NC Workers' Comp NEWS

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Symposium looks at comp system in North Carolina

Nearly 225 registrants attended the August 2 symposium in Winston-Salem sponsored by the Brantley Risk & Insurance Center at Appalachian State University.

The surprisingly large audience attracted plenty of employer representatives and defense attorneys but plaintiffs' attorneys were conspicuously absent, except for the presence of state senator Doug Berger. He presented his views in a panel discussion with defense attorneys Andy Avram of Cranfill Sumner & Hartzog and Bruce Hamilton of Teague, Campbell, Dennis & Gorham.

Other speakers included:

- George Teague, partner, Nelson Mullins Riley & Scarborough
- Stuart Powell, vice president of insurance operations and technical affairs, Independent Insurance Agents of North Carolina
- Carol Telles and Nicole Coomer, Workers Compensation Research Institute
- Bob Hartwig, president, Insurance Information Institute
- Mike Plavincky, president & CEO, Montgomery Insurance
- Pam Young, chair, North Carolina Industrial Commission
- Ray Evans, manager, North Carolina Rate Bureau and North Carolina Reinsurance Facility
- Wayne Goodwin, commissioner, North Carolina Department of Insurance

Although the symposium was titled *Is the "Compensation Bargain" Still Working for Both Employers and Employees in Our State?* few speakers directly addressed the question. Perhaps the most pointed presentations were those of Sen. Berger and Jay Norris, manager, claims at Duke Energy Corporation and president of the North Carolina Association of Self-Insurers.

Mr. Norris noted several favorable aspects of the system. "I think employers like the fact workers' compensation is a no-fault system and North Carolina employers, like employers in other states, almost universally like the fact they can choose the treating physician and direct medical care. We believe that is as it should be, because employers have a direct interest in seeking the best care for injured employees so they can get back to work as soon as feasible."

He complimented the North Carolina Industrial Commission for being available for questions or guidance. "Also, thanks to the Commission, the mediation process and clincher-agreement process work well for employers and employees, relieving potential case-backlog issues," he said.

But Mr. Norris noted "the list of things we don't like is a little longer. North Carolina has become a Form-intensive state. We have more Forms and Form-confusion than in many other states. This creates more work for state administrators and more work for adjusters and ultimately increases cost."

Also, "employers don't like the ban on speaking directly with medical providers. We think so many things could be cleared away quickly if we could speak directly to the treating physician. These restrictions drive up the cost of claims with no benefit to the employee or the employer."

In addition, he said, "there is a strong feeling among our group that there should be a limit on lifetime benefits. Employers also feel that there should be curbs on the scope of medical treatment that they are required to provide. There is some feeling that the courts have broadened the scope of medical treatment past the natural and probable

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President's Note

Modest Reform or a Redo?

There was no shortage of opinions about the state of workers' comp in North Carolina at the recently held symposium at the Benton Convention Center in Winston-Salem. As you can see from the cover story in this issue, the North Carolina Association of Self-Insurers was active in relaying the views of self-insurers, and prominent because of the nearly dozen or so members of our association who attended the symposium.

There is much we like about the comp system, and much more we would like to see adjusted. But it is not easy to make changes because at every turn we have to deal with plaintiffs' attorneys, who stayed away from the August 2 symposium in what appeared to be a deliberate strategy of non-cooperation.

It will be interesting to see how long plaintiffs' attorneys can stay away from the table. We expect there will be renewed interest in the comp system in the fall when policymakers and other opinion-makers start discussing the contents of the soon-to-be-completed study by Dr. David Marlett and colleagues.

We intend to be active players in the process. But we very much need the support of employers if we are to see any improvements in the system. For a mere $350 per year in membership dues, you can amplify our voice as we make sure employers views are heard in any retooling of the state's workers' comp system.

With very best wishes,

Jay Norris, *president*

CASE LAW UPDATE

By Joe Austin

Employees' Duty to Provide Notice

The Workers' Compensation Act provides that (1) an injured employee must provide written notice of an accident immediately or as soon as practicable, (2) the employee is not entitled to compensation or physician's fees prior to giving written notice unless the employer is aware of the accident, and (3) no compensation is payable unless written notice is provided within 30 days of the accident unless (i) the employee provides a reasonable excuse and (ii) the employer is not prejudiced by the delay. Historically, the Industrial Commission has been very liberal in favor of employees in resolving issues of notice.

One example of this occurred in the case of *Gregory v. W.A. Brown & Sons*, in which the employee claimed that she injured her back while opening a container at work on October 11, 2001. The employee acknowledged that she did not make a written report of her injury until February 1, 2002, even though she had pursued treatment in the interim. A representative of the employer testified that she believed the employee's condition had occurred outside of work, in part because the employee had never mentioned anything about workers' compensation. In reaching its decision, the Full Commission reasoned that the employee was relieved of the obligation to provide written notice because the employer was aware that the employee was having problems with her back and failed to investigate the matter further.

The Court of Appeals affirmed the Full Commission's award, but Judge Jackson dissented, arguing that the Commission had not dealt with the notice issue properly. In turn, the Supreme Court ruled that the Commission's findings were insufficient to excuse the employee from her obligation to provide written notice. In particular, Justice Newby observed that the Commission had placed the burden on the employer to disprove notice, when it was actually the employee's responsibility to prove that the employer knew about the accident. Although Justices Hudson and Timmons-Goodson dissented from the majority opinion, there is now precedent that the Act means what it says with respect to the issue of notice.

Travel Expenses for Family Members

In the case of *Price v. Piggy Palace*, the employee was severely burned in an accident at work, and he received extensive care at Baptist Hospital. The employee's parents made 18 visits to the hospital while the employee was there, and the Industrial Commission determined that the employee was released earlier than he otherwise would have been because his mother had been trained in his care at the hospital, including changing of dressings. The Commission also found that the employer did not have to

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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.

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consequences of the injury."

Mr. Norris noted yet another source of irritation to employers: the difficulty in finding work for returning injured workers that would pass muster as "suitable employment." The limitations and restrictions too often result in workers ending up on permanent and total disability, he said.

Sen. Berger responded, in effect, that employers complain too much. He noted that the state's no-fault workers' comp system provides only modest benefits to families of workers killed on the job, and the system is not much more favorable to workers severely injured but able to "push a broom."

And then there are the inevitable delays, he added. In a contested case, a worker injured in August is not likely to have a hearing before November or December, and not likely to receive benefits before January or February. Appeals by the employer may mean it will be even longer before the injured worker receives benefits, Sen. Berger said.

Employers want it all, he added. He said the employers' position is "we want to be able to choose your doctor, we want to be able to talk to the doctor, we want the ability to cut off your benefits." But the state legislature tends to balance things out, Sen. Berger said, adding legislators have twice defeated moves to cap benefits for injured workers.

Everything considered, he said, North Carolina remains attractive to new employers and usually ranks near the top for total cost of doing business.

Two researchers from the Cambridge-based Workers Compensation Research Institute presented figures that showed that while the number of claims in North Carolina is declining, claims costs tripled between 1996- 2005. They also reported total costs per claim in North Carolina are 23% higher than in the 14 states WCRI has studied.

WCRI presenters suggested part of that might be due to North Carolina's peculiar hybrid benefits system, under which an injured worker can receive temporary total benefits plus payment for permanent partial disability. The Workers Compensation Research Institute is an independent, not-for-profit research organization providing objective information about public policy issues involving workers' compensation systems.

The August 2 symposium was hosted by Appalachian State University's Brantley Risk & Insurance Center, with a major assist from the North Carolina Chamber. Dr. David Marlett, chair, department of finance, banking, and insurance at the university, said the event came about because part of the mission of the Brantley Risk and Insurance Center is to help educate the public on insurance issues and the center's first symposium, in 2008 on coastal insurance issues, was extremely well-received.

John McAlister, vice president for government affairs at the Chamber, said the group is pushing for change because "there has been no major modernization of North Carolina's Workers' Compensation system since 1994. There are a number of indicators that show our system is more costly and is not as efficient as many other states."

He added there was enough interest this year among employers and business groups to make it practical to hold a symposium on workers' comp. Dr. Marlett, along with colleague Karen Epermanis and Faith Neale of UNCC, is working on a research paper for the public on the workers' compensation system in North Carolina. The study is sponsored by the NC Chamber.

"The goal is to provide an objective assessment of the system but we will not go so far as to suggest specific reforms. We hope to have a draft finished in the next 60 days and a final report by year-end. That will be the extent of my involvement. I expect other parties will push for reform but I plan to stay out of that fight," Dr. Marlett said.

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He added once Dr. Marlett and colleagues complete their study, " we will share the data with state policy makers and other interested parties. We hope the information can provide the basis for changes to the workers' compensation system that will benefit both injured workers and employers."

"There does seem to be a growing sense that changes are needed. We intend to push for modernization in 2011."

coming up

October 13–15, 2010
15th Annual North Carolina Workers' Compensation Educational Conference. Raleigh Convention Center, Raleigh.

October 17–20, 2010
34th Annual Educational Conference on Workers' Compensation. Sponsored by the South Carolina Workers' Compensation Education Association. Embassy Suites at Kingston Plantation, Myrtle Beach, SC.

March 23-25, 2011
North Carolina Association of Self-Insurers Annual Meeting & Educational Conference. Holiday Inn Resort, Wrightsville Beach.

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Wal-Mart sued in Colorado for limiting comp medical care

Wal-Mart Stores Inc. is facing a potentially costly legal challenge in Colorado, where a class-action lawsuit accuses the retailer of conspiring to limit medical care for injured employees in a bid to save money, according to a recent story in the *Wall Street Journal.*

"Employers have the right to choose the doctors injured employers see, but Colorado requires them to pay for all "reasonable and necessary" treatment their designated doctors recommend, and to refrain from interfering with physician's care decisions. The state is the referee in any dispute," the newspaper added.

The Colorado lawsuit grew out of a complaint against Wal-Mart by Josephine Gianzero, an elderly employee who was injured in a 2005 fall and reported lingering pain in her wrist and thumb. An administrative law judge presiding over the claims dispute found that a Concentra doctor delayed referring Ms. Gianzero to a surgeon for more than a month after a Wal-Mart unit, Claims Management Inc., objected to the move.

Wal-Mart sends injured workers to clinics run by Concentra. The judge also found that before appointments with Wal-Mart workers, Concentra gave physicians "protocol notes," which, among other instructions, directed doctors to call the Wal-Mart claims subsidiary before prescribing more than five physical-therapy sessions or referring patients to other physicians, the *Journal* reported.

Wal-Mart and Concentra counter the "protocol notes" are no different than others widely used in the health-care industry to help physicians navigate paperwork. "The companies also argue that hundreds of Wal-Mart workers in Colorado received treatments that conflicted with the prohibitions the plaintiffs allege were spelled out in the notes. One worker got 475 physical-therapy sessions, they said," the newspaper added.

CASE LAW UPDATE *(continued from page two)*

pay for nurses to be sent to the employee's residence following his discharge, since the employee's mother was providing the care that would otherwise have been required. The North Carolina Court of Appeals ruled that the trips to the hospital were medically necessary, and that the employee (not the mother) was entitled to reimbursement for his mother's trips to and from the hospital.