

Workers balk at returning to office

Employers unsure how to manage workers' reluctance to return to the office now face two additional uncertainties: the possibility of a recession and the probability of another wave of Covid infections.

In a widely reported survey, Global analytics firm Basking reports nearly 50% of office visits this year have been for only one day a week. When Yelp, a company which publishes crowd-sourced reviews about businesses, surveyed its employees about coming to the office, 93% of its employees and managers said they are just as effective working remotely. Only 1% of Yelp's 4,400 employees have elected to return to the office daily.

Similarly, in a survey by ADP Research, which monitors labor market and employee performance, nearly 65% of workers said they would look for a new job if their employer requires them to be in the office full-time. In the same vein, The Future Forum, developed by workplace-messaging platform Slack, surveyed more than 10,000 workers globally in the summer of 2021 and found a deep split among executives and rank-and-file employees. Nearly 45% of executives said they want to come to the office daily; only 17% of other employees said the same.

Some CEOs say a recession, with its threat of layoffs, would change attitudes. "I think as you go into a recession and people fear that they might not have a job, that will bring people back to the office," says Stephen Ross, owner of the Miami Dolphins. "The employees will recognize as we go into a recession, or as things get a little tighter, that you have to do what it takes to keep your job and to earn a living," he noted in an interview with *Bloomberg*.

Intuit CEO Sasan Goodarzi told *MarketWatch* "if times get very tough, you will see more and more people be asked to come back to work. Many CEOs I talk to believe face-to-face trumps virtual. As the economy shrinks a bit, and people move from hiring to now cutting jobs, and a possible recession, you might see more of a move back to work."

According to the U.S. Bureau of Labor Statistics, the consumer price index rose 9.1% over the past 12 months, a 41-year high. "Inflation will come down at some point, but it is unlikely to be a soft landing without economic pain," sums up Larry Summers, former Treasury secretary and a prominent economist who's been predicting a recession.

An economic downturn is not the only cloud on the horizon. According to the CDC, hospitalizations due to COVID have doubled since April because of new subvariants. *The New York Times* reports the Biden administration is preparing for the possibility 100 million Americans will be infected with the coronavirus this fall and winter, That's lower than the number of Americans who were infected during the Omicron wave in December and January, but still amounts to roughly 30% of the U.S. population.

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CASE LAW UPDATE

By Lindsay Underwood



The “Eggshell Plaintiff Rule”

A May 2022 decision from the North Carolina Court of Appeals provides a refresher on the “eggshell plaintiff rule” and taking your claimant as you find them. In *Kluttz-Ellison v. Noah’s Playloft Preschool*, the claimant sustained two separate incidents to the knees while working as the owner and director of a preschool. One incident took place in 2013, while the claimant was changing a lightbulb, and one in 2015, when she tripped over a student’s sleeping cot. Both claims were found to be compensable.

The claimant was ultimately referred for a revision replacement surgery for the right knee, as well as a total knee replacement for the left knee. Before she could undergo the same, her physician opined she first needed to lose significant weight. The claimant was unable to lose weight on her own, and the physician recommended bariatric surgery.

The parties proceeded to hearing on the issue of weight loss and the need for bariatric surgery. The claimant testified she had tried to lose weight on her own using various diets. The Deputy Commissioner found the claimant’s need for a right knee revision surgery and repair of hardware loosening were not related to the compensable work injury, and, thus, the bariatric surgery, was unrelated as well. The claimant’s claims for the surgeries were denied.

The claimant appealed to the Full Commission. Notably, during the appeals process, the claimant underwent the right knee revision surgery and bariatric surgery on her own. The Full Commission reversed, concluding her right knee condition, treatment, and, now completed, right knee revision surgery was compensable. The Full Commission initially concluded her need for weight loss treatment/bariatric surgery was not directly related to her injury but following a Motion for Reconsideration and a Motion to Allow Additional Evidence filed by the claimant, the Full Commission amended the Opinion and Award. Though the Full Commission did not admit additional evidence, they concluded the bariatric surgery was medically necessary as a precedent to her compensable right knee surgery.

Defendants appealed to the Court of Appeals. The Court noted the claimant’s bariatric surgeon testified it was standard practice to not allow a patient to have knee replacement surgery until their BMI is under 40. Further, the surgeon testified the claimant had tried to lose weight on her own. Thus, the only way for her to get her BMI under 40 so she could undergo the medically necessary knee replacement revision was to have bariatric surgery. Further, the claimant needed surgery for both knees, and her authorized treating physician testified it was an

emergent weight loss requirement to get her BMI under 40 before she could undergo the surgeries.

The Court of Appeals cited N.C.G.S. §97-25, and the definition of medical compensation including “other treatment” such as payment of medical expenses incurred as a result of bariatric surgery because it was medically necessary to help her achieve an optimal BMI to allow her to undergo the right knee replacement revision. The question then became whether her need for bariatric surgery was directly related to the work injury. Applying the Act liberally, the Court of Appeals rejected Defendants’ argument that the claimant’s weight issues preexisted the work injury and were not therefore directly related to the compensable claim. Instead, they noted a direct line of causation connecting the dots between the compensable injury and the Commission’s award for bariatric surgery. As the bariatric surgeon testified that, due to physical limitations (the need for bilateral knee surgeries), she could not lose weight fast enough on her own, her need for bariatric surgery was directly related to the compensable injury.

Employers are often frustrated by tangential medical treatments that come up while a claimant is receiving treatment for a compensable condition. Unfortunately, defendants take their claimant as they find them, and this decision only confirms that the Commission, and the Court of Appeals, will require defendants to take steps to return the claimant to their pre-injury status, even if it includes providing treatment like bariatric surgery, weight loss programs, and smoking cessation efforts.

A key point was the physician’s testimony the claimant had made her best efforts with other weight loss treatment and bariatric surgery was the only remaining option. A motion to compel the claimant to comply with medical treatment is a potential option if we are ordered to pay for weight loss to treat a compensable work-related injury. The claimant will have to show up at meetings and comply with preliminary weight loss programs or they could jeopardize their benefits due to noncompliance with medical treatment.

What is clear from this case is that Defendants should not have to immediately pay for the most expensive treatment modality, and the claimant still has to make efforts on their own through less-expensive options.

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

Our Changing Workplace

Whether or not long-Covid will plague large numbers of workers, there's little doubt the pandemic is casting a long shadow on the U.S. workplace. Data show restaurants are crowded, airplanes full, and sports arenas bustling with fans, but offices remain largely empty because workers are reluctant to give up the freedom of working from home.

What affects work will eventually affect workers' compensation. Most workers may well be happier working on their own. But if remote work becomes pervasive, what about those for whom the workplace provides a sense of community and fellowship? Would remote work lead to greater isolation?

Mollie Kallen, CEO of a case-management firm in Florida, makes the case the so-called social determinants of health – the conditions under which we live, work, play, etc. – have an impact on our physical and mental well-being, and this of course also



applies to recovery from workplace injuries. She is among the two presenters we have selected for our annual conference next year, scheduled for March 29-31 at the Holiday Inn in Wrightsville Beach. Also on the agenda, nationally known speaker Mark Pew, who will talk about marijuana and managing chronic pain.

If you have a specific idea or a presentation in mind we would love to hear from you. Please contact me or Moby Salahuddin, our executive director.

We look forward to seeing you soon.
Stephanie Gay

NCCI

Another Profitable Year for Comp

Private insurance carriers posted another profitable year in 2021, with a calendar-year combined ratio of 87. It was the fifth consecutive year the combined ratio was below 90 and the eighth consecutive year of underwriting profitability, according to the National Council on Compensation Insurance.

“Strong employment and significant wage growth are fueling workers compensation payroll increases. We have a remarkably strong and healthy system right now,” said NCCI Chief Actuary Donna Glenn.

Among the highlights of the latest report from NCCI:

- Payroll increased more than 10% in 2021—about 3% from employment and 7% from wages. These increases were not uniform across all workers as wage gains were largest for low-wage workers and industries.
- The most recent filings resulted in decreases for all but one NCCI state. For 2022, NCCI recommended an average premium decrease of over 7%. This was the ninth consecutive year where an overall premium decrease was recommended.
- Loss ratios since 2018 have been the lowest in 30 years.
- The number of COVID-19 claims declined in 2021 relative to the prior year.
- Approximately 60,000 COVID-19-related claims with associated losses have been reported to NCCI since the beginning of Accident Year 2020. In total, those claims are associated with approximately \$500M in losses. The intensity of the waves of COVID-19 claims in 2021 was

significantly moderated by higher availability of vaccines and increased usage of personal protective equipment.

NCCI estimates lost-time claim frequency for Accident Year 2021 will be 7% higher than that for Accident Year 2020. Pandemic-related shutdowns in 2020, with workers returning to work in 2021, are likely contributors to this increase. After combining the annual lost-time claim frequency changes for the two most recent years, NCCI reports claim frequency has declined slightly since 2019.

Motor vehicle accident frequency had the largest decline at nearly -13%. These claims account for a small share of all lost-time claims. Slip and fall claims also had an above-average decline in frequency. These claims account for almost 30% of all lost-time claims.

Although NCCI's annual report receives widespread publicity, observers note the group's data excludes the performance of 15 states, among them California, New York, New Jersey, and Pennsylvania. Also, NCCI does not include data from municipalities, public schools, colleges, and healthcare, which tend to be self-insured.

Separately, the Workers' Compensation Insurance Rating Bureau of California cautions long-Covid could yet have a significant impact on the workers' compensation system. A recent report from the bureau shows about 11% of claims for mild Covid infections in California also involved workers receiving medical treatment for long-Covid in the four months following acute care. Long-Covid symptoms requiring medical treatment were more common among workers who were seriously or critical ill from Covid. Nearly 40% of these patients required more medical treatment.

coming up

Wednesday, March 29- Friday, March 31, 2023

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort Wrightsville Beach

Make reservations by Feb. 26 to get the conference rate.

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The employers' voice in workers' comp

NC Industrial Commission Update

By Bruce Hamilton

Commissioner Myra Griffin Reappointed

Commissioner Myra Griffin was reappointed by Gov. Cooper to serve a second six-year term beginning July 1, 2022. Her reappointment is subject to confirmation by the North Carolina Gen. Assembly and had been approved by the House of Representatives as of June 29, but was still pending in the Senate. However, it is not anticipated that there will not be any problem with her reappointment.

The Commission has hired three new Deputy Commissioners and a new General Counsel.

Anne Harris Appointed to Serve as a Deputy Commissioner

Anne Harris was appointed as a Deputy Commissioner of the Triad region of North Carolina. Attorney Harris has represented injured workers for over 29 years and has over six years of legal experience in the areas of elder law and estate planning.

Michelle Denning Appointed to Serve as a Deputy Commissioner

Michelle Denning was appointed to serve as a Deputy Commissioner hearing noninsured cases throughout the state. Attorney Denning has worked in various capacities at the industrial commission and other state agencies for the past 16 years. From 2006 to 2015, attorney Denning filled multiple roles at the IC including law clerk, legal counsel to the Chairman, and special Deputy Commissioner. Since 2015 she worked as Assistant Attorney General handling noninsured and penalty enforcement matters and later represented North Carolina Department of Public Safety and Worker's Compensation litigation. Most recently, attorney Denning was General Counsel for the Industrial Commission.

Patrick Wooten Appointed to Serve as a Deputy Commissioner

Patrick Wooten was recently appointed as a Deputy Commissioner in the Raleigh office. Attorney Wooten has served in the Workers Compensation Section of the North Carolina Department of justice as a special deputy attorney since 2003. Over the last 19 years he has litigated hundreds of complex Worker's Compensation claims on behalf of numerous state agencies, departments, and institutions.

Amber May Hired as General Counsel

Amber May was recently hired as General Counsel to the Industrial Commission. For the last eight years she had served as Counsel for the Rules Review Commission at the North Carolina Office of Administrative Hearings. Attorney May have previously worked in the Full Commission Section as law clerk to former Chair Pamela Young.

IC Mileage Reimbursement Increase Effective July 1, 2022

The Industrial Commission mileage reimbursement rate for medical treatment increased to \$0.625 per mile for travel from July 1, 2022 through December 31, 2022, provided the travel is 20 miles or more round-trip.