NC Workers' Comp NEWS

A publication of the North Carolina Association of Self-Insurers

spring 16

Heightened alarm over opioid use

New guidelines issued in March by the CDC emphasize once again the devastating impact of opioid use, which claimed nearly 29,000 lives in 2014 and more than 165,000 lives over the past 15 years.

Deaths related to drugs have surged across the country, but opioids continue to be used widely. The CDC reports that in 2013 alone, nearly 1.9 million people in the U.S. abused or were dependent on prescribed opioid medication.

More startling yet, opioids were prescribed, and continue to be prescribed widely, despite the lack of clear evidence they are superior to other therapies. "It has become increasingly clear that opioids carry substantial risk but only uncertain benefits — especially compared with other treatments for chronic pain," says CDC director Dr. Thomas Frieden.

The agency's latest guidelines are directed at prescribing physicians, who are often uneasy about managing patients with chronic pain and feel they don't have enough training in prescribing opioids. "Of primary importance, non-opioid therapy is preferred for treatment of chronic pain. Opioids should be used only when benefits for pain and function are expected to outweigh risks," the guidelines state.

"Before starting opioids, clinicians should establish treatment goals with patients and consider how opioids will be discontinued if benefits do not outweigh risks. Clinicians should prescribe the lowest effective dosage, carefully reassess benefits and risks when considering increasing dosage to 50 morphine milligram equivalents or more per day, and avoid concurrent opioids and benzodiazepines whenever possible," the guidelines add.

Knowledgeable observers say the guidelines are significant because they will eventually be seen as the definition of the standard of care, thereby influencing physicians and how insurers determine reimbursement. Dr. Andrew Kolodny, head of Physicians for Responsible Opioid Prescribing, noted to the ***New York Times*** the guidelines are one of the most significant interventions by the federal government.

"This is the first time the federal government is communicating clearly to the medical community that long-term use for common conditions is inappropriate," he said.

The guidelines are of particular interest to the workers' compensation community. "The use of opioids is by far the most controversial and risky kind of care in workers' comp. In direct and indirect ways, opioids are more risky and costly than all other controversial forms of care combined," concludes an in-depth report by Comp Pharma. a national organization comprised of the industry's leading workers' compensation pharmacy benefit managers.

The report notes that although there has been a shift in thinking in medical circles in recent years, and prescriptions for opioid use in workers' comp appear to have declined in recent years, it can take more than 15 years for physicians generally to adopt a best practice after a best practice is set.

Some reports suggest that although the number of opioid prescriptions has declined, the dosage per prescription may not have declined. Earlier studies have documented that the average dose per prescription for OxyContin and Vicodin increased between 2000 and 2010.

INSIDE THIS ISSUE

CASE LAW UPDATE

By Rebecca Thornton

Defining Suitable Employment

The emphasis behind the 2011 reform of the Workers' Compensation Act was putting workers' compensation claimants back to work. One of the more notable changes was the definition of suitable employment in N.C. Gen. Stat. § 97-2(22).

The recent Court of Appeals holding in *Falin v. The Roberts Company Field Servs. Inc.* provides the first authoritative interpretation of Section 97-2(22) since its enactment. In *Falin*, the Court applied a plain, but super technical, reading of the statute, centering on punctuation and placement of a comma.

Falin was hired as an iron worker in October 2012. His application stated that he was available for out of town jobs. Upon accepting the position, Falin moved over 415 miles from his home in Tennessee to Aurora, North Carolina, where the job was located. In December 2012, Falin sustained a compensable injury to his left leg. Following a short hospital admission, Falin returned to Tennessee for additional treatment. He was ultimately released to perform medium-level work.

Defendant-Employer offered Falin a position as a tool clerk. The position offered wages equal to his pre-injury wage and Falin's treating medical provider cleared him to work in the position. There was a catch: the position was located in Charleston, South Carolina, 338 miles from Falin's residence. Falin rejected the offer. Instead, he accepted a minimum wage position washing cars for a different employer. Falin was then hired as a traffic controller for a third employer. Both positions were located near his home in Tennessee.

Defendants filed a Form 24 to terminate Falin's temporary partial disability benefits, alleging the he refused suitable employment. Following a hearing, Falin received a favorable Opinion and Award. The Full Commission then affirmed the decision, holding that the tool clerk position did not constitute "suitable employment" because the position well over 50 miles from Falin's residence. The Full Commission also highlighted the fact that Falin located suitable and steady employment near his home after he was released to perform medium-duty work.

Defendants appealed to the Court of Appeals, arguing that the tool clerk position was suitable, despite the distance. They contended that the 50-mile radius is only one of several factors to be weighed. The Court disagreed, and affirmed the Full Commission's decision.

The Court held that Plaintiff's refusal of the tool clerk position was justified because it was 338 miles from his home, despite the fact that Falin's pre-injury job was over 400 miles from his home. Specifically, the Court stated that a plain reading of the statute made the 50-mile radius consideration a requirement, instead of just one factor to be weighed. Section 97-2(22) defines suitable employment for post-MMI claimants as:

> "[E]mployment offered to the employee…that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience and is located within a 50-mile radius of the employee's residence at the time of injury or the employee's current residence if the employee had a legitimate reason to relocate since the date of injury. No one factor shall be considered exclusively in determining suitable employment."

The Court of Appeals applied a very technical analysis, relying on the grammatical structure of the statute. The Court noted that the 50-mile radius requirement was contained in a separate clause, not joined to the other factors by a comma, and thus not part of the "serial" list of factors.

Also, it was held that the other balancing factors are distinguished because they are nouns, while the 50-mile radius requirement is an adjective phrase. According to the Court, reading the statute to include the 50-mile requirement as simply another balancing factor ignores ordinary rules of grammar and disregards the intent of the legislature.

Finally, the Court briefly discussed and agreed with the Full Commission's conclusion that, even if the 50-mile radius consideration is simply just another factor, the sheer distance involved here still overwhelms the other factors.

This decision is significant because it mandates the application of the 50-mile radius in the analysis of suitable post-MMI employment, regardless of the distance between the pre-injury employment and an employee's residence. This decision is a reminder that application of the 2011 reform legislation is still developing, and subject to analysis and interpretation by the courts.

Because the Court analyzed Section 97-2(22) in such a technical way, we should anticipate that the legislature will revisit its grammar and punctuation in the future.

Rebecca Thornton is an attorney in Teague Campbell's Raleigh office, practicing workers' compensation and general liability defense. In 2015 and 2016 she was recognized as a "Rising Star" by North Carolina Super Lawyers magazine.

President's Note

The power of word of mouth

This year at our annual conference we had more than the usual number of attendees, thanks in good measure to our members who had earlier put in a favorable word for us with their clients and contacts. As many of us are aware, drawing self-insured employers to the conference remains a mysterious science. Every little bit of help you can give us can add up to make a noticeable difference.

A conference must offer meaningful content to draw attendees, and here again we appreciate our members who saw a need they could address and contacted us to express their interest in being a presenter. We are always looking for candidates for our employers' panel discussion, which has rapidly become a popular feature because we all get to hear of real-life problems and solutions from our peers.

Our 2017 conference is set for March 29-31. We have begun developing the program and look forward to receiving your ideas and suggestions. In the meanwhile, please help us achieve another successful conference by spreading the word about this annual event

With very best wishes,
Jay Norris

OSHA

Nearly 50% of severe injuries not reported

Based on its year-long experience of requiring employers to report every serious injury, OSHA estimates that, at best, employers are reporting only 50% of all serious injuries.

"Because the majority of first year reports were filed by large employers, we believe that many small and mid-sized employers are unaware of the new requirements. For them, we are developing outreach strategies, including working through insurers, first responders, and business organizations," says OSHA administrator David Michaels.

"In other cases, employers are choosing not to report because they perceive the cost of not reporting to be low. They should know that, now that the requirement is in its second year, OSHA is more likely to cite for non-reporting," he warns.

The agency recently increased the unadjusted penalty for not reporting a severe injury from $1,000 to as much as $7,000. If OSHA learns that an employer knew about the requirement but chose not to report it promptly, the fine can be much higher. The agency recently assessed one employer $70,000 for willfully failing to report.

Although employers have long been required to report all work-related fatalities within 24 hours, on January 1, 2015 OSHA also began requiring employers to report any work-related amputation, in-patient hospitalization, or loss of eye. Previously, employers only had to report work-related hospitalizations of three or more employees.

OSHA says its new reporting requirement program is guided by the principle that when employers engage with OSHA after a worker suffers a severe injury — whether or not a workplace inspection is launched — they are more likely to take action to prevent future injuries. The agency says it responded to 62% of severe injury reports in 2015, including nearly 70% of hospitalization reports, not by sending inspectors to the scene but by asking employers to conduct their own incident investigations and propose remedies to prevent future injuries.

In his recent report, Dr. Michaels also addressed who is responsible for notifying OSHA when a temporary worker is injured. "The employer who provides the day-to-day supervision of the worker must report to OSHA any work-related incident that results in a worker fatality, in patient hospitalization, amputation, or loss of an eye," he says.

coming up

March 29-31, 2017

Annual Conference, NC Association of Self-Insurers. **Holiday Inn Resort, Wrightsville Beach**

April 5-7, 2017

Annual Conference, SC Self-Insurers Association. **Hilton Myrtle Beach 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

Industrial Commission News

On February 1, 2016, Gov. Pat McCrory designated Commissioner Charlton Allen as chairman of the North Carolina Industrial Commission. Chairman Allen succeeds Andrew Heath, who was appointed State Budget Director, also effective February 1, 2016.

On February 12, 2016, Gov. McCrory appointed former Secretary of Administration, Bill Daughtridge as a Commissioner of the North Carolina Industrial Commission. Commissioner Daughtridge fills the vacancy created by Andrew Heath's appointment as Budget Director.

Gov. McCrory designated Commissioner Daughtridge's appointment as an emergency appointment, so he takes his seat immediately. However, his appointment will be subject to legislative approval when the North Carolina legislature reconvenes in May of 2016. Commissioner Daughtridge will fill the remainder of Chairman Heath's term which goes through April 30, 2019.

Gov. McCrory also nominated Commissioner Linda Cheatham for a 2nd six-year term on the North Carolina Industrial Commission. Commissioner Cheatham's current term ends on June 30, 2016. Her nomination will need to be confirmed by the North Carolina legislature when they return in May of 2016.

In 2015, Chief Deputy Commissioner Loutit was nominated to replace Commissioner Danny McDonald, whose six-year term ended on April 30, 2015. However, the General Assembly did not hold a confirmation hearing for Mr. Loutit during the 2015 term, so he has not been confirmed as a Commissioner yet. Commissioner McDonald has continued on in the absence of a confirmation hearing of Chief Deputy Commissioner Loutit.