

## In North Carolina

### **Average Loss Costs Decrease 16%**

In its filing submitted on August 29, 2018, the North Carolina Rate Bureau has advised the North Carolina Commissioner of Insurance that average loss costs in workers' compensation have decreased 15.9% from loss costs approved effective April 1, 2018. The latest loss costs would be applicable to policies becoming effective on and after April 1, 2019.

The rate bureau adds that within each industry group the change to a particular classification will vary from the average depending upon the volume and character of the particular classification experience. Specifically, the declines in loss costs are as follows:

- Manufacturing -14.5%
- Contracting -15.2%
- Office & Clerical -18.0%
- Goods & Services -18.0%
- Miscellaneous -13.4%

"The prospective loss costs are based on historical data that have been developed and trended to their ultimate values and, except for loss adjustment expenses that are specifically authorized to be included in the loss costs by statute, include no provisions for expenses, dividends, profit or contingencies," the rate bureau says.

"The general explanation for the filed decrease, which follows a decrease last year as well, is insurance carriers have had fewer workers compensation claims and are paying less for these claims. This is evidenced by the -12.2% change in loss experience and a change of -4.8% in trend," the agency added.

The North Carolina Industrial Commission says the latest update from the rate bureau is yet more evidence the industrial commission is succeeding in its efforts to improve the state's workers' compensation system. The commission noted loss costs decreased 11.3% in 2017, 14.4% in 2016, and 10.2% in 2015.

Efforts by the Commission to control costs, particularly medical costs, were a significant factor in the decrease in loss costs, the agency said in a media release in early October. "The dramatic decreases in loss costs are a testament to the effectiveness of the needed reforms to the State's workers' compensation system," says chairman Charlton Allen.

The agency cited research from the Workers' Compensation Research Institute which shows indemnity costs per claim in North Carolina decreased from an average of \$26,666 for 2009 claims evaluated in 2012 to an average of \$24,675 for 2012 claims evaluated in 2015. The average period injured workers are out of work due to temporary disability has decreased from 24.6 weeks in 2009 to 21.2 weeks in 2012, for claims evaluated at an average of 36 months after the injury.

The commission adds reforms to the medical fee schedule are another factor in lowered costs. Payments for non-hospital providers decreased approximately 5% between 2015 and 2014 for claims at 12 months of experience. In the same period, payments to hospital outpatient providers decreased 24% while payments to inpatient hospital providers decreased 11%.

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## CASE LAW UPDATE

By Heather Baker



### Fraud and Malicious Prosecution

In a scathing North Carolina Court of Appeals opinion authored by Judge Lucy Inman, the Court addressed issues stemming from claims of insurance fraud, malicious prosecution, abuse of process, unfair and deceptive trade practices, bad faith, willful and wanton conduct, conspiracy, and punitive damages.

The claimant in *Seguro-Suarez v. Key Risk Ins. Co.* was Mario Seguro-Suarez. Mr. Seguro-Suarez was injured on the job in 2003 when he fell from approximately 18 feet, striking his head on the concrete below. He suffered several broken bones and severe traumatic brain injury, rendering him comatose and requiring intubation, ventilation, and emergency surgery. As a result, his personality changed, he required physical, speech, and occupational therapy, and had significant behavioral and memory deficits.

He was also rendered dependent on others for daily living activities and required 24-hour care upon his discharge from the hospital, which was provided by Mr. Seguro-Suarez's daughter and a family friend. The defendants accepted the claim as compensable.

There were several prior issues that were litigated before deputy commissioners, the Full Commission, and the Court of Appeals; all of which were decided in favor of Mr. Seguro-Suarez. The North Carolina Supreme Court previously denied the defendants' petition for writ of certiorari on the issues of attendant care and the award of attorney's fees.

The events which led to the matters before the Court of Appeals for this September 2018 decision arose from Mr. Seguro-Suarez's claims against the defendants in Mecklenburg County Superior Court after the defendants attempted to initiate criminal prosecution against him. The defendants directed an investigator to convince the Lincoln Police Department to bring criminal charges against Mr. Seguro-Suarez under the theory that he was obtaining workers' compensation benefits under false pretenses.

The investigator provided edited surveillance video to the police department, which cut nine hours of surveillance footage taken over the course of approximately six months down to 45 minutes. The Lincoln Police Department indicted Mr. Seguro-Suarez on 25 counts of obtaining property by false pretenses and one count of insurance fraud for accepting workers' compensation payments. As a part of these proceedings, Mr. Seguro-Suarez was ordered to undergo a psychological evaluation to determine his competency to stand

trial, and the examining psychologist ultimately concluded Mr. Seguro-Suarez was mentally incapable of proceeding to trial or effectively assisting counsel. The court noted concern about proceeding with prosecution, and the State then dismissed all charges against Mr. Seguro-Suarez.

Thereafter, Mr. Seguro-Suarez filed civil suit in Superior Court stemming from the attempted criminal prosecution, and the defendants filed a motion to dismiss for the trial court's lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure due to the exclusivity provision of the North Carolina Workers' Compensation Act. The defendants also requested dismissal pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The trial court denied both motions. The defendants appealed.

The Court of Appeals ultimately concluded the trial court had jurisdiction under Rule 12(b)(1) because the defendants' actions in this case involved criminal prosecution and not merely processing and handling of the workers' compensation claim. The Court noted the *Woodson v. Rowland* North Carolina Supreme Court case involving intentional torts that fall outside the scope of the Workers' Compensation Act. The Court held that the trial court did not err in denying the defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and affirmed in that regard.

In addition, the Court individually addressed each of Mr. Seguro-Suarez's five claims for malicious prosecution, abuse of process, unfair and deceptive trade practices, bad faith and civil conspiracy, and punitive damages. The Court concluded Mr. Seguro-Suarez had sufficiently alleged claims for malicious prosecution, abuse of process, unfair and deceptive trade practices, and punitive damages; and affirmed the trial court's decision regarding those claims.

However, the Court found he had failed to sufficiently allege claims for bad faith and civil conspiracy. Therefore, the Court reversed the trial court's denial of the defendants' motion to dismiss pursuant to Rule 12(b)(6) as it pertained to the claims for bad faith and civil conspiracy.

*Heather Baker is a partner in Teague Campbell's Raleigh office. She is a graduate of North Carolina State University and the University of North Carolina School of Law.*

## *President's Note*

### *Happy Times in Workers' Comp*

Workers' compensation premiums are poised to fall in North Carolina following a recent update from the state's rate bureau that loss costs have declined nearly 16% from loss costs approved effective April 1, 2018. As reported elsewhere in this newsletter, the North Carolina Industrial Commission deserves credit for some of this success, notably for its efforts in controlling medical costs.

As it turns out, workers' compensation premiums are falling nationwide thanks to a variety of reasons having to do with improvements in workplace safety, stability in the regulatory environment, predictive modeling/data analytics, use of robots in high-risk jobs, and -because of globalization - greater mobility and flexibility of capital.

As insurance industry observer James Twining explains it, "previously, when there was an event in one part of the world, or prices started to harden in a particular line of business, the inefficiency in capital flows caused prices to fluctuate significantly and raised prices. Now, capital providers are able to immediately deploy capital anywhere in the world to exploit emerging pricing opportunities." He says that because of fundamental changes in the way markets operate now, many of us may never see another

traditional hard market in our working lifetime.

In any event, 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. 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.

Average lost-time claim frequency across NCCI states declined by 6% in 2017, and a similar percentage decline was observed in 2016. Also, NCCI estimates the year-end 2017 reserve position to be a \$1 billion deficiency—down from \$5 billion in 2016. Of the nearly three dozen states served by NCCI, rates are expected to decline in all but one of them.

With very best wishes,  
Jay Norris



### *NC slips in latest premium-rate ranking*

Workers' compensation premium rates in North Carolina are the 19th highest in the nation, according to the recently released 2018 Oregon Workers' Compensation Premium Rate Ranking Summary. Put another way, 32 jurisdictions in the U.S. have lower premium rates than North Carolina.

The state has slipped three places since 2016, when it had the 22nd highest rate (i.e. 29 jurisdictions had lower rates), and several notches since 2014, when only 24 jurisdictions had lower rates. States with the highest workers' compensation premium rates include New York, California, and New Jersey, while the lowest rates are in North Dakota, Indiana, and Arkansas.

Oregon has conducted these studies in even-numbered years since 1986, when Oregon's rates were among the highest in the nation. The department reports the results to the Oregon Legislature as a performance measure. Premium rate indices were calculated based on data from 51 jurisdictions (including the District of Columbia) for rates in effect as of January 1, 2018.

The 2018 median value is \$1.70, which is a drop of 7.6% from the \$1.84 median of the 2016 study. This is the largest drop

in the study median since 2012. National premium rate indices range from a low of \$0.82 in North Dakota to a high of \$3.08 in New York.

The index rate for states in the south are as follows:

- Georgia - \$2.27
- Louisiana - \$2.05
- South Carolina - \$ 1.95
- North Carolina - \$1.84
- Alabama - \$1.65
- Mississippi - \$1.54
- Tennessee \$1.52
- Kentucky - \$1.51
- Virginia - \$1.28
- Arkansas \$0.90

The study is based on methods that put states' workers' compensation rates on a comparable basis, using a constant set of risk classifications for each state. This study used classification codes from the National Council on Compensation Insurance.

# coming up

March 27-29, 2019

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort, Wrightsville Beach

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## Commission Steps Up Anti-Fraud Efforts

By the end of fiscal 2018, which ended on June 30, 2018, the North Carolina Industrial Commission's fraud division had collected nearly \$8 million in penalties and issued close to 700 criminal charges over a 12-month period.

As the agency notes, the amount collected was an "incredible increase" from the \$1.7 million collected in the previous fiscal year. The clear proceeds of the penalties collected go to the State's Civil Penalty and Forfeiture Fund to benefit North Carolina's public schools.

The commission's Compliance and Fraud Investigative Division closed 5,314 cases in fiscal 2018, compared to 3,146 cases in the previous year.

The fraud unit proactively works with businesses to ensure adequate insurance is maintained, and also identifies noncompliant businesses using an advanced data-matching application.

In other developments, on August 16, 2018, Gov. Cooper appointed A. Robinson "Robby" Hassell as a Commissioner of the North Carolina industrial commission on an urgent basis, pending confirmation by the General Assembly. Before his appointment as a Commissioner, Mr. Hassell served as an Emergency Superior Court Judge. Judge Hassell fills the seat of former Commissioner Tammy Nance.

The Industrial Commission is going through another round of rulemaking changes. The Commission has broken the rulemaking changes into two groups. Group 1 consists of 13 proposed amendments and one proposed repeal for rules governing workers compensation claims. These rules were viewed as noncontroversial and the public hearing on the rules was held on September 26, 2018.

The Group 2 rules include two proposed adoptions and nine amendments for rules governing workers compensation claims, as well as two amendments and one repeal for rules governing state tort claims. <http://www.ic.nc.gov/proposedGroup2Rules.html>

The Group 2 rules were seen as being slightly more controversial and would need more input from stakeholders. A public hearing on the proposed rules is scheduled for October 31, 2018 and written comments are accepted from September 17 through November 16.