NC Workers' Comp NEWS

A publication of the North Carolina Association of Self-Insurers

summer 13

Continuous improvement in comp market

Fundamentals in the workers' compensation insurance market have been steadily improving and should continue to lead to robust revenue growth, Fitch Ratings reported in July.

"Following a long period of declining premium rates, workers' compensation pricing has increased for two consecutive years with little sign that pricing trends will reverse in the near term," the rating company said in its news release.

Fitch noted the 2012 combined ratio improved to 110% from 117% in the prior year, and projected it would improve to 105% for the 2013 workers' compensation calendar year.

> "Our optimism is tempered by knowing that external forces such as the economy, healthcare reform, and new legislation may still negatively affect the market."

National Underwriter notes the Council of Insurance Agents & Brokers most recent P&C lines survey says workers' comp rate hikes jumped close to 10% in the first quarter of 2013. According to insurance broker Willis, worker's comp is experiencing average rate increases of 5%-10%, the steepest increases among casualty lines. The broker expects comp rates to increase between 2.5% -7.5% in 2013, perhaps as much as 20% in California.

Earlier, the National Council on Compensation Insurance reported the workers' compensation calendar combined ratio was 109 in 2012, a six-point decrease from 2011 and the first decrease since 2006. NCCI described the current state of the industry as "encouraging."

"By many measures, the industry condition is indeed improving," said NCCI President and CEO Steve Klingel. "While we are pleased to see that the positives are beginning to outweigh the negatives, there remains great opportunity for improvement. Our optimism is tempered by knowing that external forces such as the economy, healthcare reform, and new legislation may still negatively affect the market. But for now, we view the overall industry condition as encouraging."

"The workers compensation line continues to deal with a variety of significant challenges. These include poor underwriting results, low investment yields, and continued uncertainty regarding the impact of the implementation of the federal healthcare reform bill," added NCCI Chief Actuary Dennis Mealy.

"But despite the long-term challenges, workers' compensation saw some positive developments in 2012. Premiums grew for the second consecutive year, the combined ratio declined six points, and claim frequency continued to improve at a pace slightly greater than its long-term historic rate of decline."

Among the highlights in this year's industry report from NCCI:

- The combined ratio for workers' compensation improved for the first time since 2006
- Premium grew for the second consecutive year
- Claim frequency declined significantly for the first time since 2009
- Claim severity increases remained modest
- Among the challenges facing the industry:
- The combined ratio, while lower, still remains too high
- Slow growth in employment, particularly in the manufacturing and construction industries, is impeding additional premium growth
- The impact of the implementation of the Patient Protection and Affordable Care Act in 2014 looms as a huge uncertainty for the line.

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CASE LAW UPDATE

By Joe Austin

Since our last update, North Carolina's appellate courts have only published two in cases involving the Workers' Compensation Act. The first of these deals with the consequences of failing to obtain workers' compensation coverage, and is therefore beyond the scope of this column. The other opinion demonstrates how difficult it can be to obtain a reversal on appeal because of the standard of review that appellate courts utilize. Below we examine this opinion in detail.

In *Church v. Bemis Manufacturing Co.*, the employee injured her left shoulder on November 29, 2007 in the course of her work as a machine operator, and returned to work with restrictions from December 2, 2007 through August 9, 2009. During that time, the employee never reported difficulty in performing her job.

The employee underwent surgery to repair an unrelated cerebral aneurysm on August 18, 2009, and suffered a stroke during that operation. The employee did not return to work after the surgery, but asserted a claim that she was entitled to compensation for total disability beginning as of her first day out of work.

From a vocational perspective, the employee was a high school graduate, and in addition to her work as a machine operator, she had prior clerical experience. At the time of hearing before the Commission, the employee was 49 years old.

In a split decision, the Full Commission ruled the employee was totally disabled. Commissioner Bernadine Ballance wrote the majority opinion, in which Commissioner Staci Meyer concurred, concluding that the job the employer had provided was not suitable and that the employee had proven that she was disabled in any event. The ruling specifically found that (1) after the aneurysm surgery, the employee was unable to work due to "the combination of the effects of her left shoulder injury and her neurologic impairment due to her aneurysm," (2) there was no evidence that the employee's disability could be apportioned between her compensable injury and the aneurysm, and (3) it would have been futile for the employee to try to find work within her restrictions.

In a dissenting opinion, Commissioner Cheatham argued that the employee was not entitled to compensation since (a) in assessing whether it would be futile for the employee to look for work within her restrictions, the Commission was not entitled to consider the effects of the aneurysm, but was only entitled to consider the effects of the injury combined with her "*preexisting conditions*, i.e., age, inexperience, lack of education," and (b) the employee's unrelated aneurysm and stroke resulted in her inability to work. Commissioner Cheatham suggested that the employee had raised the issue of suitable employment in an effort to overcome the fact that she had performed her job for over 20 months.

In ruling on the appeal, the Court of Appeals noted that it was required to affirm the Commission's findings if there were *any evidence* to support the findings. Regarding the issue of suitable employment, the Court noted that the employee had testified that following her injury, she had difficulty doing all of the tasks that her job required, and she usually had to get assistance with the more difficult tasks. In addition, the employee testified that the pain in her arm increased from early 2008 to 2009. The Court ruled that this testimony was sufficient to support the Commission's determination that the job was not suitable for the employee, and therefore, overruled the appeal on that issue.

As for the issue of disability, the Court observed that the employer failed to challenge the Commission's determination that there was no evidence to apportion the employee's disability between her compensable injury and the aneurysm. Therefore, that finding was deemed to be undisputed, and the Court stated that it was constrained to affirm the Commission's determination that the employee's incapacity for work following her aneurysm surgery represented a compensable disability since the employer had effectively admitted that no such evidence had been presented. Considering the employer's arguments, it seems odd that there was no evidence to suggest that the employee would have been unable to return to work within her prior restrictions solely because of the aneurysm.

In any case, the outcome provides a clear demonstration of how difficult it can be to change the outcome of a case after the Full Commission enters an award, due to the standard by which our courts review awards from the Commission.

Joe Austin is a senior attorney at Young Moore and Henderson in Raleigh. A graduate of Davidson College, he received his law degree from Wake Forest University.

President's Note

Commission gets tough on fines

Thanks to our friends at Cranfill Sumner & Hartzog for alerting us to the new fines-policy at the North Carolina Industrial Commission under new chairman Andrew Heath.

According to CSH, the industrial commission will strictly enforce fines across the board under N.C.G.S. § 97-78 for any late filings, including all form filings and discovery responses. Specifically, defendants can be sanctioned if they fail to file a Form 60, 61, or 63 within 30 days of the date at the top of the Commission's claim acknowledgment letter.

"Although the ability to impose such fines is not new, the initiative to do so is. The fines will be assessed without exception in an effort to expedite the claims process and improve efficiency at the Commission, which we believe will prove to be in the best interests of our clients. We have been informed that the Commission should be sending out warning notices prior to imposing such fines," noted a recent e-Alert from Cranfill Sumner & Hartzog.

Governor Pat McCrory designated commissioner Heath as chairman earlier this year. Prior to joining the commission, chairman Heath represented employees while working for the Cole Law Firm, and employers while working for Hedrick Gardner Kincheloe & Garofalo, He is a graduate of the Indiana University School of Law and of the University of North Carolina at Asheville.

With very best wishes,

Jay Norris

Comp not paying for ER care

Employers and workers' comp insurers often suspect employees foist healthcare treatment on workers' comp that should be covered by their health insurance. New research suggests the opposite may also be true.

Nearly 40% of work-related injuries and illnesses seen in U.S. emergency rooms are not billed to workers' compensation but paid by private insurance or Medicare or Medicaid, according to researchers with CDC's National Institute for Occupational Safety and Health.

The report by Groenewold and Baron was published online in May in the journal **Health Services Research** and titled *The Proportion of Work-Related Emergency Department Visits Not Expected to Be Paid by Workers' Compensation: Implications for Occupational Health Surveillance, Research, Policy, and Health Equity.* The authors say their research has important policy implications because, for one, looking at who pays for emergency care systematically underestimates frequency of work-related injuries.

The research was highlighted recently in a blog by Dr. Celeste Monforton, affiliated with the George Washington University School of Public Health and Health Services. She reports the analysis involves four years of data from the National Hospital Ambulatory Medical Care Survey, a representative sample of U.S. emergency room visits.

One reason injuries coded as work-related are not paid for by workers' compensation is that not all workers are covered by workers' comp. Dr. Monforton notes domestic and agricultural workers and often the self-employed are among those not covered. But this does not entirely explain why so many work-related injuries are not paid for by workers' comp.

Dr. Monforton points to research which suggests some workers may avoid filing a claim for a work-related injury because they fear disciplinary action, denial of overtime or promotion opportunities, stigmatization, drug testing, harassment, and even job loss. Another reason cited by researchers is the workers' comp system is probably frustrating and obscure, especially for first-time users.

Employees who don't report work-related injuries are harming the system because this practice may allow unsafe practices to continue, and it may give an unfair advantage to employers by keeping their mod rates artificially low.

coming up

October 9–11, 2013
The 18th Annual Workers' Compensation Educational Conference. Raleigh Convention Center.

March 26–28, 2014
NC Association of Self Insurers' Annual Conference Holiday Inn Resort, Wrightsville Beach.

April 2–4, 2014
Members-Only Forum, SC 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

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The employers' voice in workers' comp

New accounting rules may have broad impact

The Financial Accounting Standards Board has proposed new rules for insurance accounting that are expected to have an impact beyond the insurance industry, according to the **New York Times**.

"Some of the largest protests might come from companies that until now have thought insurance accounting rules did not apply to them. The new rules would cover any company that issues contracts that are seen as insurance, or similar to insurance," the newspaper reports.

"Insurance is defined as "accepting significant risk" from another party — the insured policyholder — by agreeing to pay compensation "if a specified uncertain future event adversely affects the policyholder." That could include product warranties issued by third parties, mortgage guarantees and residual value guarantees. Most banks would have at least some products subject to the insurance rules," the **Times** added.

FASB chairwoman Leslie Seidman said in a news release "the proposed standard is intended to bring greater consistency and relevance to the accounting for contracts that transfer significant risk between parties." The accounting standards board is seeking comments by October 25.

"One of the most significant changes is that the guidance in the proposed Update would require contracts that transfer significant insurance risk to be accounted for in a similar manner, regardless of the type of institution issuing the contract. In other words, the contractual features of the contract—not the type of insurer—would determine whether it is insurance. Consequently, the proposed standard would apply to banks, guarantors, service providers and other types of insurers, in addition to insurance companies," FASB said.

FASB is the designated organization in the private sector for establishing standards of financial accounting and reporting. Those standards govern the preparation of financial reports and are officially recognized as authoritative by the Securities and Exchange Commission and the American Institute of Certified Public Accountants.