NC Workers' Comp NEWS

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Bill would take away employers' right to choose treating physician

A bill introduced by state Sen. Doug Berger (D-Franklin) with 20 co-sponsors would take away the employer's right to select the treating physician for injured workers. Senate Bill 781 was introduced March 24 and referred to the Committee on Commerce the following day.

Sen. Doug Berger

"Every employer should take notice of this threatening development. Giving claimants the right to choose their physician would almost certainly increase workers' compensation costs," warns E.J.Norris, president of the North Carolina Association of Self-Insurers and manager of claims at Duke Energy Corporation.

Mr. Norris refers to a 2005 study by the Workers Compensation Research Institute. WCRI's study, conducted in California, Texas, Massachusetts and Pennsylvania, concluded that "when workers chose their provider, costs were generally higher, perceived recovery of health outcomes were not better, and return-to-work outcomes were often poorer than when employers chose the provider."

Based in Cambridge, Massachusetts, the Workers Compensation Research Institute is an independent, not-for-profit research organization providing high-quality, objective information about public policy issues involving workers' compensation systems. The 2005 study, titled The Impact of Provider Choice on Workers' Compensation Costs and Outcomes, found that "employers, on average, may be well-positioned to select good quality, lower-cost providers—or at least better positioned than many workers. It also suggests that employers, in practice, were not generally selecting inferior-quality providers; although there may be exceptions, they were not frequent enough to affect overall results." — CONTINUED ON PAGE FOUR

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President's Note

Employers should heed the General Assembly

Employers should be aware that at least four bills that could have an impact on workers' compensation were introduced in the North Carolina General Assembly in March.

We have highlighted SB-781 in our lead story in this issue but equally problematic is HB-805, which seeks to include the employer's contribution to an employee's retirement account when calculating the average weekly wage. This bill hopes to overturn the Supreme Court decision in **Shaw vs. US Airways**, where the court held that employer contributions to pension plans are not to be included in calculating average weekly wage.

HB-805 would include in the definition of "earnings" an employer's contributions to an employee's retirement accounts if contributions are vested, quantifiable and available to the employee. This definition alone is fraught with ambiguity.

For one, it doesn't specify if the funds have to be "fully" vested, how they are to be calculated (i.e. do you divide the vested amount by the number of weeks the employee worked for the employer? Does it include a waiting period?), and whether you have to go back and look at the value of the asset on the day of injury (do you use the closing value of the stock market on the date of injury to calculate the benefits?).

Our association is monitoring this bill, and others unfriendly to business, but all employers should be alert to the potential for mischief when the General Assembly is in session.

With very best wishes,

Jay Norris, *president*

CASE LAW UPDATE

By Joe Austin

In **Reaves v. Industrial Pump Serv.**, the employee died at work. Plaintiff claimed that the death was due to exposure to a hot and humid work space that had poor ventilation, but the Industrial Commission found that the employee had become accustomed to working in similar conditions and therefore, that there had been no accident.

The Court of Appeals ruled that for claims resulting from exposure to extreme conditions to be compensable, it is not necessary to show that the exposure was unusual, but only that the job placed employees at a greater risk of exposure-related problems than the general public.

Even though the Workers' Compensation Act provides that no compensation is payable unless written notice of an accident is provided within 30 days, except where there is a reasonable excuse for the delay and the employer has not been prejudiced by the delay, the Supreme Court has ruled that an employee is not required to provide written notice where the employer has been verbally informed of the accident. **Richardson v. Maxim Healthcare**

The Court of Appeals has ruled that a job applicant, who is injured as a result of a motor vehicle accident on her way home from a pre-employment physical examination, is not entitled to workers' compensation benefits because the applicant was not an employee. **Floyd v. Executive Personnel**

In **Jones v. Modern Chevrolet**, the employee was terminated after he had returned to work. The Industrial Commission ruled that because the employer had not shown that any employee would have been terminated for the same reason, the employee was entitled to collect TTD. The Court of Appeals reversed, ruling that it was improper for the Industrial Commission to require the employer to justify the termination because the employee had been released to return to work without restrictions.

The Court of Appeals has ruled that although employees are entitled to recover interest on out-of-pocket medical expenses, they are not entitled to recover interest on expenses that are initially paid under a plan of private health insurance. **Sprinkle v Lilly Indus**.

In **Strickland v. Martin Marietta**, the employee's claim was initially denied but the Industrial Commission found his injury to be compensable. In the interim, he collected short-term disability benefits under an employer-funded program.

Although the Industrial Commission has discretion to grant employers a credit for such benefits, the Court of Appeals ruled that it is an abuse of the Commission's discretion to reduce the credit in order to fund a fee for the employee's attorney where the employee achieves a substantial recovery from which the attorney is being adequately compensated.

Joe Austin leads the workers' compensation practice group at Young Mooreand Henderson in Raleigh. A graduate of Davidson College, Joe received his law degree from Wake Forest University.

At the NC Industrial Commission

New faces, new procedures

by Amy L. Pfeiffer

The current Commissioners and their terms are:

- Dianne C. Sellers, through 2009 (April)
- Danny Lee McDonald, through 2010
- Laura K. Mavretic, through 2011
- Bernadine S. Ballance, through 2012
- Christopher Scott, through 2012
- Staci Meyer, through 2013
- Chair Pamela Thorpe Young, through 2014

Commissioner Meyer was most recently a Deputy Secretary at the N.C. Department of Cultural Resources, and she has acted as an Assistant Attorney General for the State. In other personnel news, effective January 30, 2009, Wanda Blance Taylor was named as Chief Deputy Commissioner. Stephen T. Gheen will remain as a deputy commissioner and will be working in the normal rotation along with the other deputy commissioners.

Other Important News:

The reimbursable mileage rate is now $0.55 per mile. Updated Forms 25T are available on the IC website.

There is a new *N.C. Workers' Compensation Notice to Injured Workers and Employers* (Form 17) that must be posted effective February 1, 2009. It is also available on the I.C. website. According to I.C. Rule 201, this poster must be conspicuously posted in all places of employment when there is workers' compensation coverage in place or the employer qualifies as a self-insured. Please note that the I.C. website indicates that the poster must be in the same colors and formats as shown on the website. Please call me or the Commission if you have specific questions about this new poster.

Effective January 29, 2009, there is a new IC file numbering system. The Commission actually exhausted all of their available IC file numbers. From now on, all new claims will be designated by the letter W plus five numerical digits; for example: W12345.

As of January 8, 2009, the Claims Department began acknowledging the receipt of Forms 60, 61 and 63. The report is automatically generated and will be a part of the daily IC file number report, which notifies the carrier/self-insured of the filing of a Form 18 and 19. The carriers/self-insureds should keep a copy of this report as verification of the filing of a Form 60, 61 and 63. It is important to keep track of these forms when filed given the new sanctions policy for a defendant's failure to file a N.C. Gen. Stat. §97-18 form.

The deputy commissioners will continue to hold a large number of their hearings in Raleigh. This is necessitated by the state's severe budget crisis and is an attempt to cut down on the travel expenses of the deputies. This will continue for the foreseeable future.

Finally, the 79th Annual N.C. Statewide Safety Conference will be held on May 12-15, 2009, at the Joseph S. Koury Convention Center in Greensboro. Registration is online on the Commission website.

Amy Pfeiffer is an associate at Cranfill Sumner & Hartzog in Raleigh. She is a graduate of North Carolina State University and Columbus School of Law, Catholic University of America in Washington, DC. Amy served as a Deputy Commissioner at the North Carolina Industrial Commission from 1997-2003.

COMING UP

April 19-23, 2009
RIMS 2009 Annual Conference — Orange County Convention Center, Orlando

May 12-15, 2009
The 79th Annual NC Statewide Safety Conference. Register online at www.ic.nc.gov — Joseph S. Koury Convention Center, Greensboro

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Treating Physician (Ctd. from page 1)

"The WCRI study confirms that employers are far more likely to make better choices when it comes to selecting treating physicians," Mr. Norris says. "Employers routinely work with a network of providers. Thanks to this pre-existing relationship, providers have an incentive to not provide unnecessary care while doing all they can to return the injured worker to work," he adds.

Mr. Norris notes that under North Carolina law if a claimant objects to the treating physician or the treatment provided, the claimant may ask the Commission to choose a different physician. As regards disability ratings, claimants have the absolute right to see a physician of their choosing if they disagree with the rating.

"Figures provided by the North Carolina Industrial Commission show that injured workers and their attorneys rarely disagree with the employer's choice of physician. Our system is working well. There is no need to disrupt a long-standing practice," he adds.

The North Carolina Association of Self-Insurers is among the influential groups lobbying to defeat the proposed legislation. In addition to SB-781, employer groups are keeping an eye on three other bills. One of them is SB-930, which would create a presumption that certain infectious diseases, respiratory disease, hypertension, heart disease, and certain cancers are occupational diseases for firefighters.

The second bill is SB-975, which provides that total disability compensation shall continue until the injured employee reaches the age of 65 or for 300 weeks, whichever period is longer.

Similarly, employers are concerned about two house bills: HB- 805, which seeks to include the employer's contribution to an employee's retirement account when calculating the average weekly wage; and HB-843, which would require the attending physician of an employee to select the health care provider and the diagnostic services center toadminister and analyze any diagnostic tests authorized by a physician under the workers' compensation act.