent them to the youth softball field in a tiny town called Hedgesville. Two of the parents were lying on the ground, unconscious, several yards apart. The couple's younger children, aged ten and seven, were running back and forth between their parents, screaming, "Wake up! Wake up!"

The frightening scenes from across the country should indeed be a wake-up call for our industry and for policymakers.

With very best wishes,

Jay Norris

Wilkes v. Greenville continued from page 1

wondering how to defend disability claims in the future. After *Wilkes*, disability can be proven by methods other than those outlined in *Russell*, but the Court does not specify all of the ways an employee may prove disability.

Also, the Court's statement in *Wilkes* that an employee may use competent lay testimony to support a disability claim may result in a greater number of disability determinations. In cases of contested disability, employers and carriers should consult with defense counsel and consider obtaining expert review of medical and vocational issues to refute disability.

As part of the negotiations amend G.S. § 97-82(b), representatives for both employees and industry have agreed to continue to discuss issues raised by *Wilkes* concerning how employees prove a disability during the remainder of the 2017-2018 legislative session. In addition, both sides have agreed to discuss the potential implications of *Wilkes* in medical only cases, including cases where medical benefits are paid without prejudice under Section 2 of a Form 63, and whether an expedited hearing process should be available to claimants seeking to prove that an additional condition or body part not listed on the Form 60 or 63 is related to the compensable injury.

coming up

Oct. 4-7, 2017

NC Workers' Compensation Educational Conference.

Raleigh Convention Center

Mar. 21-23, 2018

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort, Wrightsville Beach

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Baddour named to Commission

On June 28, 2017 the NC General Assembly confirmed Governor Roy Cooper's nomination of Philip Baddour, III for appointment as a Commissioner to the North Carolina Industrial Commission for a six-year term.

Commissioner Baddour joined the commission as a Deputy Commissioner in November 2000. Prior to joining the Commission, he practiced law in Goldsboro, N.C. from 1996 to 1999, primarily representing plaintiffs in the areas of tort and workers' compensation litigation.

In 1999, he joined the North Carolina Department of Justice as an Assistant Attorney General defending state agencies in workers' compensation and tort claim actions. He has also served as a JAG Officer in the North Carolina National Guard, achieving the rank of Captain before receiving an honorable discharge.

Commissioner Baddour received his B.A. degree from the University of North Carolina at Chapel Hill in 1992 and earned his law degree from Campbell University.

Grimes appointed Deputy Commissioner

Chairman Charlton Allen has appointed attorney Melissa Grimes to a six-year term as a Deputy Commissioner in the agency's Charlotte regional office.

Until recently, she was in private practice with Hedrick Gardner in Charlotte, where she focused on workers' compensation. She is a graduate of East Carolina University and the Campbell University School of Law.

Public hearing on Commission's Medical Fee Schedule

The Commission will hold a public hearing on Wednesday, July 19, 2017, at 2:30 p.m. in Room 2149, 2nd Floor, Dobbs Building, 430 North Salisbury Street, Raleigh, NC 27603. The Commission will also accept written comments on the proposed rule through August 14, 2017 (Rule 04 NCAC 10J .0103).

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