NC Workers' Comp NEWS

A publication of the North Carolina Association of Self-Insurers

summer 11

Comp reform emphasizes return to work

North Carolina governor Bev Perdue signed into law on June 24 sweeping reforms to the state's workers' compensation act which, among other changes, provide employers more mechanisms for returning injured employees to work.

Titled Protecting and Putting North Carolina Back to Work Act, the compromise legislation easily passed the House and sailed through the Senate largely because of efforts by Speaker Pro Tempore Dale Folwell of Forsyth County. The North Carolina Chamber, the North Carolina Retail Merchants Association, and the North Carolina Homebuilders Association were among those pushing the legislation.

Prominent in drafting the legislation and in behind-the-scene negotiations were three members of the North Carolina Association of Self-Insurers: Bruce Hamilton of Teague Campbell Dennis & Gorham, Julia Dixon of Young Moore and Henderson, and Stephanie Gay of Aegis Administrative Services.

"We are proud of the role our members played in getting this landmark legislation through the General Assembly," says Jay Norris, president of the North Carolina Association of Self-Insurers. "Our association has long provided a forum for employers to express their concerns, and this year we played a helpful role in enacting meaningful legislation," he adds.

The reform legislation touches on a broad array of issues, ranging from attendant care to vocational rehabilitation, and definition of "suitable employment," along with reducing the number of commissioners from seven to six. The legislation also puts a 500-week cap on temporary total disability and temporary partial disability benefits, and makes it easier for employers to communicate with medical providers.

The overarching purpose is to return injured employees to work, says Bruce Hamilton of Teague Campbell. "I think the biggest change the legislation is likely to usher in is a dramatic improvement in employers' ability to get injured workers back to work, with a corresponding reduction in indemnity costs per claim," he adds.

> "We have streamlined the procedures for communicating with doctors and have strengthened the employers' right to control medical treatment..."

He noted the cap on indemnity benefits, with limited exceptions for catastrophic cases, and a significant change to the definition of "suitable employment," which will make it easier to return employees to work. "We have streamlined the procedures for communicating with doctors and have strengthened the employers' right to control medical treatment. I think these changes will allow carriers and employers to have greater control over the handling of claims, along with getting employees back to work sooner," he says.

Changes affecting medical treatment became effective immediately after the governor signed the legislation. Other reforms, such as changes in the statute regarding suitable employment, payment of benefits, and vocational rehabilitation, will apply to claims arising on or after June 24, 2011.

Julia Dixon of Young Moore says "the changes to the definition of suitable

continued on page three

INSIDE THIS ISSUE

President's Note

Our members step up

Earlier this year the North Carolina General Assembly passed sweeping changes to the state's workers' compensation act, and prominent in the effort were three members of our association.

Per our page one story, Bruce Hamilton of Teague Campbell, Julia Dixon of Young Moore, and Stephanie Gay of Aegis Administrative Services helped draft the legislation and saw it through the legislature. Stephanie, of course, serves on our board, and each year almost single-handedly puts together the program for our annual conference.

Hardly any group in the state understands the complexities of workers' compensation as comprehensively as does our association, so it was no surprise that our members were active in the recent legislative effort. We are an eclectic group, both serving and benefiting claims personnel, risk managers, defense attorneys, TPAs, and rehab and surveillance professionals, among others.

As I never get tired of mentioning, we need more support from employers. The more employers we have, the more vendors we attract to the annual conference, and that of course means more revenue for the association. But above all, having a large number of employers strengthens our collective voice when dealing with the General Assembly or the Industrial Commission.

With very best wishes,

Jay Norris

CASE LAW UPDATE

By Joe Austin

Maximum Compensation Rate

The Workers' Compensation Act provides that compensation is to be calculated based on the employee's earnings, subject to a cap that is established annually. In a recent case, the Court of Appeals ruled that the cap is to be determined based on when the claim accrues, which does not necessarily coincide with the year from which the average weekly wages (AWW) are determined, leading to an unexpected result.

In *Johnson v. Covil Corp.*, the employee retired in 1987, at which point he was earning $807.69 per week. In 2006, the employee was diagnosed as suffering from mesothelioma due to exposure to asbestos, and he filed a claim. The employee died later that same year, and a claim for death benefits was asserted.

The Industrial Commission found that the employee's condition and death were compensable and ordered payment of compensation at the rate of $308.00 per week, since that was the maximum compensation rate (comp rate) for 1987. The Court ruled that although the Industrial Commission properly determined that the employee's AWW were to be based upon his earnings from his last year of employment, the maximum comp rate was the figure for 2006.

Similarly, the Court ruled that the claim for death benefits did not accrue until 2006 and was subject to the cap that applied to claims arising in 2006. As a result, the IC should have awarded weekly compensation at the rate of $538.41 (two-thirds of the AWW), since the cap for 2006 ($730.00) did not limit the comp rate. Thus, because the claims did not accrue until after the employee stopped working, the comp rate increased by nearly 75%. Employers should be aware that, despite a cap on compensation in the current year ($836.00 for claims arising in 2011), they may have exposure to pay compensation at higher rates for claims involving employees with occupational diseases or employees who die in later years.

Disability

In *Newnam v. New Hanover Regional*, the employee developed bilateral carpal tunnel syndrome as a result of performing her job duties, and claimed that she was unable to work. With respect to the issue of disability, the only evidence the employee presented was the deposition of her treating physician, who testified that the employee would have been unable to work for a period of time after she underwent carpal tunnel release surgery, but admitted that he did not believe that she remained unable to work.

The Industrial Commission ordered compensation for total disability, but the Court of Appeals reversed on the grounds that the evidence failed to satisfy the employee's burden of proving disability, ruling that the employee was not entitled to recover any compensation for disability.

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

By Amy Pfeiffer

GENERAL

As of July 1st, the mileage reimbursement rate for sick travel is being raised to the IRS rate of $0.555 per mile.

Also as of July 1st, rehabilitation professionals will be required to complete a comprehensive course entitled Workers' Compensation Case Management in NC: A Basic Primer for Medical and Vocational Case Managers, in order to be recognized as "Qualified" under Section IV of the NCIC Rules for Rehabilitation Professionals (WWW.IC.NC.GOV/NCIC/PAGES/REHABRUL.HTM). See the IC web site for more information.

The Commission is in the process of planning and scheduling the public hearings that will take place to implement new Rules based upon the recent legislative changes.

REINSTATEMENT OF BENEFITS

The IC has now instituted a new procedure and a new Form for the reinstatement of indemnity benefits. Please check the IC web site for a copy of the new Form 23. The Form 23 may not be used to request medical compensation or to request payment of disability compensation in denied claims or admitted claims in which no disability compensation has been paid.

However, if a claimant seeks to have indemnity benefits reinstated, the claimant will file the Form 23. Defendants will have a right to contest the reinstatement. A telephonic hearing will take place in front of Executive Secretary Meredith Henderson. An appeal from that decision will be on a peremptory basis to the Deputy Commissioners.

NEW PERSONNEL AND PERSONNEL CHANGES

Commissioner Tamara Nance has been appointed to be an employer representative and her term will run through June 2012. At that time she will be up for reappointment by the Governor, and confirmation by the General Assembly. Ms. Nance has served as a Deputy Commissioner with the IC, and since leaving the Commission, she has done mediations, and worked for both a plaintiffs' and a defense law firm.

We also have a new Deputy Commissioner, Melanie Wade Goodwin. She is married to Wayne Goodwin, the Insurance Commissioner, and was in private practice for 10 years, primarily focusing on family law issues. She has served in the NC House of Representatives.

Deputy Commissioner George Glenn has been reassigned to hear only prisoner tort claims, both motions and hearings. As you may know, he most recently has held special set hearings, but now he will be only handling prisoner tort matters.

Taking DC Glenn's spot on the special set dockets will be Brad Donovan. Other changes to the assignments will have Victoria Homick doing expedited/emergency medical motion hearings along with Theresa Stephenson, while Chrystal Stanback goes back into the regular hearing rotation.

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.

Comp reform emphasizes return to work

continued from page one

employment combined with the TTD cap will have the most significant impact on workers' compensation claims into the future."

Because the changes to 97-27 and 97-25 took effect immediately and apply to all claims, employers are already seeing the effects of those changes in Form 24 hearings. "For example," she says, "when the treating physician assigns work restrictions and a 97-27 rating doctor says the employee cannot work at all, the Commission must disregard the rating doctor's opinion on work restrictions."

"Thus, in the scenario described above, the employee should be able to return to work rather than remain out based on the rating doctor's restrictions. This is helping employer's win Form 24 hearings more frequently," she adds.

Amy Pfieffer of Cranfill Sumner & Hartzog, and a former deputy commissioner at the Industrial Commission, says one favorable aspect of the new legislation is that it subjects Deputy and Full Commissioners to the Code of Judicial Conduct and that may restrain them in their rulings. While the provisions regarding medical treatment are generally favorable to employers, some of them may in fact lead to higher claims costs, she adds.

"One concern I have is that it is possible that the value of some claims may actually increase," she says. "Yes, we have the 500-week cap on TTD benefits, but that isn't a hard cap, and it is my guess that claimants will continue to make lifetime claims, even in TTD as opposed to PTD cases," she says.

"In addition, now that "suitable employment" is actually defined in the Act, and now that vocational rehabilitation is part of the statute, there will be more temp partial claims, more requests for education, and potentially more vocational rehab costs such a mileage for education," she adds.

"Given that the changes to 97-30 contemplate 500-weeks of payments, not just 500 weeks from the date of injury or date of disability, this could be a significant driver in terms of the value of claims. We need to prepare ourselves for this and realize that the value of claims may not necessarily go down," she says.

coming up

October 19–21, 2011
16th Annual North Carolina Workers' Compensation Educational Conference. Raleigh Convention Center, Raleigh.

March 28–30, 2012
North Carolina Association of Self-Insurers. Annual Meeting & Educational Conference. Holiday Inn Resort, Wrightsville Beach.

April 11–13, 2012
Members-Only Forum. South Carolina Self-Insurers Association. Litchfield Beach & Golf Resort.

NC Workers' Comp News is produced quarterly by the North Carolina Association of Self-Insurers. To be added to our distribution list, please contact Moby Salahuddin, executive director, at MSALAHUDDIN@SC.RR.COM

www.ncselfinsurers.com

NCASI
NORTH CAROLINA
Association of Self-Insurers
The employers' voice in workers' comp

Internet searches are fair game

Searching the Internet for information about injured workers is becoming routine for workers' comp attorneys and surveillance companies, and the searches include looking at Facebook, Twitter, MySpace, and other forms of social media.

Courts have allowed social networking evidence to be admitted in cases involving family law, employment law, and criminal law. *Risk & Insurance* says such evidence would likely be admissible in workers' compensation as well.

"A privacy argument is unlikely to prevail in workers' comp cases because people do not have a reasonable expectation of privacy on social networking sites," says one attorney quoted in the story. If an employee refuses or is unable to provide social networking information to counsel in response to a valid request for discovery, the employer may request this information from the social networking site operator directly. This could occur, for example, if an employee deactivated a social networking account or simply refused to turn over the information.

"Most social networking websites have privacy policies allowing them to provide user profile information in response to a narrowly tailored discovery request or court order," the publication adds.

Do bans on cell-phone use reduce accidents?

There is no evidence that bans on cell phone use or texting while driving have reduced automobile accidents, says the Governors Highway Safety Association.

The association reviewed 350 papers on distracted driving published from 2000 to 2011 and found that existing research is "incomplete or contradictory," according to Barbara Harsha, executive director of the association.

However, the group issued contradictory advice saying states should consider passing cell phone bans for novice drivers and texting bans for everyone. The association also urges states with bans to enforce them.