

NC Reforms Lowering Comp Costs

Major reforms passed by the General Assembly in 2011 and new medical-fee schedules imposed in 2015 are moderating indemnity and medical costs in North Carolina, according to a recent study from the nonprofit Workers Compensation Research Institute (WCRI).

The study, *CompScope™ Benchmarks for North Carolina, 19th Edition*, is free for WCRI members and available to non-members for a small fee. To learn more about it or to download a copy, visit WCRI's website at <https://www.wcrinet.org/reports/compscope-benchmarks-19th-edition>.

WCRI reports medical payments per claim between 2012 and 2017 decreased nearly 5% per year, in sharp contrast to the period between 2004 and 2012 when medical payments increased about 4% per year. Indemnity payments, which increased 5% per year between 2004 and 2012, have increased only 3% per year since reforms passed in 2011.

The net effect is that total payments per claim with more than seven days of lost time at 12 months of experience have remained about the same since 2012, whereas between 2004 and 2012 they were increasing nearly 5% per year. Unlike many of the 18 states monitored by WCRI, where total costs increased 3% per year between 2012 and 2017, total costs per claim changed little in North Carolina.

Under reform legislation passed in 2011, North Carolina capped temporary total disability benefits at 500 weeks (in most instances) and that addressed larger lump-sum settlements and slower return to work (hence longer duration of temporary disability). These were the main drivers of higher indemnity benefits per claim in the state. The 2015 medical fee schedules targeted higher-than-average hospital outpatient costs in North Carolina.

But, despite reforms and despite recent improvements, total costs per claim in North Carolina were 23% higher than the median of the 18 states monitored by WCRI. Specifically, total costs per claim in North Carolina averaged about \$52,000 for 2015 claims with more than seven days of lost time at an average of 36 months of experience. Other states studied by WCRI include Arkansas, California, Florida, Georgia, Illinois, Indiana,

Iowa, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, Pennsylvania, Tennessee, Texas, Virginia, and Wisconsin.

In North Carolina, indemnity benefits per claim with more than seven days of lost time were among the highest and, indeed, would have substantially increased total costs per claim were it not for the decrease in medical costs. WCRI reports indemnity benefits in North Carolina were nearly 70% higher compared to the median for the 18 states (for 2015 claims at an average of 36 months of experience).

Key factors responsible for this disparity are some specific features of North Carolina's workers' compensation system. WCRI notes that unlike most states, North Carolina has aspects of both a wage-loss and permanent partial disability (PPD) system. An injured worker who has not returned to work at the end of the healing period either continues to receive temporary total disability (TTD) benefits (as in a wage-benefit system), or elects to receive PPD benefits based on an impairment rating. A worker who has returned to work at full wages can receive PPD benefits (as in a PPD system).

Thus, settlements in North Carolina may include payments for ongoing TTD benefits, for PPD benefits, and for future medical care. In addition, settlements in North Carolina were more frequent and occurred earlier than in most states.

Carol Telles, a senior analyst at WCRI, authored the recent study on North Carolina's workers' compensation system. Ms. Telles will present and discuss her findings at the North Carolina Association of Self-Insurers' 2020 conference, scheduled for March 25-27 at the Holiday Inn Resort in Wrightsville Beach.

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CASE LAW UPDATE

by Tracey Jones



Jackson v. The Timken Co.

Although the Workers' Compensation Act has frustrated North Carolina employers because there is no "fault base" analysis in cases, the Act has afforded employers "limited" liability in cases and allows employers to calculate their exposures with a much-needed accuracy that is hard to obtain in the civil liability arena.

Unfortunately, this benefit has been strained in *Jackson v. The Timken Co.*, a recent decision from the North Carolina Court of Appeals published in May 2019. The Court allowed a Plaintiff in a denied workers' compensation claim to bring an action in civil court, potentially spoiling the exclusive remedy doctrine.

Plaintiff suffered a stroke while at work. His supervisor noticed Plaintiff was having difficulty completing work tasks and escorted him to the occupational health nurse (with 41 years of experience) who completed a physical examination of Plaintiff. Plaintiff walked without assistance, responded appropriately to questions, exhibited no weakness, followed commands, and had no change in speech, balance or facial feature. Plaintiff's wife was called to pick him up. Plaintiff collapsed in the parking lot of his primary care provider's office and was rushed to the hospital by EMS.

Plaintiff first filed a workers' compensation claim with the Industrial Commission. The parties stipulated that each party was bound by and subject to the North Carolina Workers' Compensation Act, and noted the Industrial Commission had subject matter jurisdiction. While Plaintiff was waiting for the Industrial Commission to issue a decision, Plaintiff filed a complaint in Gaston County Superior Court.

The Deputy Commissioner issued an Order denying Plaintiff's workers' compensation claim because Plaintiff did not suffer a compensable injury by accident, and Plaintiff did not appeal the Order. Defendants then filed a Motion to Dismiss for lack of subject matter jurisdiction in the Superior Court, which was denied. Defendants appealed.

The main issue is whether the Superior Court had jurisdiction over Plaintiff's claim when the claim has already been heard and denied by the Industrial Commission because it does not fall under the scope of the Act. Unfortunately, the Court held that if the Industrial Commission lacks exclusive jurisdiction to hear a claim that occurs in the course of one's employment, a trial court does not err in asserting subject matter jurisdiction over the claim.

In upholding the Superior Court's decision to assert subject matter jurisdiction over this case, the Court

contradicted the Supreme Court's decision that the Act "provides the exclusive remedy when an employee is injured in the course of his employment by the ordinary negligence of co-employees." *Abernathy v. Consolidated Freightways Corp. of Delaware*, 363 S.E.2d 559 (N.C. 1987). The Court tried to distinguish *Abernathy* on the basis that the Plaintiff alleged his co-worker was liable for breaching N.C.G.S. §90-21.12, our statute establishing a special duty for medical professionals when rendering care, and because, unlike in *Abernathy*, Plaintiff did not suffer a compensable injury by accident.

These weak distinctions do not help employers in North Carolina feel better about the Court's analysis. Typically the only exception to the exclusive remedy doctrine happens when an employer's conduct is intentional and substantially certain to cause serious injury or death, which is not the case here.

The Court's analysis on this question is concerning for two reasons. First, the Court seems to carve out an additional exception for claims asserted under the medical malpractice statute, which potentially increases exposures for employers that keep medical staff on site. Second, the Court seems to suggest that whenever a claim is denied by the Industrial Commission for not meeting the elements of a compensable claim, the Plaintiff has a second chance at a remedy by filing a civil suit. That seems to defeat the purpose of the exclusive remedy provision and opens the floodgate for ordinary workers' compensation claims being heard in civil courts.

Risk Handling Tips: In light of this case, North Carolina employers must ask themselves whether having an occupational health professional on site to help their employees is worth the risk of being sued in civil court, which inevitably results in higher exposures. This Opinion was unanimous, but a Petition for Discretionary Review has been filed with the North Carolina Supreme Court.

Tracey Jones, a partner in Teague Campbell's Raleigh office, is a graduate of the University of North Carolina and Wake Forest University School of Law.

President's Note

Reform Efforts Paying Off

There is considerable good news in a recent update prepared by the Workers Compensation Research Institute on North Carolina's workers' compensation system. It turns out reforms passed by the General Assembly in 2011 and new medical-fee schedules imposed in 2015 are moderating indemnity and medical costs.

Our association played a major role in both efforts mentioned above; indeed, we contributed several thousand dollars to fund an amicus brief in ensuing litigation initiated by the state's ambulatory surgery centers to evade the medical fee schedule. Employers who wonder what good is the North Carolina Association of Self-Insurers should heed the success the state's comp system is enjoying because of our vigorous advocacy of employers' interests.

But there is also sobering news in WCRI's recent report. Despite reforms and despite recent improvements, total costs per claim in North Carolina were 23% higher than the median of

the 18 states WCRI is monitoring. Specifically, total costs per claim in North Carolina averaged about \$52,000 for 2015 claims with more than seven days of lost time at an average of 36 months of experience.

This goes to show that our work is not done yet. We have to understand why our claims costs are so much higher than in other states, and then we have to consider what sort of changes we may wish to advocate. It is precisely this kind of monitoring and follow-up that NCASI does best – there is no other group or organization in the state whose sole job is to keep an eye on the workers' compensation system.

With very best wishes,
Stephanie Gay



Continuing Gains in Workers' Comp

The workers' compensation calendar year 2018 combined ratio for private carriers was 83%, the fifth consecutive year the workers' compensation line of business has posted an underwriting gain, according to the National Council on Compensation Insurance.

NCCI noted the combined ratio of 83% is the lowest on record since the 1930s, adding the industry's favorable combined ratio results over the last several years have been primarily driven by notable improvement in the underlying loss ratios. Also, underwriting discipline appears to have contributed to these results in what seems to be a perpetual low interest rate environment, with low investment returns.

On an accident-year basis, the industry-reported 2018 workers' compensation combined ratio was 97%. NCCI expects this accident year's combined ratio to develop favorably over time.

Other market indicators and trends highlighted in NCCI's 2019 **State of the Line Report**:

- As of year-end 2018, the overall reserve position for private carriers is a \$5 billion redundancy. A redundant workers' compensation reserve position has not been observed in at least 25 years.

- On a preliminary basis, average lost-time claim frequency across NCCI states declined by 1% in 2018.
- In NCCI states, the preliminary 2018 average indemnity accident year claim severity increased by 3% relative to the corresponding 2017 value. Medical lost-time claim severity increased by 1%.
- The workers' compensation Residual Market Pool premium volume was approximately \$1 billion during 2018, representing a residual market share of about 7%.

Here is how NCCI summed up all the various parts: the industry saw very low combined ratios, direct written premium was flat, and employment, wages, and payroll increased. Also, investment gains on insurance transactions slipped a bit, and economic factors contributed to a milder decrease in frequency.

At the same time, reserve deficiencies evaporated, indemnity and medical severity changes moderated, net written premium rose sharply, gain from operations increased, and loss costs decreased.

coming up

March 25-27, 2020

NCASI Annual Conference

Holiday Inn Resort, Wrightsville Beach

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The employers' voice in workers' comp

Update from the Commission

The Industrial commission announced that it will close the Greenville Regional Office effective June 28, 2019. The Commission will continue to serve the citizens of Eastern North Carolina by holding hearings in the Greenville area, and litigant travel time to hearings will not be affected, but Deputy Commissioners Perlungher and Howell will transfer from the Greenville office to the Commission's main office in Raleigh.

Vicki Hewitt-McNeil joined the Commission as the Medical Rehabilitation Nurse Consultant. The Commission's Medical Rehabilitation Nurse Consultant is available to provide temporary assistance in cases with difficult medical challenges, thereby supporting ongoing case management efforts provided by the private industry.

Ms. Hewitt-McNeil has been a registered nurse for more than 25 years and has been a certified case manager advocating for injured workers in the workers compensation system for 12 years.

Mark Taylor has been named the chief operating officer of the Commission. Mr. Tyler brings 26 years of North Carolina state government experience to the Commission in the areas of finance and budget, strategic planning, performance management, project management, and information technology.

Most recently, Mr. Tyler served as the Director of Strategy Research and Planning for the Department of Transportation, Division of Motor vehicles.