NC Workers' Comp NEWS

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Surgical centers

Another big battle brewing

The North Carolina Association of Self-Insurers is teaming up with major business interests to defeat demands by ambulatory surgical centers for much higher fees than approved by the North Carolina Industrial Commission.

Surgical Care Affiliates, which manages seven ambulatory surgical centers in North Carolina, contends the Industrial Commission's maximum fee schedule is invalid because the agency did not comply with the state's rule-making requirements when it imposed the fee schedule in 2015.

The surgical centers won a court ruling against the commission in August 2016 but, thanks to opposition by business interests, the matter is effectively at a standstill as the various parties struggle towards a solution.

The Industrial Commission says it adopted a Medicare-based fee schedule at the direction of the General Assembly. The agency notes that in states that allow both ambulatory surgical centers and outpatient hospital facilities to be reimbursed using Medicare's outpatient hospital rates, the average fee percentage allowed for ambulatory surgical centers is about 128% above Medicare rates. "Notably, SCA is requesting 210% of current Medicare outpatient hospital rates for dates of services in 2016, and 200% of current Medicare outpatient rates in 2017 and beyond," the commission says. It warns rate increases of that magnitude would raise workers' compensation premiums in North Carolina by anywhere between $21 million and $28 million.

The surgical centers successfully argued in Wake County Superior Court that the General Assembly mandated new fee schedules only for hospitals and physicians and, because the surgical centers are legally distinct from hospitals, the Industrial Commission did not have statutory authority to impose new fee schedules on them. The commission retorts it give ample notice of its rulemaking, including a notice of a public hearing and written comment period, but received no comments or objections from the surgical centers.

If the surgical centers prevail, employers and insurers may be forced to revisit payments made to the centers to make up the difference between what the Industrial Commission approved and what the surgical centers want. As things stand now, Superior Court Judge Paul Ridgeway has placed a stay on his decision until the matter is resolved by an appellate court, or perhaps the General Assembly.

The Industrial Commission is moving towards putting a temporary rule in place and has scheduled a public hearing on November 18. The agency says the purpose of the temporary rule is that should the surgical centers prevail, the period of time subject to a retroactive review by employers and insurers will be limited to April 1, 2015 to December 31, 2016, providing certainty regarding medical costs for 2017 and beyond.

Earlier in the summer, a coalition of major business interests agreed to pool resources to fund a collective amicus brief and to work towards a settlement. Groups joining the North Carolina Association of Self-Insurers include: North Carolina Chamber, North Carolina Farm Bureau and Affiliated Companies, North Carolina Home Builders Association, North Carolina League of Municipalities, North Carolina Manufacturers Alliance, North Carolina Retail Merchants Association, and Forestry Mutual Insurance Company, and other major insurers.

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CASE LAW UPDATE

By Rebecca Thornton

Injury by Accident Cases at the Commission

Injury by accident cases involve an examination into whether the accident arose out of and in the course and scope of the employment, as well as whether there is an unusual or unexpected condition, or an interruption of the normal work routine. These factors can be difficult to define because of fact-specific analysis by courts, which can be very discretionary.

A recent decision by Deputy Commissioner Perlungher demonstrates how important facts are so to whether an accident involves interruption of the normal work routine. On October 15, 2014, Kim Chesnue, a 55-year-old teacher, was working in a classroom when she stepped onto the carpeted area and rolled her ankle. The claim was denied, and following a hearing, Perlungher found in Chesnue's favor based on the facts presented.

Chesnue filed a Form 33. She believed she was injured because the foundation of the floor underneath the carpet was weak. At the hearing, Chesnue testified that after her injury she observed an inspection of the area during which the carpet was pulled back and she noted the floor underneath "looked strange, 'like it had been sanded, smoothed out.'" In her recorded statement she said "there might have been a (……) under the carpet." Despite the inaudible words, the deputy commissioner held that statement indicative of the fact there was an issue with the floor.

Defendants presented evidence that inspections of the area did not reveal any problem with the foundation, and a safety review of the building did not identify foundation issues. However, the deputy commissioner noted that Defendants' inspections did not involve rolling back the carpet to inspect the floor beneath.

It was held that Chesnue sustained a compensable injury by accident based on her "credible testimony that the area on the floor where she stepped felt weak." The fact that Chesnue stepped onto a weak spot on the carpeted area was held to be an unlooked for and untoward event that was not expected, nor designed by her. Also, the fact that she rolled her ankle was a "fortuitous event" that counted as an interruption of her normal work routine.

The Full Commission also recently decided an injury by accident case. Patricia Edwards, a 74-year-old tour director, fell in the shower one morning before meeting her tour group and sustained an injury to her right knee. The claim was denied, and at hearing Defendants acknowledged the injury occurred in the course of her employment since she was on call 24 hours a day, so the only issue was whether the fall arose out of her employment. The deputy commissioner found in Edwards' favor, and the Full Commission affirmed.

The Full Commission held the risk of injury while in the hotel room was contemplated by and one that arose out of her employment, which included hotel stays. The Full Commission also held Edwards' injuries were the result of the interruption of her regular work routine, and occurred in the course of and arose out of her employment.

This decision was based on the following: (1) The Tour Director Manual given to Edwards stated that "Tour directing is a 24 hours a day job," and Edwards was required to be available to tour guests; (2) Edwards was required to maintain good hygiene and appearance while on tours, and not taking showers would adversely affect her job; (3) Unlike the shower at Edwards' home, the hotel room shower did not have a mat or grab bars; (4) Also unlike Edwards' home, the hotel shower had a wall soap-dispenser and thus soap not caught by Edwards' fell to the shower floor; and (5) the hotel room was paid for by Edwards' employer.

Also noteworthy, the Full Commission noted Defendants did not provide Edwards with information on filing a workers' compensation claim. Defendants did not file a Form 19, nor did they provide Edwards with a blank Form 18, and were sanctioned for their actions.

All of this should serve as a strict reminder that maintaining "clean hands" can be very important to the analysis. These cases also illustrate that facts are critical to the injury by accident analysis.

Rebecca Thornton is an attorney in Teague Campbell's Raleigh Office. In 2015 and 2016 she was recognized as a "Rising Star" by North Carolina Super Lawyers magazine.

President's Note

Once again in the fray

The North Carolina self-insurers association is contributing financially to two amicus briefs in cases working their way through the judicial process. Earlier in the summer, we contributed $2,500 as part of a larger effort to reverse a lower court ruling in ***Wilkes v. City of Greenville***, and a few weeks later we contributed $5,000 to a similar coalition fighting demands by surgical centers for higher payment rates.

We have often said if the self-insurers association did not exist it would be necessary to create it. Our association is the perfect vehicle to advocate for and represent employers in issues related to workers' compensation, as illustrated so clearly in the two cases above.

Although such opportunities present themselves infrequently, we are always working behind the scenes to make sure our workers' compensation system retains its balance and proportion.

Not the least of our utility is in educating and informing workers' comp professionals about emerging developments and perennial issues. Everyone who has attended our annual conference can attest the spring event is an excellent opportunity for continuing education and networking. We are well on our way towards putting together the program for the 2017 conference and look forward to seeing you in Wrightsville Beach from March 29-31.

With very best wishes,

Jay Norris

Uptick in Drug Use among U.S. Workers

The percentage of workers testing positive for drugs has steadily increased over the last three years to a 10-year high, according to an analysis of nearly 11 million workforce drug test results released by Quest Diagnostics, a leading provider of diagnostic information services.

Overall, 4% of workers tested positive in 2015 for illicit drugs which include marijuana, heroin, and methamphetamine. Among workers in safety sensitive jobs such as truck drivers, pilots, ship captains, and subway engineers, positive tests rose to 1.8% from 1.7%. In the general workforce, positive tests rose to 4.8% from 4.7%.

Post-accident positive results increased 6.2 % between 2014 and 2015. Among workers in safety sensitive jobs, post-accident positive results have risen 22 % over the past five years. Quest reports marijuana remains America's favorite illegal drug, as nearly half of all workplace positive tests are for marijuana, with the number holding steady from 2014.

"More troubling was an increase in detection of heroin. While the numbers are relatively small—less than one-tenth of 1% of all drug tests—heroin positives increased 146% in the general workforce between 2011 and 2015 and 84% in the safety-sensitive workforce," notes the ***Wall Street Journal***.

Heroin use has increased in part because of a crackdown on abuse of prescription opiates such as hydrocodone. At the same time, Quest found that detection of the two most common prescription opiates—hydrocodone and hydromorphone—fell steeply in 2015.

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**

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

A New Wrinkle at the Commission

The recent decision by the North Carolina Court of Appeals in ***Bentley v. Piner*** could cause havoc at the state's Industrial Commission.

On September 20, 2016 a three-member panel of the appellate court essentially voided an opinion and award from the full commission because the deputy commissioner who conducted the evidentiary hearing was not the deputy commissioner who issued the eventual opinion and award. The court held that G.S. 97-84 is clear the deputy who hears the case must be the one who issues the eventual opinion.

In ***Bentley***, the defendants were contesting the claimant's employment status with the defendant employer. The case was assigned to Deputy Commissioner Vilas, who decided to bifurcate the employment issue from the remaining issues in the case. The case was set for hearing on December 5, 2014, when Deputy Commissioner Vilas knew her term ended effective February 1, 2015 and indicated she would attempt to issue a decision before she left.

However, she was unable to do so and the case was transferred to Deputy Commissioner Shipley who issued an opinion on February 16, 2015 finding that the claimant was not an employee of the defendant employer. The Full Commission subsequently affirmed that decision, but the Court of Appeals vacated the decision on grounds noted above.

The defendants argued the Full Commission is the ultimate arbiter of the credibility of witnesses and transfer of the case between deputy commissioners should not matter. The court rejected this argument.

There are literally hundreds of cases currently pending at the Industrial Commission that involve the exact situation mentioned above and may therefore have to be retried before a Deputy Commissioner. The agency and various other parties are exploring other options, including the possibility of allowing the parties to mutually agree a Deputy Commissioner could render a decision despite not having handled the initial hearing.