NC Workers' Comp NEWS

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For adjusters

Industry Surprised by New Procedures

Workers' compensation professionals in North Carolina were surprised by the Industrial Commission's sudden decision in September to no longer accept motion filings or motion responses from adjusters or insurance carriers on grounds these constitute unauthorized practice of law.

Documents the Commission will no longer accept from adjusters include Form 24s, and responses to Form 23s, Form 28Us and Form 18Ms, as well as motions to compel compliance, medical motions, or other pleadings requesting relief. Adjusters can still file partial settlement agreements or agreements on compensation such as Form 26As, Form 60s, Form 63s, and Form 29s.

"The Commission has stated that it worked with North Carolina's State Bar on this issue and ultimately concluded that such filings were the unauthorized practice of law," notes Bruce Hamilton, an attorney with Teague Campbell and legal advisor to the North Carolina Association of Self-Insurers.

"Normally, ethics opinions regarding issues like this are announced by the North Carolina State Bar in a proposed opinion, and interested parties are provided an opportunity to provide input. In this case, we are not aware of any proposed opinion from the State Bar addressing this issue, and input was apparently not sought from the defense bar or industry representatives. In addition, it is unclear who and/or what prompted the Commission and State Bar to address this issue at this time," he added.

WorkCompCentral, an industry news outlet, quotes the North Carolina State Bar as saying the Industrial Commission did not seek its opinion. The State Bar says it did not rule on the issue, or concern itself in any way with the policy change.

"Our lawyer did not give an opinion. The State Bar has not interjected itself into this issue at all," says Katherine Jean, the chair of the grievance committee at the State Bar.

She told ***WorkCompCentral*** that if someone wishes to seek the State Bar's opinion on unauthorized practice of law, the procedure is to put the request in writing, which is then formally answered by the State Bar's *Unauthorized Practice Committee*. In the case at hand, she said the State Bar was telephoned by Brian Ratledge, the commission's attorney, who said he was not seeking a formal opinion but merely wanted to know if he was correct in his understanding that state law forbids adjusters to file form 24s and similar motions.

She said he was put through to an attorney but advised that the attorney's opinion would not constitute an official unauthorized-practice-of-law determination from the bar.

Brian Ratledge told the news outlet the recent decision by the agency is not a new policy or a new concept and, therefore, there was no need for the commission to make a big deal about it. "What constitutes the practice of law in North Carolina is clearly outlined in our statutes," he said, adding the commission does not have the discretion to waive those legal requirements.

Regardless, henceforth it will be necessary for employers to retain an attorney to file Form 24 Applications, Responses to Form 23 Applications, Responses to Forms 28Us and Responses to Form 18Ms, as well as Motions to Compel Compliance, and Responses to Medical Motions.

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CASE LAW UPDATE

By Heather Baker

Post-Wilkes Statutory Amendment

As reported in our Summer 2017 Issue, House Bill 26 was passed by the General Assembly. Since then, Governor Cooper approved the legislation and the bill became law. This legislation amended N.C.G.S. § 97-82(b) and limited the scope of the medical presumption created by Wilkes v. City of Greenville.

In light of this statutory amendment, filing a Form 60 or 63 does not create a presumption that medical treatment for an injury not identified in the Form 60 or 63 is causally related to the compensable injury. Instead, a claimant has the burden of proving causation for any injury not included on the Form 60 or 63, which then can be rebutted by the defendants.

A recent decision by the Court of Appeals, Pine v. Wal-Mart Associates, Inc., has applied this statutory amendment. Patricia Pine suffered various injuries as a result of a December 29, 2011 at-work fall. Defendants filed a Form 60 accepting the right shoulder and arm injury, but filed a Form 61 denying the cervical spine condition.

The Deputy Commissioner found all of Ms. Pine's claimed injuries to be related and awarded medical compensation. The Full Commission affirmed and concluded that, because defendants had accepted as compensable Ms. Pine's right shoulder and arm injuries, a rebuttable presumption arose that her other medical conditions were causally related to the compensable injury.

In its decision, the Court noted the Commission had erred by applying a rebuttable presumption for Ms. Pine's injuries not included on the Form 60 in light of the recent statutory amendment. Nevertheless, the Court found that the Commission had included factual findings applying the correct legal standard to support its award. The Commission had made findings that Ms. Pine's pre-existing condition was aggravated and that her other medical conditions were caused by the work-related accident.

The Court, therefore, indicated that the Commission had found an "alternative factual basis" for the award despite misapplication of the presumption, and affirmed the Commission's award of compensation for all injuries without the need for remand. There was also an issue regarding whether the medical evidence was competent, but the Court ultimately affirmed the Commission's determination that the medical evidence was competent and not speculative for establishing causation.

There was a dissent issued by Judge Tyson. He concluded that the error in applying the presumption would require remand to the Commission for application of the correct legal standard. He further dissented from the majority's conclusion that the medical evidence was competent to support Ms. Pine's burden of proving causation. He instead concluded that the relevant medical opinion relied on the incompetent post hoc, ergo proctor hoc premise, and therefore should not have been relied on to establish causation.

Calculation of Average Weekly Wage

The Court of Appeals recently issued a decision, *Ball v. Bayada Home Health Care*, which highlighted the requirement for the calculation of average weekly wage to be fair and just. The Court outlined the five methods for calculating average weekly wage contained in N.C.G.S. § 97-2(5).

The Commission had implemented Method 3 given that Ms. Ball had been employed for less than 52 weeks prior to the injury. The Court disagreed with this application and remanded the case to the Commission to use Method 5.

The Court found that using Method 3 was not "fair and just" given that this calculation did not account for the higher hourly rate and increased hours worked after the date of injury. The evidence showed that Ms. Ball received higher wages and worked more frequent hours for three months after the injury.

The key fact in this case was that Ms. Ball had in fact worked at the higher wage, albeit just one day. As such, the Court concluded that these post-injury wages were to be included when calculating average weekly wage. The Court emphasized the uncertainty of all at-will employment, and that the goal of calculating average weekly wage was to most nearly approximate what the claimant would be earning if not for the injury.

Employers should consult with defense counsel if they have a case involving a dispute about average weekly wage and the claimant was briefly earning or was expected to earn higher wages after the injury.

Heather Baker, a partner in Teague Campbell's Raleigh office, is a graduate of North Carolina State University and the University of North Carolina School of Law. In 2015 and 2016, she was named a "Rising Star" by North Carolina Super Lawyers magazine.

President's Note

Mark Your Calendar

By the time you are reading this newsletter, you should already have received an email blast from us noting the dates for our 2018 conference (March 21-23 at Holiday Inn Resort, Wrightsville Beach) and alerting you that our room block is now open.

Since our 2017 conference drew more registrants and exhibitors than we had attracted in a very long time, we went ahead and opened the hotel reservations early. Room rates are $159 per night for an oceanfront room and $139 for a standard room (the reservations number is 910-256-2231).

Our planning committee is currently active in developing the program for the conference and we expect to send out the program by mid-January. There is still time for you to submit ideas and suggestions and perhaps even to volunteer as a speaker. Please contact our executive director, Moby Salahuddin, at msalahuddin@sc.rr.com.

We would be particularly interested in presentations on how technology may be altering your worksite or the care and rehab of injured workers. To illustrate what we have in mind: Consider two electricians working on construction projects. Both wrongly assume the power to the circuits they're working on has been shut down. One taps in and suffers severe burns. Across town, in a similar situation, another worker is about to do the same when a sensor in his vest lights up and emits a high-pitched warning, alerting him the power is still on and thus allowing him to work without incident.

Sensors can be life-saving in another common scenario: if a worker wanders into the path of a forklift, sensors can warn both the wayward employee and the forklift driver. Innovative technologies are transforming home care as well, and we would be delighted to learn of specific instances you are familiar with or those that might be just around the corner.

Keep thinking, and we look forward to seeing you in March.
With very best wishes,
Jay Norris

A New Era at OSHA

As expected under President Trump, OSHA is getting rid of many current and proposed regulatory initiatives and emphasizing compliance assistance over the Obama administration's emphasis on enforcement.

Safety + Health, a publication of the National Safety Council, notes the labor department's updated agenda lists 14 OSHA regulations in various stages, compared with 30 on the fall 2016 agenda. OSHA has removed from its agenda measures related to bloodborne pathogens, workers' exposure to combustible dust, preventing injuries caused by vehicles backing up in factories and construction sites, and workplace noise, among others.

Blomberg BNA adds that "other OSHA rulemakings, including those governing emergency response and preparedness, as well as a rule that would make a series of fixes to the existing cranes and derricks in construction rule, have been moved to the "long-term actions" list, signaling that the Trump administration has no intention to move them forward."

Business interests applaud OSHA's new direction. "This suggests that the agency is taking a responsible approach to regulating and trying to focus on those areas where there is the most need, and to do so in a way that respects the various interests at stake," a spokesman for the U.S. Chamber of Commerce commented to the publication.

In another sharp break with the Obama administration, the agency has scaled back its reporting to the public about workplace fatalities. Under the Obama administration, OSHA listed the names, locations, employers, and circumstances under which a worker had died on the job. Now, the agency provides more limited information and does not include names of the deceased workers.

Also, OSHA previously publicized most workplace fatalities accidents, including those in states that operate their own OSHA programs. Now, the agency includes only the 28 states under jurisdiction of federal OSHA.

While the Obama administration said public shaming of employers helped raise awareness and gave employers additional incentive to improve workplace safety, critics said it maligned employers who were not at fault in the workplace deaths. OSHA says "the previous listings included fatal incidents that were outside federal OSHA jurisdiction, not work-related, or the employer was not cited for a violation related to the incident."

Given the Trump administration's open disdain for government regulations, critics sometimes assume OSHA is dragging its feet when, in fact, there may be a simpler explanation. A case in point is the agency's injury tracking application, a web-based form that allows employers to electronically submit required injury and illness data.

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coming up

Mar. 21-23, 2018

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

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

Increased fines for Delinquent Filings

Effective December 1, the North Carolina Industrial Commission will increase from $200 to $400 the fines against employers/carriers failing to file a Form 60, 61, or 63 within thirty days following notice from the Commission of the filing of a claim.

After the initial sanction of $400 for failure to timely file these forms, carriers/employers will have thirty days anew in which to remit payment-in-full for the sanction AND to file the forms. Failure to do *either* will result in an additional $200 sanction and being referred to an Enforcement Docket before the Commission for additional sanctions potentially including, but not limited to, Contempt for failure to remit payment in full and/or failure to file the forms.

For each case in which the $200 sanction is more than thirty days delinquent, the sanction amount will be increased to $400 starting on December 1, 2017, if payment is not made in full on or before November 30, 2017. The matter will also be referred to an Enforcement Docket.

The Commission reports that as of June 30, 2017, more than 4,500 claims were not in compliance with the state statute that calls on employers/insurers to promptly investigate injuries, and at the earliest practicable time admit or deny the claim. The increase in fines is meant to motivate tardy employer/carriers.

Separately, in its annual report, the commission reports sharp increases in the number of criminal charges against uninsured employers. Criminal charges increased from 10 in fiscal 2013 to 405 in fiscal 2017. The amount of fines increased from nearly $175,000 in fiscal 2013 to $1.7 million in fiscal 2017.

A New Era at OSHA *continued from page 3*

The application has been having technical difficulties and some observers say that may indeed be the entire story, rather than an instance of the agency subverting the requirement to report certain data. Business Insurance quotes Kathryn McMahon, a partner in the OSHA workplace safety practice group for law firm Conn Maciel Carey L.L.P., as saying it would be premature to draw firm conclusions about OSHA's intent.

"The agency has moved forward on this rule to the extent that it has set up this live portal. We don't know why the portal is not working. It could simply be some sort of technical issue. It is a government-run program, no offense to the government," she said.