

## Flu + COVID

### Two epidemics this season?

As the U.S. enters its annual flu season, public health officials are bracing for the possibility the country may have to contend with two epidemics this fall.

The 2019-2020 flu season had ended by the time the U.S. was engulfed by COVID-19 earlier in the year. Health officials are not counting on being lucky again. North Carolina's state health director Elizabeth Tilson, also co-chair of the state's coronavirus task force, has been working with health systems to develop plans for increasing surge capacity by converting unused facilities, procuring extra beds, or hiring extra staff.

"Thankfully, we haven't had to pull the trigger on any of our emergency med surge plans. But we have all those plans in place, whether it be COVID-19 or COVID-19 and flu," she commented to *Scientific American*.

Even without other threats, the annual flu season is a formidable adversary, causing between 12,000 - 61,000 deaths annually and between 140,000 - 810,000 hospitalizations, according to the Centers for Disease Control and Prevention. But despite ongoing appeals by public health authorities, the percentage of adults vaccinating against the flu has hovered around 45% for the last 10 years.

Perhaps surprisingly, given the gloom and doom over COVID-19, employers are not making a particularly strong push to encourage their employees to take flu shots. A recent survey by Mercer LLC found that only 62% of employers responding are emphasizing the importance of flu shots this year, and 60% of employers will pay all costs for flu shots at provider's office, pharmacy, or other offsite location.

While public health officials fear another surge of COVID-19 infections in the colder months, there are some indications preventive measures against the pandemic may ward off the flu. As has been widely reported, flu all but disappeared this year in several countries in the Southern Hemisphere. *Science* notes Australia reported 33 documented cases of the flu this year, compared to 9,933 in 2019. Chile reported 12 cases, compared to 5,007 last year. Argentina and South Africa also reported dramatically smaller numbers of flu cases.

Employers who may be motivated to make vaccinations mandatory for their employees should consider that the requirement may be difficult to enforce unless the vaccinations are job-related, as is the case in hospitals. Regardless, employers must be mindful of workers who decline vaccinations for medical reasons or sincerely held religious beliefs since such refusals are covered under Title VII of the Civil Rights Act and the Americans with Disabilities Act.

The CDC says flu vaccinations will be particularly important this year because they can help reduce the overall impact of respiratory illnesses and lessen the burden on the healthcare system during the ongoing pandemic. The agency adds vaccine manufacturers expect to ship a record number of doses this year.

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## Court Weighs in on Weekly Wages

By Lindsay Underwood

The North Carolina Court of Appeals has recently issued two decisions that focus on average weekly wage issues. The first case, *Wilkins v. Buckner*, is illustrative with regards to computation of average weekly wage. Notably, this case was unpublished, so it is nonbinding. However, it still provides some context for how the Court reviews these matters.

In *Wilkins*, the claimant sustained injury to his left eye while installing hardwood flooring. The claim was initially denied, but was later accepted as compensable by Defendants post-hearing. The only remaining issue for hearing was computation of the claimant's average weekly wage. The Deputy Commissioner found that claimant had an average weekly wage of \$260.64, with a compensation rate of \$173.77. The Full Commission affirmed. Claimant appealed to the Court of Appeals.

N.C.G.S. 97-2(5) sets out five distinct methods for calculating a claimant's average weekly wage. The Commission had applied Method 3 in determining the appropriate average weekly wage in this case. Method 3 states, where the employment is extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks during which the employee earned wages shall be followed, provided the results would be fair and just to both parties. Claimant argued that Method 5 should have been used to determine the appropriate average weekly wage. Method 5 states that, where, for exceptional reasons, the other methods would be unfair, another method of computing average weekly wages may be resorted to as will most approximate the amount which the injured employee would be earning if not for the injury.

Claimant argued that, because he went full time with the Defendant-Employer at one point, and his hours and responsibilities changed, Method 5 should have been used to calculate his correct average weekly wage. Though claimant was arguing that he was now full time, and was working more hours, he also admitted that there was no way to identify how long his increased workload would last, and the witnesses also failed to provide any concrete testimony about increased work. The Court of Appeals ultimately held that the claimant simply did not provide enough evidence to support his arguments, and Method 3 was appropriately used, as it provided a "fair and just result" for both parties.

In *Nay v. Cornerstone Staffing Solutions*, the claimant worked as an employee of a staffing agency. Though the positions with the staffing agency would start out as temporary, the testimony showed that a large percentage of employees (nearly 95%) had the possibility of obtaining full-time and permanent employment with employers. Claimant began working for Defendant-Employer on August 25, 2015. On November 24, 2015, he injured his back

while performing work in a temporary placement. After his injury, he returned to work briefly. He did not have a formal end date for his employment.

### The Deputy

Commissioner found that claimant's average weekly wage should be calculated using Method 5, by dividing his gross wages by 52 weeks. The Full Commission affirmed. Defendants argued that Method 5 was appropriate, noting that claimant was employed in a temporary capacity with no guarantee of permanent employment, length, or wage rate.

The Court of Appeals reversed the decision and found that Method 5 should not be applied. The Court found that Method 3 was fair. The Court analyzed the amount claimant would be earning were it not for his injury and found he would have been earning \$11.00 per hour. The Court found that, though the length of employment was unknown, calculating his wages according to what he earned over the number of weeks worked fairly approximated what he would have earned but for the injury. It was further noted that claimant's work relationship continued with Defendant-Employer post-injury, which was evidence that he could have earned money from Defendant-Employer indefinitely.

It should be noted that the Court distinguished this case from the *Tedder* case. In *Tedder*, the claimant was hired to fill in for a driver for seven weeks. The Court noted that the *Tedder* claimant would have only earned wages for no more than the seven weeks, until his temporary job ended. In contrast, the claimant with Defendant-Employer in this case, did not have a definite, specified end date. The court in *Nay* also cited to the recent decision in *Wilkins* as further support for its ruling.

Ultimately, we will argue that the facts in the *Nay* case make its holding very fact specific. In most cases, an employee will have a set end date for the employment, or will clearly be a "seasonal" employee. Further, we would encourage employers to make sure that temporary employees have set end dates when the employment begins, so there is no confusion as to whether a specific project is indefinite.

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*Lindsay Underwood is an attorney in Teague Campbell's Raleigh office. She is a graduate of Cleveland State University and Wake Forest University School of Law.*



## Undecided about 2021 Conference

If ever there was a time when it was critical to hear from our members, this is it. If we hold the conference in March 2021 will you attend? What are you hearing from your employers and supervisors about your budgets for traveling to conferences?

Please share your views with me or with our executive director Moby Salahuddin. What you say will help us immensely in making important decisions regarding NCASI's 2021 conference.

At our board meeting in September, the consensus was employers are in no hurry to relax travel restrictions imposed at the beginning of the pandemic. Even though expectations are high we will have a vaccine by early next year, there remains considerable uncertainty about how rapidly people will get vaccinated, how effective the vaccine will be, and whether all that would be enough to allay apprehensions about gathering in groups.

While I am optimistic, I am planning for two eventualities: a regular conference, where we meet in person as before, or a

series of webinars approved for continuing education credits by the NC Department of Insurance and the NC State Bar. Indeed, it is very likely we will host periodic webinars even if we get the all-clear on holding the conference in person. We are monitoring developments and expect to decide around mid-December on whether or not to hold the annual conference in March as usual.

Are any of you interested in hosting webinar(s) in collaboration with us? Have you had success with a particular format/platform? I would love to hear from you. Again, your perspective and experience would be invaluable as we chart a new course in 2021 and beyond.

With very best wishes,

*Stephanie L. Gay*



## Better Outcomes with PT

Starting physical therapy soon after a low-back injury is associated with lower medical costs and results in shorter duration of temporary disability, according to a newly reported study by the Workers Compensation Research Institute.

“This is a comprehensive study that shows a strong association between PT timing and outcomes for workers with low-back pain,” said WCRI President and CEO John Ruser. “While the study cannot conclude that early PT causes better outcomes, it does suggest that the potential benefits of early PT should be considered when planning care for these injuries,” he adds.

The study, titled *The Timing of Physical Therapy for Low Back Pain: Does It Matter in Workers' Compensation?*, focuses on claims with low-back pain only. Among the study's findings:

- Later timing of PT initiation is associated with longer TD duration. On average, the number of TD weeks per claim was 58% longer for those with PT initiated more than 30 days post-injury and 24% longer for those with PT starting 15 to 30 days post-injury, compared with claims with PT within 3 days post-injury.
- Workers whose PT treatment started more than 30 days post-injury were 46% and 47% more likely to receive opioid prescriptions and MRI, respectively, compared with those who had PT treatment initiated within 3 days of injury. The

differences between PT after 30 days post-injury and PT within 3 days post-injury were 29% for pain management injections and 89% for low-back surgeries.

- The average payment for all medical services received during the first year of treatment was lower for workers with early PT compared with those with late PT. For example, the average medical cost per claim for workers who had PT more than 30 days post-injury was 24% higher than for those who had PT within 3 days post-injury.
- Among claims with PT treatment starting more than 30 days post-injury, the percentage with attorney involvement was considerably higher (27% compared with 13%–15% among those in the early PT groups) and workers received initial medical care much later (on average 18 days compared with 2–3 days in the early PT groups).

The study was based on nearly 26,000 LBP-only claims with more than seven days of lost time from 27 states, with injuries from October 1, 2015, through March 31, 2017, and detailed medical transactions up through March 31, 2018. North Carolina is among those states, along with several southern states.



# coming up

March 24-26, 2021

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort, Wrightsville Beach

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## Update from the Commission

By Bruce Hamilton

Chief Deputy Commissioner Melanie Wade Goodwin passed away on September 1, 2020, following a courageous battle with breast cancer. Chief Deputy Commissioner Goodwin was, among many other accomplishments, a North Carolina State Representative from 2004 through 2010 and served on the Commission since 2011. She was a beloved member of the workers' compensation community and respected by both sides of the Bar. She will be greatly missed.

Governor Cooper has nominated Wanda Blanche Taylor to the Full Commission, but her appointment is still pending at the General Assembly. Her appointment has been approved by the North Carolina Senate, but is currently in committee with the North Carolina House.

Mediations, Deputy Commissioner hearings and Full Commission hearings continue to be held remotely, with few exceptions. If all parties agree to an in person mediation or an in person hearing, then those are proceeding in some limited fashion at this time. Any in person hearings have very specific guidelines and safety protocols in place. However, if the parties want an in person hearing, but do not feel it is safe at the current time, the Commission is allowing for continuances.

The 25th annual North Carolina Workers' Compensation Educational Conference is going forward as a virtual event Tuesday, October 13, through Friday, October 16, 2020. Topics include discussion of the extended benefits provision of G. S. § 97-29 (c) enacted in 2011, presentations specifically related to the pandemic including suitable employment and returned to work issues and 2020, work-related injuries and telecommuting, and COVID-19 compensability issues.