

New hopes over falling COVID cases

By Moby Salahuddin

Buoyed by rapidly falling COVID cases, the White House is preparing to adopt a new strategy of living with the virus, according to *Politico*, a well-known media outlet.

“We are moving toward a time when Covid doesn’t disrupt our daily lives. But in order to get people to view the pandemic differently, they have to feel differently about the pandemic,” one White House official commented.

Administration officials say the White House plans a subtle shift over the next several weeks toward touting the president’s achievements in rolling out vaccines and treatments and emphasizing the everyday things that people can do again if they’re vaccinated.

“We can really get to a much more active, less fearful, more normal style of living” if cases keep declining, said one of the people familiar with the response. “We have to reset people’s expectation that they can get back to joy.”

Separately, the *Washington Post* reports some municipalities and schools are shedding mask requirements and elected officials no longer talk about conquering the virus, as President Biden did just seven months ago, in the short-lived glow of the vaccine rollout. “A bipartisan group of governors told Biden last week at the White House it is time to “move away from the pandemic,” the newspaper reported.

Even public health authorities have been surprised by the speedy decline in new cases. *The Atlantic* notes that one month ago the Centers for Disease Control and Prevention published results of more than 20 pandemic forecasting models. Most projected COVID-19 cases would continue to grow through February, or at least plateau. “Instead, COVID-19 is in retreat in America. Some pandemic statistics are foggy, but the current decline of COVID-19 is crystal clear,” the magazine concludes.

Public health officials cannot explain fully why the pandemic is in retreat but suggest social distancing, masks, vaccinations, and a natural drop-off in new infections may be the reasons. “It has infected everybody that could be infected out and about — and that means automatically it will run out of people to infect and start coming down as fast as it went up,” Ali Mokdad, an epidemiologist at the Institute for Health Metrics and Evaluation at the University of Washington, commented to *Vox*.

However, despite the current waning of the pandemic, workers remain reluctant about returning to the office. A widely reported poll taken by Morning Consult on January 6 found that more than half of workers would consider quitting if forced to return to the office. Only a week earlier, the percentage of reluctant workers was 45%, compared to 35% on December 30.

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CASE LAW UPDATE

By Lindsay Underwood

Monroe v. MV Transportation

The most recent case to analyze futility has been issued by the North Carolina Court of Appeals. The case, *Monroe v. MV Transportation*, relies heavily on the *Griffin v. Absolute Fire Control, Inc.* case that came down last year to support its findings.

In *Monroe*, the claimant was in her late 40's when she sustained her injury. She had a bachelor's degree, but was working part time as a bus dispatcher and driver for the employer, earning \$10.50 per hour. She had been receiving SSD benefits since 1994 for an unrelated medical condition (PTSD). On the date of injury, the claimant slipped while inspecting a bus, hit her left shin, and twisted her back and right knee. On November 7, 2016, she received restrictions of alternating between sitting and standing, and no lifting over 20 pounds.

The claimant's claim was denied initially but was ultimately heard before Deputy Commissioner Lori A. Gaines and the claim was determined to be compensable. The claimant's disability was also an issue for hearing, and the claimant introduced medical records that showed her work status as "unable to work secondary to dysfunction." Her medical providers testified they would have recommended work restrictions.

Deputy Commissioner Gaines found that the claimant was disabled from November 7 through November 14, 2016, when she was written out of work. Further, Deputy Commissioner Gaines held that the claimant had been disabled thereafter until she returned to work. The Full Commission disagreed. It was noted that the claimant was 51 years-old, was a part-time dispatcher and bus driver earning \$10.50 per hour and had been receiving SSD since 1994. The Full Commission found the claimant had not produced sufficient evidence to demonstrate a post-injury job search, or that looking for employment would be futile. Thus, because she had not looked for work, she was not disabled and could not meet her burden.

The claimant appealed to the Court of Appeals and argued futility. Under *Russell*, a plaintiff can meet her burden of proving disability by showing she is capable of some work, but it would be futile to look for other work because of pre-existing conditions like age, unrelated conditions, or lack of education. In this case, the claimant argued that the Commission's findings of fact were insufficient to support the conclusion that she failed to provide any evidence of futility.



Specifically, she argued the record contained ample evidence of futility considering her restrictions and other factors unrelated

to the injury. The Court in this case cited *Griffin*. In that case, the claimant was 49 years-old with a ninth-grade education, prior work experience limited to construction, and permanent restrictions of no lifting greater than 20 pounds as a result of a work injury. The Court in *Griffin* found the Commission's conclusion that there was "no evidence" to support futility misapplied the law and they reversed for additional findings as to whether the claimant demonstrated futility since the only factual findings in the record were consistent with a conclusion of futility.

The Court felt this case is analogous to *Griffin*. The claimant was in her 50s at the time of the hearing, had been receiving SSD benefits unrelated to the work injury for several decades, and despite her bachelor's degree was working a part-time transportation job earning \$10.50 per hour, and was restricted to no lifting over 20 pounds. The Commission still concluded the claimant had not otherwise presented evidence to establish disability and made no findings regarding the claimant's medical records labeling her work status as "unable to work secondary to dysfunction." The Court was essentially unable to reconcile the Commission's findings "or lack thereof" to its conclusion that the claimant failed to present any evidence showing futility.

This case was ultimately vacated and remanded to the Full Commission for additional findings as to whether, under *Russell*, the evidence the claimant presented is sufficient to establish disability by futility. This case is yet another reminder of how the Court will treat disability arguments regarding futility. Based on this decision, as well as *Griffin*, it is a good idea for defendants to have labor market surveys, or other vocational assessments completed to support their defense that a claimant is not disabled as alleged. It is also important to note that 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.

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

Conference 2022

We are putting the final touches to the program for our upcoming conference at the Embassy Suites in Wilmington. As we have mentioned, this year we will follow a Monday-Wednesday rotation, with the conference opening at 1:00 p.m. on April 18 and concluding around noon on April 20th.

Rates at the Embassy Suites will be \$189 (river view) and \$169 (standard view) per night. Rates include a made-to-order breakfast and a manager's reception each evening. Please book your reservations by March 19 to receive the discounted rate. You can register from our website at ncselfinsurers.com (under the conference tab). You may also call 1-800-HILTONS and use the group code: ASI

Also in the works for May 19 is a workshop in Raleigh on strategies to win cases exceeding 500 weeks. We believe some of



the losses employers have suffered are likely due to inappropriate or, perhaps, ineffective use of vocational services/labor market surveys. The workshop would cover the proper use of vocational planning for decisions on job search vs. labor market survey use. We would obtain CEU approval for attorneys, adjusters, rehab professionals.

Stay tuned for updates later in the spring. We look forward to seeing you soon.

Stephanie Gay

Comp Market Holds its Own

The workers' compensation insurance market remained profitable in 2021 despite premium declines and in spite of COVID-19, which turned to be a non-factor, according to a recent article in *NU Property & Casualty*.

"We're in a period now where, year after year, workplaces just seem to be getting safer," says Jeff Eddinger, senior division executive at the National Council on Compensation Insurance. Most-recent figures from NCCI show net-written premium dropped 10% between 2019 and 2020 but combined ratios and operating margins have never been more favorable to the industry.

In December, NCCI released the results of its recent study on the impact of COVID-19. Key findings:

- For the 45 states included in this analysis, COVID-19 claims represent 11.0% of total claims counts and 3.5% of incurred losses.
- Indemnity-only claims emerged as a significant share of reported COVID-19 claims.
- In aggregate, COVID-19 claims that remained open have relatively higher case reserves due to the uncertainty of COVID-19 infections, later than average accident dates, and timing of the various waves of the pandemic.
- COVID-19 indemnity claims closed more quickly than non-COVID-19 indemnity claims, partly driven by the large share of indemnity-only claims.

- Despite the higher closure rate, the ratio of paid to paid + case losses on COVID-19 claims is lower when compared with that for non-COVID-19 claims.

The study included data from nine states, including North Carolina. The analysis does not include experience from self-insured employers or denial and expense-only claims.

"COVID-19 introduced a new challenge in WC. Claim and loss activity during 2020 varies across jurisdictions for a variety of reasons, such as the existence of presumptive legislation, differences in compensability and underlying costs, state-specific ordinances constraining trade and/or working conditions, and disease waves that occurred at varying times and magnitudes," the report notes.

NCCI says on average, COVID-19 indemnity claims closed more quickly than non-COVID-19 indemnity claims. Indemnity-only claims are the driver. These short-duration, wage replacement claims were not as prevalent in the WC system prior to the pandemic. The ratio of paid to paid + case losses on COVID-19 claims is lower when compared with that for non-COVID-19 claims. To some extent, this may reflect higher insurer case reserves in the denominator of the ratio, given the uncertainty associated with possible future development on COVID-19 claims.

"In almost every state, the average cost of a COVID-19 claim is lower than that for non-COVID-19 claims. This may be

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coming up

April 18-20, 2022

NC Association of Self-Insurers' Annual Conference.

Embassy Suites by Hilton Wilmington Riverfront

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NC Industrial Commission Update

By Bruce Hamilton

Deputy Commissioner Hearings

In-person Deputy Commissioner hearings were scheduled to resume effective January 1, 2022, but the return date has now been delayed. In-person Deputy Commissioner and Full Commission hearings are currently scheduled to begin March 1, 2022. In-person Deputy Commissioner hearings will follow the safety protocols for the County courts where the hearing is being held or the safety protocols of the building where the hearing is held, whichever are more restrictive.

Deputy Commissioner John C. Shafer to Retire

Deputy Commissioner John Schafer, who has been the Dispute Resolution Coordinator for the IC since 1997, has retired effective February 1, 2022. Current Chief Deputy Commissioner Tamara Nance will serve as the acting Dispute Resolution Coordinator effective February 1, 2022.

David Hullender and Thomas Perlungher Reappointed to Second Terms

Deputy Commissioners David Hullender and Thomas Perlungher were reappointed to second six-year terms effective February 1, 2022.

2022 Maximum Weekly Compensation Rate

The maximum weekly compensation rate for 2022 was increased to \$1184.

Industrial Commission Issues Annual Report for Fiscal Year 2020/2021

The IC issued its annual report for fiscal year 2020-2021. When compared to fiscal year 2019-2020, the total number of workers' compensation claims filed increased in 20-21, but the total number of Deputy Commissioner and Full Commission hearings dropped as did the number of cases referred to mediation and Orders approving clincher agreements. However, the overall mediation settlement rate stayed approximately the same in 20-21 when compared to 19-20 despite almost all mediations moving to a remote format in 20-21.

Comp Market Holds its Own *continued from page 3*

impacted by the later-than-average accident date for COVID-19 claims," the report adds.

Including COVID-19 claims, most states saw a decrease in total claims between accident years 2019 and 2020. Excluding COVID-19 claims, all states saw a decrease in claims between 2019 and 2020. Nationwide, total claim counts decreased by 2.6% in 2020, while non-COVID-19 claim counts decreased by 13%.