

Commission adopts rules on opioid use

Effective May 1, 2018 healthcare providers prescribing opioids, related prescriptions, and pain management treatment to workers' compensation claimants must comply with the recently developed nine rules adopted by the North Carolina Industrial Commission and approved by the state's Rules Review Commission.

The purpose of the rules is to curtail misuse of opioids and other pain medications. The Industrial Commission, which sees the rules as proactive measures, aims to encourage non-opioid and non-pharmacological means for treating pain, along with promoting evaluation and treatment of employees with substance use disorder.

The rules cover pain prescriptions administered immediately after an injury and through the chronic phase, defined as continued treatment after 12 weeks. Although the Commission specifies that neither the recently adopted Opioid Utilization Rules or related guidance from the agency are meant to replace professional medical judgment, the Commission is unambiguous about several measures.

First, healthcare providers are to prescribe the lowest effective dosage of a targeted controlled substance, not to exceed a 50 mg morphine equivalent dose per day, using only short-acting opioids. Also, neither fentanyl, methadone, or carisoprodol is to be prescribed in the acute phase. Further, the rules do not allow prescribing benzodiazepines for pain or as muscle relaxers in the acute or chronic phase.

The rules allow for exceptions and waivers in case of a disagreement among healthcare providers and employers/carriers, or where a claimant may disagree with the prescribed treatment. The Commission notes it is expected the parties will be able to resolve disputes about treatment. If they cannot, the agency will step in and issue an order, if requested.

"An employer or carrier may authorize treatment outside of the Rules based on medical documentation and communication with the healthcare provider. Nothing in the Rules prevents the parties from reaching an agreement for safe recommended treatment outside the Rules," the agency adds.

In promulgating the recent rules, the Industrial Commission reviewed opioid and pain management measures in more than a dozen states and also benefited from recommendations from its interdisciplinary task force appointed in February 2017. The task force included representatives from public health, TPAs, healthcare providers, and attorneys for injured workers and employers. Stephanie Gay, vice president of the North Carolina Association of Self-Insurers, also served on the task force.

The rules are available on the agency's website, along with a companion guide which explains and interprets the rules and walks the reader through a number of plausible scenarios. The Commission anticipates the guide will be updated and says it is open to requests and recommendations.

Recent data from the National Council on Compensation Insurance and from the California Workers' Compensation Institute, among others, shows opioid use falling in workers' compensation, thanks to steps taken by regulators and payors and because of public awareness.

NCCI reports that in 2012, 55% of claimants with a prescription were prescribed an opioid; by 2016, that share decreased to about 45%. California reports that between 2007-2017, opioid prescriptions in workers' compensation declined from 32.1% of all prescriptions to 23.2%.

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CASE LAW UPDATE

By S. Scott Farwell



The Developing Disability Dilemma

Recent rulings from The North Carolina Supreme Court and Court of Appeals have set Workers' Compensation Defendants somewhat adrift regarding the burdens of proof relating to disability. With this uncertainty, and to counter the testimony historically provided by Plaintiffs seeking indemnity benefits, Defendants involved in complicated disability disputes should consider early involvement of a vocational expert well in advance of hearings. Otherwise, Defendants risk even strong defenses turning sour, and the higher ranges of exposure being reached.

Recall, first, the matters of *Hilliard* and *Russell* historically provided a meaningful structure to evaluate a Plaintiff's burden of proof. *Hilliard v. Apex Cabinet Co.*, 54 N.C. App. 173, 282 S.E.2d 828 (1981), *rev'd on other grounds*, 305 N.C. 593, 290 S.E.2d 682 (1982); *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). Those matters established that proving disability requires specific and objectively supported persuasive evidence produced by Plaintiff.

With the advent of *Wilkes v. City of Greenville*, ___ N.C. ___, 799 S.E. 2d 838, (2017) , in combination with *Neckles v. Teeter*, No. COA 16-569-2, 2018 WL 944070, (N.C. Ct. App. Feb. 20, 2018) and *Adame v. Aerotek*, 809 S.E.2d 922 (N.C. Ct. App. Feb. 20, 2018) however the evidentiary structure provided by *Hilliard* and *Russell* has somewhat unraveled. *Wilkes* is the landmark case decided by the Supreme Court which held that Plaintiff could prove disability in ways outside of the *Russell* framework and suggested that the Industrial Commission may rely upon competent lay testimony to prove disability.

In *Neckles*, the Court of Appeals held that the Full Commission did not properly address plaintiff's wage-earning capacity in light of his pre-existing and co-existing conditions. In *Adame*, the Court of Appeals held that Defendants failed to meet their shifted burden to prove Plaintiff was not disabled.

Defendants in *Adame* utilized a vocational expert who performed a labor market survey and offered testimony; however, the expert had limited knowledge of Plaintiff's education and qualifications. Plaintiffs may argue these newer rulings reduce their burden of *proof* to a burden of *production*, which, if met, shifts the burden of proof to Defendants to disprove disability.

While this potential burden shifting is, itself, concerning, the time needed for Defendants to obtain persuasive evidence is, perhaps, even more harrowing. Following notice of a request for hearing, Defendants typically have four to six months to gather

and present evidence before the case will be heard. This timeframe can be further reduced depending on when the file is assigned to defense counsel and whether any discovery disputes arise between the parties.

Since Plaintiffs may now be able to meet their burden and demonstrate a job search is futile by offering evidence that their age, education, and experience render future job searches futile, Defendants must spend the limited months available to them before hearing to locate jobs the Plaintiff is actually capable of obtaining given both his work-related and non-work related limitations and present that evidence in a format which will persuade a Deputy Commissioner to rely on it over Plaintiff's own testimony. This can be challenging given that the Workers' Compensation Act must be liberally interpreted in Plaintiffs' favor.

Wilkes, *Neckles* and *Adame* leave Defendants wondering how to approach this developing dilemma. Utilization of a well-qualified vocational expert will be essential in many cases, but prudent employers should heed the guidance provided by these recent decisions.

The Industrial Commission has indicated a willingness to consider labor market surveys, but the above cases demonstrate that a labor market survey alone may not be enough. Employers who recognize the need for vocational evidence and retain an appropriate expert must also prepare the expert to both obtain an appropriate labor market survey and offer well-informed testimony at a hearing.

This requires Defendants to obtain comprehensive information about Plaintiff's pre-existing and co-existing limitations in discovery and to ensure the vocational expert has reviewed and considered this information in preparing his or her report and rendering opinions. Satisfying these standards will require early diligent planning by Defendants well in advance of hearing, but appears inevitable in the post-*Wilkes* era.

S. Scott Farwell, a partner in Teague Campbell's Raleigh office, is a graduate of the University of North Carolina School of Law.

President's Note

Tackling the opioid epidemic

The North Carolina Industrial Commission deserves high praise for its painstaking and thorough approach in developing guidelines for use of opioids, related prescriptions, and pain management treatment for workers' compensation claimants. The rules went into effect May 1, 2018 after a nearly year-long process during which the agency reviewed similar measures in more than a dozen states and conferred regularly with its multidisciplinary task force.

The Commission also put effort and energy in rolling out the rules, including making an hour-long presentation at our annual conference earlier this year. It is not surprising that no letters of objection were received, thus ensuring smooth approval from the Rules Review Commission. We note that a companion guide to the new changes is available at the agency's website and should go a long way towards educating all stakeholders on this extremely important issue.



Opioid misuse in workers' compensation and beyond is wreaking havoc in our society. We hope physicians embrace the new rules and also that adjusters, employers, and carriers all throw their weight behind the new guidelines by seeing they are practiced and enforced. In particular, employers can play a huge role by encouraging alternative pain treatments such as acupuncture, dry needling, massage therapy, and other non-pharmacological therapies.

Let us know about your experience in living with the new guidelines. Your candid thoughts and observations can help everyone in our workers' comp system.

With very best wishes,

Jay Norris

Happy times for comp carriers

The National Council on Compensation Insurance reports that the workers' compensation combined ratio in 2017 improved to the lowest level in over half a century.

There is more good news: payroll is increasing, reserve position continues to strengthen, and severity increases remain moderate. Last year's combined ratio of 89% was the seventh consecutive year the workers' compensation line of business has posted an underwriting gain. As recently as 2010, the combined ratio was 115.

Other market indicators and trends highlighted in NCCI's 2018 State of the Line Report included the following:

- The overall reserve position for private carriers improved in 2017. NCCI estimates the Year-End 2017 reserve position to be a \$1 billion deficiency—down from \$5 billion in 2016.
- Average lost-time claim frequency across NCCI states declined by 6% in 2017, on a preliminary basis. A similar percentage decline was observed in 2016.

- In NCCI states, the preliminary 2017 average indemnity and medical accident-year claim severities both increased by 4% relative to their corresponding 2016 values.
- The workers compensation Residual Market Pool premium volume declined to approximately \$1 billion during 2017, while the average residual market share remained stable at 8%.

Employers buying workers' compensation coverage are seeing flat renewals or slight rate decreases, according to *Business Insurance*. Stephen Hackenburg, New York-based chief broking officer for Aon Risk Solutions, said 40% of Aon clients saw decreases in comp insurance costs.

"There are a lot of people chasing the business. Payrolls are up and strong. The industry is seeing good underwriting results and there is a lot of competition. That portends a healthy climate for buying insurance," he commented to the publication.

coming up

March 27-29, 2019

NCASI Annual Conference.

Holiday Inn Resort, Wrightsville Beach, NC

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Industrial Commission News

On April 15, 2018, Chairman Allen designated Deputy Commissioner Sumit Gupta as the interim Chief Deputy Commissioner of the Industrial Commission.

Mary Clair Brown has been appointed to the Industrial Commission as a Deputy Commissioner. Deputy Commissioner Brown previously practiced worker's compensation defense work at Hedrick Gardner. She is assigned to the Charlotte office.

Amanda R. Witzke has been appointed to the Industrial Commission as a Deputy Commissioner. Deputy Commissioner Witzke previously practiced worker's compensation defense work with Wilson Jones. She is also assigned to the Charlotte office.

Gov. Cooper has nominated Deputy Commissioner Robert Harris for a six-year term on the Full Commission to the seat presently occupied by Commissioner Nance. Gov. Cooper has also nominated Deputy Commissioner Myra Griffin to fill the seat previously occupied by Commissioner Cheatham, who resigned from the Commission effective January 2018.

Commission collects \$5.1 million in penalties

By the end of the third quarter of the current fiscal year, which began July 1, 2017, the Commission's Compliance and Fraud Investigative Division had collected more than \$5.1 million from businesses not complying with the Workers' Compensation Act. At this point in the previous fiscal year, the agency had collected only \$1.5 million in penalties.

The Commission attributes a significant portion of the increase in penalty collections to the earlier assignment of cases to investigators, and the substantial number of investigations commenced and completed. On average, cases are now assigned to investigators within 87 days, down considerably from an average of 590 days in early 2016.

The bulk of the penalty proceeds will go to the State's Civil Penalty and Forfeiture Fund to benefit North Carolina's public schools.