

Workers, Employers Face a New Landscape

By Moby Salahuddin

The U.S. is moving towards normalcy as all parts of the country have opened vaccinations to all eligible adults and hopes are high COVID-19 will become as manageable as the annual flu.

Although pockets of infection plague some states, and variants pose a lurking threat, there is widespread optimism the worst is over. On **Face the Nation**, former FDA Commissioner Scott Gottlieb noted given the high number of Americans who are infected and even higher numbers who have been vaccinated, “you have somewhere around 200 million Americans that have reached some level of immunity. I think that there’s enough immunity in the population that you’re not going to see a true fourth wave of infection.”

McKinsey & Company reports evidence from around the world shows vaccines work, the vaccine rollout is improving, and therapeutics such as monoclonal antibody treatments are poised to make a difference. “Further, vaccine trials on children aged 12 and up are well underway, and new trials on babies and children six months and older raise the possibility of pediatric vaccination, which would add to the population that could potentially contribute to herd immunity,” it adds.

The sudden reversal of fortune is posing headaches for employers who continue to be diligent about best-practices but are facing resistance from workers buoyed by the good news. “It’s hard to enforce mask wearing all the time, and it’s hard to enforce social distancing all the time,” says Pat Tyson, partner and head of the OSHA practice in the Atlanta office of Constangy, Brooks, Smith and Prophete.

“We have clients that have monitors going around all the time to make sure (workers) are social distancing and disciplining those who aren’t,” he commented to **Business Insurance**.

The divide between workers cavalier about getting sick and colleagues worried about infection may be another legacy of this pandemic. Indeed, as companies resume normal operations, one of their first challenges will be whether to demand vaccinations.

Some observers foresee profound changes. “Over the past year, no area has undergone more rapid transformation than the way we work,” says Satya Nadella, Microsoft CEO. Microsoft says we’re on the brink of a disruption as great as last year’s sudden shift to remote work: the move to hybrid work — a blended model where some employees return to the workplace and others continue to work from home.

Flexible work is here to stay, the company says, noting remote-job postings on LinkedIn increased more than five times during the pandemic. “People no longer have to leave their desk, house or community to expand their career, and it will have profound impacts on the talent landscape,” Microsoft says.

Joseph Fuller, professor of management practice at Harvard Business School, says an apt term to describe the next phase is not “back to normal” but the “next normal.” In a feature in **Harvard Gazette**, he predicts many industries will move to a four-day work week, reduce travel for training and sales meetings, and will do away with vacation policies tied to an employee’s years of service.

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Futility Frustration

By: Lindsay Underwood

A decision has been issued by the North Carolina Supreme Court in a case that we have been following for quite a few years: *Griffin v. Absolute Fire Control, Inc.* The Supreme Court affirmed the ruling from the Court of Appeals that was issued in January 2020. The case is now remanded back to the Full Commission. Though we will have to wait and see what the Full Commission does, it is not a good disability decision for defendants.

For some factual history: Plaintiff worked as a pipe fitter and injured his back in 2014. He returned to work a month later with restrictions. His pre-injury job was outside his restrictions, so he was offered, and accepted, work in the fabrication shop. Plaintiff was ultimately assigned permanent restrictions. In 2016, Plaintiff underwent non-work related heart surgery and asked to return to work in the field, stating that walking would improve his back condition.

Defendants allowed Plaintiff to return to work in the field as a helper. Plaintiff later requested a hearing seeking a determination on the suitability of the job. The Deputy Commissioner concluded Plaintiff was not disabled. The Full Commission determined the fabrication shop position was suitable because it was a real, actual position. The field helper position was never offered as suitable employment, and was classified as an accommodation offered to Plaintiff at his request. Therefore, Plaintiff failed to prove disability. Plaintiff appealed.

At the Court of Appeals level, Plaintiff made a futility argument. Under *Russell*, an employee can meet his burden of proving disability by showing he is capable of some work, but it would be futile to look for other work because of pre-existing conditions like age or lack of education. The Commission made factual findings that Plaintiff failed to show it would be futile. The Court of Appeals noted the Full Commission found that Plaintiff was 49 years old, had a 9th grade education, and worked as a pipe-fitter. Plaintiff had a permanent 20-pound lifting restriction, would sometimes need to leave work because of pain, and reached MMI in 2017.

The Court of Appeals did not see how the Full Commission could conclude Plaintiff presented no evidence on futility given its findings were similar to other cases where courts supported futility. These factors included age, education, work experience, and restrictions.

The Court also disagreed with the suitable employment analysis. "Make work" positions are those that have been altered such that they are not ordinarily available on the job market. The Court reasoned that, whether a position existed with employers, beyond a given employer in a specific case, is an essential part of

the make work analysis, as the Act does not allow employers to avoid paying benefits by offering a job that does not exist outside of that employer's business.



Because the Commission's findings failed to address whether the job was available with employers *other* than Defendant-Employer, the Commission's assessment was flawed. Additionally, the Commission's finding that "Defendant's *unique* hiring practice of hiring based upon word of mouth and personal recommendations" meant the position was "available to individuals in the marketplace," exemplified this shortcoming in the Court's view and defined the marketplace based on the employer's practices.

Now that this decision has been affirmed by the Supreme Court, the case will go back to the Full Commission for further review on remand. Consequently, we will need to see what the Full Commission does on remand before knowing the full impact of the *Griffin* decision. However, we anticipate that it will be argued that even where a plaintiff is working with his pre-injury employer, and there are jobs available to him with the pre-injury employer, the plaintiff could still prove disability if there is no evidence that the offered position is available in the general marketplace.

We will continue to monitor this case while it is on remand to the Full Commission, but it is worth noting that there are still facts which are unique to this case that may allow this case to be distinguished going forward. For example, the employer in this case had a unique hiring practice, and the higher courts did not look favorably on this. Further, this case does not eliminate other "futility" factors that need to be present like age, education level, and work experience, to demonstrate that returning to work is futile.

Plaintiffs routinely appear to rely on the futility argument for proving disability when they do not conduct their own reasonable job search. Defendants will need to analyze cases with that fact pattern very carefully. If the plaintiff has work restrictions, but has done no job search at all, be prepared to defend a disability argument based upon futility.

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.

President's Note

Off to a Brisk Start

I am pleased to report we already have 40 registrants and 10 exhibitors signed up for our September annual conference. We have mapped out most of the conference agenda but a few slots remain open. I am eager to hear from you if you have a topic or presentation in mind. If I can't work you into this year's conference, there will be another opportunity with our three-day conference in March 2022.

As we have announced, this year's conference will be a shorter one since we expect to get back to our normal schedule next year. We will begin the September 2021 conference around noon on Tuesday, September 7 and conclude by 3:00 p.m. the next day. To mark our 30th anniversary, we are offering a spectacular deal: registration fees of \$30 per person for members and exhibitor fees of \$300 per booth. For non-members, registration rates will

be \$450 per person and \$750 for an exhibition booth.

We don't anticipate major comp-related legislation this year, and it's been quiet on the judicial front also. But of course it could all change rapidly as the economy comes roaring back and employers and employees adjust to new realities at work.

I am looking forward to seeing you at the conference. Let's make it a special one!

Stephanie Gay



Motor vehicle crashes

Higher Deaths, Despite Fewer Miles

The U.S. death rate from motor-vehicle crashes in 2020 increased 24% from 2019, despite a 13% drop in the number of miles driven. The increase in the death rate was the highest in nearly 100 years, according to the National Safety Council.

Eight states saw an increase of more than 15% in death rates. North Carolina did not fare much better as motor-vehicle deaths here increased by 12% between 2019 and 2020.

Lorraine Martin, president & CEO of the National Safety Council, says "it is tragic that in the U.S. we took cars off the roads and didn't reap any safety benefits. These data expose our lack of an effective roadway safety culture." Among the measures advocated by the group: lower speed limits, stricter seat-belt laws, and expanded use of driver-assistance features like automatic emergency braking.

Drivers took advantage of empty highways last year to test their speeding prowess. According to the Associated Press, over a five-month period in California alone, more than 15,000 motorists were ticketed for speeding in excess of 100 miles per hour. Perhaps the most-spectacular incident of speedy driving occurred in North Carolina last year when a man crashed his Audi RS7 after reaching speeds as high as 187 miles per hour on Interstate 95 near Raleigh. He was charged with speeding in a work zone, failure to stop for blue lights and siren, and fleeing to elude arrest.

Several groups have noted drivers continue to drive at high speeds even though the roads are congested once again. Arity, a mobility data and analytics company, reports "typically we see people slowdown in September as kids return to school, but we've seen less of that impact this year."

Another behavioral change that concerns safety groups is that more drivers are testing positive for drugs and alcohol. A study by the National Highway Traffic Safety Administration found that between mid-March and mid-July last year, almost two-thirds of seriously injured or fatally injured drivers tested positive for at least one active drug, including alcohol, marijuana, or opioids. The proportion of such drivers testing positive for opioids nearly doubled after mid-March, as compared to the previous six months, while marijuana prevalence increased by about 50%.

Regarding alcohol and other drug prevalence among seriously and fatally injured drivers at the five trauma center study sites, more than 29% in the most recent period (July 19 to September 30) had measurable alcohol in their systems, with over 26% testing positive for the presence of cannabinoids and over 13% positive for opioids. In the same period, the percentage of drivers testing positive for at least one category of drugs remained above 60%, with nearly 25% testing positive for multiple categories of drugs.

coming up

September 7-8, 2021

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort, Wrightsville Beach

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NCIC Update

By Bruce Hamilton

Wanda Blanche Taylor and Adrian A. Phillips appointed to the Full Commission by Gov. Cooper

Cooper Wanda Taylor has been appointed by Gov. Cooper to the Full Commission. If confirmed by the General Assembly, Attorney Taylor will replace Commissioner Charlton Allen, who has stayed on following the expiration of his term on June 30, 2020. Attorney Taylor is a Fellow of the College of Workers' Compensation Lawyers. She received her JD degree from UNC-Chapel Hill and her undergraduate degree from Duke University. She is currently the Director of Litigation/Counsel at Key Risk Insurance. Previously, attorney Taylor served as a Deputy Commissioner and Chief Deputy Commissioner at the Industrial Commission for 20 years. Ms. Taylor's appointment is subject to approval/confirmation by the North Carolina Gen. Assembly.

Adrian Phillips has been appointed by Gov. Cooper to the Full Commission to fill the slot currently held by Commissioner Loutit, whose term is set to expire April 30, 2021. Attorney Phillips has served as a Deputy Commissioner at the Industrial Commission since 2002. Before joining the IC, attorney Phillips worked as an assistant attorney general in the tort claim section of the North Carolina Department of Justice. Prior to that, Ms. Phillips prosecuted Medicaid fraud cases for the North Carolina Department of Justice and served as an assistant district attorney and Caswell and Person Counties. Attorney Phillips received her JD from North Carolina Central University school of Law and her undergraduate degree at Bennett College. Ms. Phillips' appointment is also subject to confirmation by the North Carolina Gen. Assembly.

Celeste Harris Appointed to Serve as Deputy Commissioner

Celeste Harris has been appointed as a Deputy Commissioner. Attorney Harris has been in private practice for 30 years representing injured workers and workers compensation matters and individuals in personal injury and Social Security disability matters. She is a North Carolina state board certified Specialist in Worker's Compensation Law and a North Carolina certified mediator. She earned her law degree from St. Louis University of school of Law, attending Wake Forest University school of Law during her third year. Ms. Harris will be assigned to the Winston-Salem regional office of the IC.

Notice to All Carriers, Third-Party Administrators, and Self-Insured Employers: New Requirement to Provide Commission with Email Address for Claim-Related Documents

Effective March 1, 2021, all carriers, third-party administrators, and self-insured employers are required to provide the Commission with an email address for receipt of claim-related documents. The designated email address shall be provided to the Commission at contactinfo@ic.nc.gov. The email address provided will be used in cases where the Commission does not have an individual email address for the claims representative assigned to the claim. Providing an email address is mandatory and will ensure timely receipt of claim-related documents. See Rule 11 NCAC 23A .0109 (d).

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