NC Workers' Comp NEWS

A publication of the North Carolina Association of Self-Insurers

fall 13

WCRI study

NC hospital costs among highest

Hospital costs in North Carolina were among the highest in 16 states studied recently by the Workers Compensation Research Institute, an independent, not-for-profit research organization based in Cambridge, Massachusetts.

Even after the state adopted fee schedule changes and cut payments to providers in 2009, payments per service for outpatient care were still among the highest in North Carolina, according to WCRI. The group's recently published 14th edition of CompScope™ measured the performance of 16 state workers' compensation systems, how they compare with each other, and how they have changed over time.

WCRI studied Arkansas, California, Florida, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, Pennsylvania, Texas, Virginia, and Wisconsin. These states account for nearly 60 percent of the nation's workers' compensation benefit payments.

North Carolina also had longer duration of temporary disability and larger lump-sum settlements than other states. The 2011 reform measures addressed them by establishing caps on duration of temporary disability, specifying a more precise and narrower definition of suitable employment, and improving worker access to vocational rehabilitation services.

WCRI notes the provisions apply to injuries occurring on or after June 24, 2011 and says it may take a couple of years to gauge the impact of the changes.

Earlier studies by WCRI had noted medical payments per claim in North Carolina were among the highest, mainly because of higher payments for hospital care for both inpatient and outpatient services. Hospital charges for outpatient services have continued to increase at double-digit rates even after the fee schedule reduction, it adds.

North Carolina policymakers introduced interim fee schedule changes in 2013, aiming to reduce payments for hospital care while increasing prices paid for office visits and physical medicine services. "Effective February 1, 2013, charges for inpatient and outpatient services were frozen at the rates set by each hospital as of June 30, 2012. Effective April 1, 2013, the frozen rates were cut by 15 percent for hospital outpatient services and ambulatory surgery centers and by 10 percent for inpatient care," WCRI reports.

Also effective April 1, 2013, payments for surgical implants were capped at the invoice cost plus 28 percent. For nonhospital providers, the new fee schedule increased the multiplier for office visits and for physical medicine services.

Finally, HB 92 ratified on the last day of the 2013 legislative session, specifies physician and hospital fees in North Carolina are to be based on Medicare payment methodologies, whenever the North Carolina Industrial Commission can develop the new payment system . The Commission is exempt from the State's rule-making process in developing the fee schedules required by this legislation.

WCRI notes the 2011 reform measures could also have an impact on defense attorney involvement, average defense attorney payment, and use and average cost of vocational rehab services. In the 2009 baseline date compiled by the research group, the percentage of cases with defense attorney involvement in North Carolina was higher than in most states (39 percent versus 25 percent), while the average defense attorney payment per claim was 10 percent lower than in the median state.

The reform measures make it easier for injured workers to make use of vocational rehab services, and use of these services is expected to increase. As of 2009, vocational rehab services were used in 4 percent of claims in North Carolina, according to WCRI.

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CASE LAW UPDATE

By Joe Austin

Effect of fiscal hardship on claims for disability compensation

Under North Carolina law, it is well-settled that an employee bears the burden of proving the existence and degree of any reduction in the capacity to earn wages resulting from a compensable injury. Under the commonly-applied Russell test, there are four ways by which an employee can show that he is disabled: (1) by proving that he is medically unable to work, (2) by establishing that it would be pointless for him to look for work, (3) by showing that he has been unable to find other work after making a reasonable effort to do so, or (4) by producing evidence that he has obtained a lower-paying job. However, a recent decision from the North Carolina Court of Appeals clarifies that an employer should not be liable for paying ongoing disability benefits if the employee is unable to find work due to economic conditions, as opposed to physical limitations arising out of a compensable injury.

In Medlin v. Weaver Cooke Construction, LLC, the employee injured his right shoulder at work in May 2008. The employer accepted the claim as compensable, but the employee continued to work until he was laid off in November 2008, at which time the employer's work force dropped from 160 employees to 65. The employee began collecting unemployment benefits after the lay-off, and the employer began paying the employee compensation for total disability in February 2009. In July 2009, the employee's physician assigned permanent work restrictions of no lifting greater than 10 pounds and no repetitive overhead activities.

The employee, who had an engineering degree from North Carolina State University, had worked in the construction industry as a project engineer, project manager and estimator since 1974. The evidence established that the employee's job for the employer was within his permanent restrictions, and according to the employee, he tried to find similar work after being laid off, having initiated hundreds of job inquiries.

In December 2010, the employer applied to terminate disability benefits, arguing that the employee could not return to his prior job due to economic conditions, as opposed to any physical limitations stemming from the injury. Concluding that the employee did not establish that his incapacity to earn wages after December 2010 was attributable to the compensable injury, the Industrial Commission authorized the employer to terminate the payment of compensation.

On appeal, the employee argued that the Russell test only required that he prove that he had made a reasonable effort to find work, and not that the lack of work was a product of his injury. Judge Robert C. Hunter authored the opinion for the majority, rejecting the employee's theory. In particular, Judge Hunter wrote that while the Russell standard does allow an employee to establish disability by showing that he has made a reasonable but unsuccessful effort to find work, it is implicit that there must be a causal connection between the injury and the inability to find work. In this case, the employee was still physically able to perform his pre-injury job, and had stipulated that the lay-off was result of a "reduction of staff due to lack of work." Thus, the evidence supported the Commission's finding that the only reason the employee was unable to find other work was the economic downturn, and the Court affirmed the termination of compensation.

Judge Martha Geer filed a dissenting opinion, arguing that in light of the evidence that the employee had made a reasonable effort to find other work, the employer was required prove that (a) suitable jobs were available and (b) the employee was capable of getting one of those jobs. According to Judge Geer, "a disabled worker does not bear the burden of unfavorable economic conditions that further diminish his ability to find suitable work."

In light of the dissent, the employee has an automatic right of appeal to the North Carolina Supreme Court, and we fully expect that he will exercise that right. Undoubtedly, the final decision in this matter will have far-reaching implications, especially in light of recent economic conditions. In particular, if an employee is only required to prove that he is been unable to find another job, but not to relate that to an injury at work, it would seem that workers' compensation has become little more than extended unemployment insurance, but that would be the effect of a ruling in the employee's favor.

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

The next fiasco?

The disastrous rollout of the much-awaited health insurance marketplaces should make everyone wary of another colossal IT project headed our way. I am referring to the nationwide conversion from ICD-9 to ICD-10, effective October 1, 2014.

ICD refers to the International Classification of Diseases, and ICD-9 code sets are now used to report medical diagnoses and inpatient procedures. The 10th version is more detailed and comprehensive and would yield a great deal of useful information to payers and healthcare researchers. The federal government has told healthcare providers they won't get paid if they don't make the conversion next year.

Although workers' compensation entities are not required to use ICD-10 codes, major groups such as the Work Loss Data Institute and the National Council on Compensation Insurance have been preparing for the change. The Centers for Medicare and Medicaid Services and other groups say the rest of the comp industry should also follow suit, because a two-tier billing and diagnosis system is unsustainable.

This is how a spokesman for Mitchell International, a software vendor, explains the rationale:
"We deal with providers who have less than 3% of their business with workers' comp. They're going to be dealing with ICD-10 for all their other business, and they're not going to be reporting both ICD-9 and ICD-10."

(Because comp is not required to adopt ICD-10) "Why don't we take the bills we get in ICD-10 and just crosswalk them back to ICD-9? In even beginning to talk about that, we can see that if we do that, everything will be subject to crosswalking inaccuracies, and if you're making the effort to crosswalk every bill, you might as well put in the effort up front to move to ICD-10."

With very best wishes,

Jay Norris

More claims reported during recession

Claim frequency for workers' compensation injuries increased 3.8% in accident year 2010, marking the first increase since 1997, according to the National Council on Compensation Insurance.

NCCI reports prior to the 2010 uptick, claim frequency had been declining since 1990 at an average rate of more than 4% per year. Following the 2010 increase, claim frequency declined in 2011, albeit by a modest 0.9%, and declined by 5% in 2012.

Over the five complete policy years ending with policy year expiring 2011:

- Frequency per payroll declined by 16% (4.3% per year) but has leveled off over the latest two years.
- Frequency per payroll declined for all industry groups, most notably in contracting and manufacturing.
- Frequency per payroll declined for all employer sizes, with the largest declines for employers having more than $100 million in payroll.
- Frequency declines were relatively consistent by NCCI type of injury.

Payroll volume increased by double digits in the oil & gas and healthcare sectors, while declining nearly 2% for all industries combined. NCCI notes in the oil & gas sector, claim frequency is notably high in the emerging hydraulic fracturing industry.

The group adds the Great Recession of 2007–2009 was the most serious and long-lasting economic contraction since the Great Depression.

coming up

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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Roundup of Legislative & Commission News

By Bruce Hamilton, Teague Campbell

- **On May 13, 2013**, House Joint Resolution 444 was ratified and Andrew T. Heath was confirmed as the newest member of the Full Commission. Mr. Heath was appointed by Gov. McCrory to replace Staci Meyer as the Chairman of the Commission. Chairman Heath's term began on May 1, 2013 and will expire on April 30, 2019.

- **On June 24, 2011**, House Bill 709 was ratified making the Rules of the Commission subject to the formal rulemaking procedure of the Administrative Procedures Act. Pursuant to that bill, the Commission published proposed rules on July 16, 2012 and adopted these rules in accordance with the APA on September 20, 2012. In October, November, and December of 2012, the Rules Review Commission approved 152 of the 152 adopted rules. In October and November of 2012, the Office of Administrative Hearings received the requisite number of objection letters to 42 of the 152 approved rules, thereby subjecting those 42 rules to legislative review. In response, the Commission delayed the effective date of the remaining 108 approved rules. In March of 2013, Senate Bill 174 was filed formally subjecting the 42 objected rules to legislative review.

- **On July 18, 2013**, Senate Bill 174 was signed by Gov. McCrory disapproving 28 of the 42 Objected Rules. The Commission is in the process of re-adopting all 28 of the Objected Rules. Until the readopted rules become effective, the Commission will continue to operate under the Rules as they existed on January 1, 2011, with the exception of two specifically identified rules dealing with proof of insurance coverage and fees for medical compensation. In summary, the Commission Rules are still in flux. Until there is a final decision on all of the Rules, the Commission is operating under the old Rules that were in effect prior to the passage of the workers compensation Reform Act in June of 2011. The General Assembly did give the Commission very specific instructions on how they wanted medical motions handled and rewrote 97-25 so that the Commission can essentially track the language of 97-25 when drafting the new Rules.

- **In addition to** the legislation regarding the Commission Rules, House Bill 74 was enacted on August 23, 2013 revising the acceptable procedures for cancellation of a workers compensation policy, amending G. S. 97-19 regarding the liability of a principal contractor when they obtain a certificate of insurance, creating a rebuttable presumption that certain taxicab drivers are independent contractors and not employees under the workers compensation act, removed several employees within the Commission from being subject to the State Personnel Act, including the Executive Secretary, Administrator, Deputy Commissioners and these employees will no longer be protected under the State Personnel Act effective July 1, 2015.

- **House Bill 168**, enacted on July 18, 2013, allows the commission to have jurisdiction to resolve fee disputes between current and former attorneys for an employee. In addition, Senate Bill 10 and House Bill 1011 each passed their respective chambers of the General Assembly, but were not resolved in a conference committee. These bills can be brought up again in May of 2014. These bills contain specific provisions that deal with the tenure of the Full Commissioners. One bill reduced each Commissioners current term by two years and the other bill resulted in the immediate termination of each Commissioner, subject to reappointment or replacement by Gov. McCrory.