

NC holds its place in state ranking

Workers' compensation premium rates in North Carolina are in line with those in southeastern states, but the state has slipped in rankings since 2006, when it had among the lowest rates in the country.

According to the widely reported *2014 Oregon Workers' Compensation Premium Rate Ranking Summary*, 25 jurisdictions out of 51 in the country had higher workers' compensation premium rates than North Carolina as of January 2014. In 2006, 35 jurisdictions had higher rates.

As of January 2014, Louisiana and South Carolina have the highest premium rates in the southeast at \$2.23 and \$2.00 per \$100 of payroll. Rates in North Carolina and other states in the region are between \$1.50 - \$1.99.

"You have to be determining whether your system is meeting other goals, like getting people effective medical treatment, getting people back to work ... minimizing injuries and resolving disputes," he said in an interview with *Business Insurance*.

Oregon's Department of Consumer and Business Services conducts the study every two years. The department says its study is based on measures that put states' workers' compensation rates on a comparable basis, using a constant set of risk classifications for each state. The study used classification codes from the National Council on Compensation Insurance.

The 2014 median value is \$1.85, which is a drop of 2 percent from the \$1.88 median of the 2012 study. National premium rate indices range from a low of \$0.88 in North Dakota to a high of \$3.48 in California. Other states with the highest rates are, respectively, Connecticut, New Jersey, New York, and Alaska. At the other end, Indiana, Arkansas, Virginia, and Massachusetts boast the lowest rates in the country.

Officials in states which rank poorly are among those who say the biennial study doesn't really say much about a state's workers' compensation system. For instance, states with more generous benefits for injured workers would likely not do well in the study. Mike Manley, research coordinator at the Oregon agency, agrees the study doesn't express the cost-effectiveness of a system.

California had a stiffer reaction. "There is nothing in the Oregon study to compare the differential coverage and benefits and medical-legal appeals system that each state offers," Christine Baker, director of the California Department of Industrial Relations, told the publication. "At the extreme, a state could drastically reduce its scope and level of benefits in order to reduce costs and do 'better' in the Oregon comparison," she added.

Oregon officials also caution against making too much of the study. For one, the latest rankings show 21 states within 10% of the median, and the range from highest and lowest rankings has been shrinking. Some states may have enacted reforms that have yet to show results.

"We're always trying to tell other states ... that we're describing you, we're not evaluating you. We're not saying you're doing well (or) you're doing poorly. It's a description of one aspect of your system," Mr. Manley noted to *Business Insurance*.

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CASE LAW UPDATE

By Melissa Cleary



Hiring employees who fail to disclose prior injuries and then reinjure themselves can be incredibly frustrating. In 2011, the North Carolina legislature tried to address this issue of misrepresentation by passing N.C.G.S. §97-12.1 which states no benefits will be awarded to an employee in a workers' compensation claim if the employer can prove that during the hiring process:

- The employee knowingly and willfully made a false representation as to the employee's physical condition;
- The employer relied upon one or more false representations by the employee and the reliance was a substantial factor in the employer's decision to hire the employee; and
- There was a causal connection between the false representation by the employee and the injury or occupational disease.

The North Carolina Court of Appeals recently handed down a decision in the first case to apply this provision of the Workers' Compensation Act, *Purcell v. Friday Staffing*.

In *Purcell*, the employee suffered an injury at work to her back in 1999. Consequently, she had surgery and was told she could lift no more than 20 pounds. Once the employee finished her treatment, she settled her claim for \$50,000.

In May of 2010, she applied for employment with Friday Staffing. During the hiring process, the employee completed an essential-functions questionnaire and indicated she could lift more than 50 pounds. Friday Staffing then conducted an interview in which the employee confirmed she could lift 50 pounds. During her employment with Friday Staffing, employee worked on a line that required her to frequently lift items weighing 20 to 25 pounds.

On July 18, 2011, she reinjured her back and was diagnosed with a large disk protrusion. She filed a workers' compensation claim and the employer denied it. The case was heard by a Deputy Commissioner who also denied the claim. Employee appealed the case to the Full Commission and they agreed with the Deputy Commissioner. Employee then appealed to the North Carolina Court of Appeals.

Employee's primary argument was related to the third element of the statute: whether there was a "causal connection between the false representation by the employee and the injury or occupational disease." In interpreting what was meant by "causal connection" the Court of Appeals turned to *Freeman*

v. Rothrock, a case that was decided before the 2011 reform and dealt with this issue of misrepresentation.

In *Freeman*, the court adopted the "Larson Test" which states an employee may be barred from recovering workers' compensation benefits as a result of a false statement made at the time of hiring when the employer proves:

- The employee must have knowingly and willfully made a false representation as to his or her physical condition;
- The employer must have relied upon the false representation and their reliance must have been a substantial factor in the hiring; and There must be a causal connection between the false representation and the injury.
- As you can see, the language in N.C.G.S. §97-12.1 closely mirrors this test and the North Carolina Court of Appeals noticed that as well.

The Court looked at the *Freeman* case and how they had interpreted "causal connection." The Court found there is a "causal connection" between the misrepresentation and the injury if the prior medical condition, which was kept from the employer, increased the risk the employee would have a new injury. In the *Purcell* case, both employee and her doctor conceded her prior back injury increased the potential for her 2011 back injury, if she violated her lifting restrictions. As a result, the Court agreed with the Full Commission that employee's claim for workers' compensation benefits should be denied.

Purcell provides reassurance the courts will enforce some of the more aggressive portions of the Workers' Compensation Act. Employers should use essential-function questionnaires or job descriptions as a post-offer, pre-employment screening tool and confirm applicants can perform the essential functions of the job they are seeking. It is also a good idea to have the applicant sign any questionnaire or application and certify the information they are providing is truthful. Employers who have concerns about how these pre-employment questions can legally be asked (so as not to violate the ADA) should consult with an experienced employment law attorney.

Melissa Cleary is a partner with Teague Campbell Dennis & Gorham, LLP in their Raleigh office. In 2015, she will be the first female defense attorney from North Carolina inducted as a Fellow into the College of Workers' Compensation Lawyers.

President's Note

Our value to employers

One of our members, a large employer in North Carolina, recently asked us what does an employer receive in return for the \$350 in annual membership dues. Since this is a question that may be in the minds of many employers, and indeed should be, here are some thoughts about the benefits of membership:

For a mere \$350, you would be joining employers in the state who believe it is valuable to have an organization that lobbies for their interests before the General Assembly and the North Carolina Industrial Commission. If our association did not exist, employers would find it necessary to create it.

We are proud to be the employers' voice in the state, and have played a key role in averting and/or modifying harmful legislation and regulations. Some of these are headed off at the pass, as it were, because that is our responsibility and we maintain a professional lobbyist for that purpose.

No organization in the state has a better understanding of workers' comp than our association, simply because the best lawyers and claims and rehab professionals are members of our group. We regularly call on these resources when proposing or opposing changes to the system.

Each year we put on a three-day conference designed to help our members keep abreast of current and emerging trends in workers' compensation. Members receive a discount on registration fees and exhibitor fees, especially so if they have more than one person attending the conference. The three-day event is an excellent opportunity to make contacts and learn how other organizations are dealing with the issues you might be dealing with.

Our members also receive our quarterly newsletter, which is another way of knowing what is going on in workers' compensation nationwide and in North Carolina.

With very best wishes,

Jay Norris



Update on Medicare Set-Asides

The National Council on Compensation Insurance recently reviewed a sample of proposed workers' compensation settlements who's MSAs have been reviewed by the Centers for Medicare & Medicaid Services. Among the key findings:

- After a period of dramatic lengthening, CMS's processing time for MSAs has recently declined.
- The ratio of CMS-approved MSA amounts to submitted MSA amounts has declined over time.
- The differences between proposed and approved MSA settlements have been largely due to prescription drug costs.
- Most MSAs are for claimants who are Medicare-eligible at the time of settlement. Most of these claimants are Medicare-eligible because they have been on Social Security Disability for at least two years.
- MSAs make up about 40% of total proposed settlements. Of this 40%, prescription drugs make up half.

NCCI notes although the processing time has changed considerably over the period considered, there is no apparent trend in approved MSA amounts, and almost half of MSAs are less than \$25K.

CMS recently issued guidance affecting Medicare Set-Aside proposals submitted on or after January 1, 2015. The guidance has to do with the U.S. Drug Enforcement Administration's rescheduling of hydrocodone combination products from C-III controlled substances to C-II controlled substances.

Normally, C-III controlled substances require a new prescription after five refills or after six months, whichever occurs first. C-II's require new prescriptions at intervals no greater than 30 days; however, a practitioner may issue up to three consecutive prescriptions in one visit authorizing the patient to receive a total of up to a 90-day supply of a C-II drug.

CMS says new set-aside proposals should allow for a minimum of four healthcare provider visits per year when schedule II controlled substances (including hydrocodone combination products) are used continuously, unless the visits are more frequent per medical documentation.

coming up

March 25-27, 2015

NC Association of Self-Insurers' Annual Conference.

Holiday Inn Resort, Wrightsville Beach

April 15-17, 2015

Members-Only Forum, SC Self-Insurers' Association.

Litchfield Beach & Golf Resort

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NORTH CAROLINA
Association of Self-Insurers

The employers' voice in workers' comp

New appointments at the Commission

By Bruce Hamilton, Teague Campbell

Chairman Andrew Heath recently announced appointments of seven deputy commissioners, all for six-year terms.

He reappointed Melanie Goodwin, Sumit Gupta, Christopher Loutit, and Robert Harris. The new appointees are Lori Gaines, William "Bill" Shipley, and Michael Silver.

Ms. Gaines is currently in private practice in Wilmington with more than 15 years of legal experience, while Mr. Shipley practices workers compensation law in Columbia, South Carolina and was previously a prosecutor there. Mr. Silver is an assistant district attorney in Forsyth County.

Deputy Commissioner Harris has served as a deputy commissioner since 2005, Deputy Commissioner Goodwin has served as a deputy commissioner since 2011, and Deputy Commissioner Gupta has served as a deputy commissioner since October of 2014, and was previously the Commission's general counsel. Deputy Commissioner Loutit was sworn in as chief deputy commissioner in January 2014.

In other news:

- On January 20, the Industrial Commission adopted its proposed physician and hospital fee schedule rule changes and submitted them to the Rules Review Commission for consideration at the February 19th meeting. The proposed changes have the support of physicians and the North Carolina Hospital Association.
- The maximum weekly compensation rate effective January 1, 2015 is \$920, while the IRS mileage rate for business travel is \$0.575 per mile. This is the rate to be used for reimbursement for mileage incurred for medical treatment in workers' compensation cases.