

Self-insurers, other employers defeat comp bills

The North Carolina Association of Self-Insurers, in coalition with the NC Association of Defense Attorneys and the State Chamber of Commerce, defeated four ill-considered bills introduced in the North Carolina Legislature in March 2009.

“The bills would have substantially changed workers’ compensation law in the state, along with making workers’ compensation insurance more expensive,” notes Jay Norris, president of the NC self-insurers’ association and manager, claims at Duke Energy Corporation.

“We appreciate the work done by our lobbyist Bob Kaylor and by Paul Cranfill, our legal advisor. Our thanks also to employers who raised the alarm over potentially damaging legislation.”

The bills were as follows:

HB 843 - Diagnostic Testing. This bill would have allowed the treating doctor to select the diagnostic facility. The current system, which allows employers to make the selection, gives employers a chance to keep costs down by directing injured workers to less-expensive facilities.

HB 781 - Choice of Physician. Potentially the biggest game-changer of all, this bill would have allowed injured employees to choose their treating physician. Worse yet, from the employers’ point of view, the bill would have allowed the injured employee to make the change at any point during the course of treatment without having to obtain permission from the employer or the North Carolina Industrial Commission.

Along with putting an intolerable work load on the Industrial Commission, the bill would have rendered meaningless painstaking provisions dealing with managed care organizations, and various preauthorization and utilization guidelines for medical treatment. It would have also opened the door for injured workers to be treated by physicians unfamiliar with impairment ratings, return-to-work concepts, and other aspects of workers’ compensation.

HB 805 - Calculation of Income. This bill would have overturned the North Carolina Supreme Court’s decision in Shaw v. US Airways where the Supreme Court held that employer contributions to pension plans are not to be included in the calculation of the average weekly wage. The bill would have included in the definition of “earnings” an employee’s contributions to an employee’s retirement accounts if the contributions were vested, quantifiable, and available to the employee.

HB 903 - Firefighter Occupational Diseases. HB 903 would have declared that certain diseases, including cancer, hypertension, respiratory disease, and HIV-infections are presumptively related to a firefighter’s employment. Put simply, that means that if a firefighter were to develop any of these illnesses it would have been assumed they were related to the firefighter’s work.

This would, of course, have shifted the burden of proof to employers and likely created more litigation.

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President's Note



Why we need the self insurers' association

If the North Carolina self-insurers' association did not exist, it would be necessary to create it. Workers' compensation is so specialized employers need a group dedicated to it, so that the group can keep up with comp's changing laws and regulations and best practices.

More important, employers need a watchdog to keep out ill-informed legislation like the bills we defeated this year. So much potential legislation seems innocuous and innocently worded on the surface. Legislators not familiar with workers' compensation need a group like ours to point out the pitfalls and all the unintended consequences that can drive up costs for businesses, small and large.

I mention all this because we need the support of employers if we are to thrive as an association. In addition to maintaining a lobbyist to protect the interests of employers before the General Assembly, the association is active in providing continuing education through its quarterly newsletters and the annual three-day conference in the spring.

For a very modest annual fee, \$290 at this time, you can help us amplify the voice of employers in workers' compensation.

Finally, please mark your calendars and plan to attend our annual conference next year, scheduled for March 24-26 at Wrightsville Beach. We will soon begin planning the curriculum for this event. If you are interested in making a presentation or would like to suggest a topic, please contact our executive director or me.

We are always open to your ideas and suggestions.

With very best wishes,
Jay Norris, *president*

CASE LAW UPDATE

By Joe Austin



The Court of Appeals has ruled that a clincher agreement drafted by an employer's attorney is enforceable, even if no representative of the employer signs the agreement. In Chaisson v. Simpson, the attorney drafted a clincher and sent it to the employee for signature. Instead of returning it to the attorney, the employee sent the agreement directly to the Industrial Commission, which approved it notwithstanding the lack of any signatures by the employer or attorney. Ruling that the actions of the claims adjuster and the attorney had manifested assent to settle the claim under the terms outlined in the clincher agreement, the Court of Appeals held that it was proper for the Industrial Commission to approve the settlement.

In Freeman v. J.L. Rothrock, Inc., the employee misrepresented his ability to do the work for which he was hired. The Court of Appeals held that the employee's claim for workers' compensation benefits should be barred because the employer would have never hired the employee had it not been for the employee's deception, but the Supreme Court reversed, ruling that there is no basis in the Workers' Compensation Act to deny benefits based on an employee's fraudulent conduct in the hiring process.

In Erickson v. Lear Siegler, the employer paid benefits without prejudice, utilizing a Form 63 which acknowledged an injury without defining its nature or extent. Over two years later, the employee filed a request for hearing, asserting injuries to both his neck and low back, but the employer asserted that the employee's claim for the alleged neck injury was not timely, claiming that only the low back injury had been accepted. According to the Court of Appeals, the submission of the Form 63 invoked the Commission's jurisdiction as to the accident, and as a result, the employee was entitled to seek compensation for any injuries that resulted from the accident.

The Court of Appeals has ruled that, in a case where an employee is disabled as a result of two separate compensable injuries for different employers, both are liable for payment of benefits. As a result, the employee could recover for medical expenses and disability from either employer. In turn, the employer paying benefits would be left to pursue contribution from the other employer. In reaching its decision, the Court observed that the last injurious exposure statute places complete liability on a single employer for occupational disease claims that develop in the course of more than one employment, but noted that there is no similar provision governing employees who sustained multiple injuries. Newcomb v. Greensboro Pipe Co. comparing the development of the disease for individuals performing his job duties as compared to the general public. Lanier v. Eddie Romanelle's

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



At the NC Industrial Commission

Awaiting word on Sellers, and coping with the recession

by Amy L. Pfeiffer

Still no word from the Governor's office regarding the Full Commission term of Dianne C. Sellers, whose term ended on April 30, 2009. Ms. Sellers continues to serve on the commission, as has been customary, and continues to be placed on Full Commission hearing dockets.

Employer groups like Ms. Sellers and we certainly hope she would be reappointed.

In other personnel news, there is a shortage of law clerks at the Full Commission level. Because of the hiring freeze, the agency cannot hire anyone on a full-time basis and has been making do by using law students as interns, and by doubling up on existing clerks and even getting assistance from other members of the Commission.

Two new deputies have been assigned to hear the expedited and emergency medical motions at the Deputy Commissioner level. These Deputy Commissioners are Theresa Stephenson and Chrystal Redding Stanback, who took over the task from Deputy Commissioners Myra Griffin and Robert Rideout. This new medical motion procedure is still in its infancy and the Commission is learning on the go with how best to handle these motions both from a procedural and a due process standpoint.

Everyone is acutely aware of the very severe budget crisis at the State level. As we have reported in this newsletter, a large number of the Deputy Commissioner hearings are being held in Raleigh to minimize travel expenses. This will continue for the foreseeable future. In addition, Commission employees were furloughed along with the rest of State employees, and as such took a .5% pay cut over two months, May and June. It was unclear whether the Commissioners were subject to this furlough and pay cut, but it is my understanding that they voluntarily took the furlough in solidarity with the rest of the employees. All employees are entitled to take off 10 hours of work between now and 2010.

In a separate development, Chair Pamela T. Young has made customer service a priority at the Commission. All Commission employees have been required to attend two day-long training sessions on customer service. It is clear Chair Young views the role of Commission employees as public servants quite seriously, and I believe she would want to know if anyone has any complaints or compliments of her employees.

Along the same lines, there does seem to be more accountability in general at the Commission, and perhaps even a greater transparency. You will have noticed the signature lines of the employees when you receive e-mails. This *mandatory signature line on all Commission-generated e-mails make the disclosure that "e-mail correspondence to and from this address is subject to the North Carolina Public Records Law and may be disclosed to third parties."* Pursuant to Industrial Commission minutes adopted on March 31, 2009, and in compliance with Executive Order, all e-mail Commission electronic correspondence will be retained and archived as public records.

You can read updates about a host of matters at the Industrial Commission's website (www.ic.nc.gov). The Annual Bulletin has been updated as of April 1, 2009, and is available for review on the website. In addition, you will find information posted about the Educational Conference, scheduled for October 7-9, 2009. For the first time ever the conference will be held in downtown Raleigh at the Raleigh Convention Center. It should make for an exciting change of pace for the attendees and speakers.

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

October 7-9, 2009

14th Annual North Carolina Workers' Compensation Educational Conference.

Raleigh Convention Center, Raleigh.

March 24-26, 2010

North Carolina Association of Self-Insurers Annual Meeting & Educational Conference Holiday Inn Sunspree Resort, Wrightsville Beach

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NCASI

NORTH CAROLINA
Association of Self-Insurers

The employers' voice in workers' comp

Bill that would federalize comp picks up co-sponsors

A bill introduced in the House early this year by Congressman Joe Baca, D-Calif., would authorize the creation of a National Commission on State Workers' Compensation Laws. H.R. 635, which recently picked up six co-sponsors, is opposed by employer groups.

The bill requires the Commission to: (1) review the findings and recommendations of the previous National Commission on State Workmen's Compensation Laws; and (2) study and evaluate state workers' compensation laws to determine their adequacy and whether additional remedies should be available to ensure the payment of benefits medical care.

Congressman Baca says "more than 35 years have passed since our government took a serious look at the effectiveness of workers' compensation laws. Access to proper benefits and medical care after on the job injuries is a right every American worker deserves. I am hopeful this legislation will bring us closer to updating and modernizing our state workers' compensation laws to ensure they remain effective in this new century."

Co-sponsors include well-known legislators Rep. Dennis Kucinich [D-OH] and Rep. Fortney Stark [D-CA].