NC Workers' Comp NEWS

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Commission to Tackle Opioid Abuse

Chairman Charlton Allen of the North Carolina Industrial Commission announced in early February he will appoint a task force to address opioid abuse and addiction, which have claimed the lives of at least nine North Carolina workers in recent years and are causing problems nationwide.

"Opioid misuse and addiction are a major public health crisis in this state. Many injured workers are prescribed opioid medications as part of treatment for their injuries, creating a nexus between the problems affecting the general population and the workers' compensation system," he said.

According to a 2014 report from the Centers for Disease Control and Prevention, which looked at prescriptions written for painkillers in every state, North Carolina had between 96-143 prescriptions per 100 people. Although that puts North Carolina among the states with the highest prescriptions for painkillers, it reflects a common pattern. CDC reported earlier that in 2012 physicians nationwide wrote 259 million prescriptions for opioid pain medication, enough for every adult in the United States to have a bottle of pills. The Industrial Commission looked at opioid misuse originating from or exacerbated by workplace injuries as part of its study last year on developing a drug formulary. The agency says its Workers' Compensation Opioid Task Force will be composed of representatives from various stakeholders in the state's workers' comp system.

The CDC notes actions at the state level can have an impact on prescribing patterns, and highlights the success of Florida in reversing overdose trends. Alarmed over a nearly 30% increase in overdose deaths between 2006-2010, Florida adopted legislative and enforcement actions which have resulted in the death rate dropping nearly 25% in recent years. Florida has also seen declines in prescribing rates for oxycodone, methadone, and hydrocodone.

Indeed, although opioid abuse and addiction remain formidable problems, many comp systems across the country are reporting decreases in utilization and prescriptions. This favorable trend will likely get a boost from just-released guidelines of the American College of Physicians which say opioids should be considered for chronic back pain only when other alternatives don't work.

The CDC had said as much in earlier recommendations, and in 2014 the National Safety Council put out a white paper which concluded the combination of 200 mg of ibuprofen and 500 mg of acetaminophen is one of the strongest pain reliever combinations available. "It is clearly more efficacious than any of the opioids used alone or in combination with acetaminophen," the group said.

Observers have also pointed out that not only are too many physicians prescribing opioids for injured workers when alternatives are available, they are often not monitoring their patients as called for in various guidelines. In its study of longer-term opioid use, The Workers Compensation Research Institute found only 4% - 9% of injured workers received psychological evaluations and only 3% - 8% received psychological treatments.

"Even in states with the highest use of these services, only one in three injured workers with longer-term opioid use had a psychological evaluation and one in seven received psychological treatment," WCRI reported.

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CASE LAW UPDATE

By Rebecca Thornton

Patillo v. Goodyear

In its recent holding in *Patillo v. Goodyear Tire & Rubber Company*, the Court of Appeals once again examines the Parsons presumption and its application in North Carolina workers' compensation cases, as well as the reasonableness of a job search.

Patillo suffered a low back injury on February 16, 2011 while working as a press operator for Goodyear. He was evaluated at the on-site medical clinic and was restricted to "off-standard" work, which meant he could not perform all his job functions without assistance. Patillo remained on off-standard work until April 4, 2011, returned briefly to on-standard work, and on May 13 was restricted to two weeks of sit-down work only, which was not available, so he went out of work two days later.

Patillo filed a Form 33 Request for Hearing. No Form 60, 61, or 63 was ever filed. The parties later entered a consent order that Patillo suffered "some level of contusion to the lower back as a result of [the] accident." Following a hearing, the Deputy Commissioner found the low back injury compensable and also awarded temporary total disability benefits between March 6, 2012 and the time of the hearing. However, Patillo's request for prior temporary total disability benefits between May 13, 2011 and March 6, 2012 was denied.

Defendants appealed to the Full Commission, which concluded the parties' consent order created a rebuttable presumption that Patillo's current low back condition was related to his compensable accident and that defendants had failed to rebut the presumption. Even without the presumption, the Commission concluded that Patillo had proven that his at-work injury caused ongoing non-mechanical back pain and awarded him ongoing medical treatment.

The Commission also concluded that Patillo had failed to prove he was disabled after March 6, 2012 because he had not shown that he had made a reasonable effort to return to work or that a job search would have been futile. Both parties appealed to the Court of Appeals.

The Court affirmed the Commission's application of the *Parsons* presumption and its conclusion that defendants had not rebutted the presumption that Patillo's medical treatment was related to the at-work injury. The Court cited the *Parsons* and *Perez* cases, noting that a presumption of compensability for medical treatment applies to future symptoms allegedly related to the original injury, not just for the original injury itself. The Court rejected defendants' argument that no presumption applied because they had only admitted the compensability of a low back contusion.

The Court further concluded that defendants had not rebutted the presumption of compensability because they were unable to show through medical testimony that plaintiff's current low back pain was separate and distinct from his original work injury.

The decision highlights the burden shift in accepted claims where defendants must rebut the presumption that an injured worker's medical treatment is related to the compensable injury. Unlike Wilkes, this decision does not radically extend the application of the Parsons presumption to injuries that are not "the very injury" accepted as part of the claim. Instead, it emphasizes the importance of investigating new injuries or conditions soon after they are discovered to determine whether evidence exists to rebut the presumption, and also to establish there is evidence that new injuries and conditions are "separate and distinct" from the original accepted injury.

The Court also examined the issue of futility and reasonableness of Patillo's job search. It reversed the Commission's decision and stated the determination that Patillo had not conducted a reasonable job search was not supported by the evidence. The Court acknowledged there is no rule for determining the reasonableness of a job search and stated that, although the determination of "reasonable" is discretionary, the Commission must make findings of fact to support its determination of reasonableness. Therefore, the case was remanded to the Commission for further findings.

The holding in *Patillo* does not constitute as drastic a shift from the application of the Parsons presumption as the Court's holding in *Wilkes*. However, both cases are an important reminder to be prepared to produce evidence that additional claimed injuries are not causally related to accepted conditions.

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

Conference Off to a Great Start

For the first time in nearly a decade, we filled all 20 of our available exhibitor spots within three weeks of sending out the conference brochure, and we already have more than a 100 registrants for the event scheduled for March 29-31. Kudos to our speakers for coming up with substantive topics and a big thank you to them for helping us in putting together a meaningful conference.

Workers' compensation in North Carolina has taken a volatile turn, with at least three court decisions pending that could have a ripple effect throughout the system. One case we are following closely is the lawsuit by ambulatory surgery centers demanding higher payment rates. The surgery center contend 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.

Last year our association contributed $5,000 to fund a collective amicus brief by a coalition of major business interests opposing the surgery centers. We contributed another $2,500 as part of an effort by employers to reverse a lower court ruling in *Wilkes v. City of Greenville*. We believe the Court of Appeals erred in ruling it is the employer who must prove the injured worker's anxiety and depression are not related to his physical injuries, rather than putting the burden of proof on the claimant, as traditional.

We are also following developments in the *Bentley v. Piner case*. 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. There are literally hundreds of cases pending at the commission that involve the exact situation and may therefore have to be retried before a Deputy Commissioner.

We are fond of saying if the North Carolina self-insurers association did not exist employers would find it necessary to form one. We are the employers' voice in workers' compensation, and seldom has it been more essential for that voice to be heard.

With very best wishes,

Jay Norris

Stay Away from Drugs for Low Back Pain

Newly released guidelines from the American College of Physicians recommend physicians and patients should treat acute or subacute low back pain with non-drug therapies such as superficial heat, massage, acupuncture, or spinal manipulation.

If drug therapy is desired, physicians and patients should select nonsteroidal anti-inflammatory drugs (NSAIDs) or skeletal muscle relaxants, the group says. The second line of treatment should be duloxetine, sold under the brand name Cymbalta, or tramadol, an opioid-like narcotic which is less potent than standard opioids such as oxycodone or fentanyl. The guidelines note steroid injections are not helpful and neither is acetaminophen.

Dr. Nitin Damle, president of the American College of Physicians, said pills, even over-the-counter pain relievers and anti-inflammatories, should not be the first choice. "We need to look at therapies that are nonpharmacological first. That is a change," he commented to the ***New York Times***.

About 80% of adults experience low back pain at some point, and it is the most common cause of job-related disability and a leading contributor to missed work days, according to the National Institute of Neurological Disorders and Stroke. Approximately one quarter of U.S. adults reported having low back pain lasting at least one day in the past three months. Pain is categorized as acute (lasting less than four weeks), subacute (lasting four to 12 weeks, and chronic (lasting more than 12 weeks).

"Physicians should reassure their patients that acute and subacute low back pain usually improves over time regardless of treatment. Physicians should avoid prescribing unnecessary tests and costly and potentially harmful drugs, especially narcotics, for these patients," Dr. Damle said.

"For the treatment of chronic low back pain, physicians should select therapies that have the fewest harms and costs, since there were no clear comparative advantages for most treatments compared to one another. Physicians should consider opioids as a last option for treatment and only in patients who have failed other therapies, as they are associated with substantial harms, including the risk of addiction or accidental overdose," he said.

coming up

March 29-31

NC Association of Self-Insurers' Annual Conference. **Holiday Inn Resort, Wrightsville Beach**
(See conference brochure on home page)

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The employers' voice in workers' comp

At the Commission

By Bruce Hamilton

The North Carolina General Assembly returned to Raleigh in December 2016 for a special session and, along with the governor, approved measures impacting the North Carolina Industrial Commission.

Specifically, when Commissioner Bill Daughtridge resigned in early December, Gov. Pat McCrory appointed Yolanda Stith to fill the remaining 2 1/2 years of Commissioner Daughtridge's term. The General Assembly amended the Worker's Compensation Act to effectively provide that Commissioner Stith would be granted an additional six-year term at the end of the remaining 2 1/2 years of her current term.

The statute was then amended back to its original language. The General Assembly also passed legislation that the chairman and vice-chairman of the Industrial Commission would be appointed by the Governor on December 30, 2016, and then every four years thereafter. On December 30, 2016, Governor McCrory appointed Chairman Allen for a four-year term as chairman beginning effective December 30, 2016 and appointed Commissioner Stith as vice-chair for a four-year term effective December 30, 2016.

Separately, Chairman Allen recently made the following appointments: J. Brian Ratledge has been named General Counsel, Asia Prince has been named Director of Claims Administration, and Kevin Howell and Theodore Danchi have been appointed deputy commissioners with six-year terms. Mr. Howell will serve in the Greenville office and Mr. Danchi will serve in the Raleigh office.

Also, the Industrial Commission recently amended Rule .0108 which now requires that almost all submissions to the IC be filed electronically. The rule does not apply to claimants, medical providers, or noninsured employers without legal representation.