NC Workers' Comp NEWS

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CDC

New Guidelines on Opioid Prescriptions

The Centers for Disease Control and Prevention is removing its previous recommended ceilings on opioid doses and encouraging doctors to use their best judgment, after complaints from patients and providers who found the guidelines too restrictive.

The agency says its new guidelines are voluntary and intended to be flexible to support, not supplant, clinical judgment. CDC emphasizes "this clinical practice guideline should not be applied as inflexible standards of care across patient populations by healthcare professionals, health systems, pharmacies, third-party payers, or state, local, and federal organizations or entities."

Dr. Samer Narouze, president of the American Society of Regional Anesthesia and Pain Medicine, told the ***New York Times*** he is pleased with the tone, level of detail, and focus of the new recommendations. "It's a total change in the culture from the 2016 guidelines," he said, characterizing the earlier edition as ordering doctors to "just cut down on opioids — period."

For instance, the 2016 guidelines specified hard thresholds like 90 morphine milligram equivalents, and noted most patients could get by with taking opioids for three days while "more than seven days will rarely be needed." Consequently more than half the states passed laws that limited initial opioid prescriptions to seven days or less, and many states limited pain-medication refills for Medicaid enrollees. Private insurers and pharmacies also curtailed opioid prescriptions.

Nevertheless, the new guidelines emphasize nonopioid therapies are effective for many common types of acute pain and found insufficient evidence to determine long-term (>1 year) benefits of opioid therapy for chronic pain. "Before starting opioids for subacute or chronic pain, clinicians should discuss with patients the known risks and realistic benefits of opioid therapy, work with patients to establish treatment goals for pain and function and consider how opioid therapy will be discontinued if benefits do not outweigh risks," the guidelines say.

The guidelines, which are open for public comment on the Federal Register, address 1) determining whether or not to initiate opioids for pain; 2) opioid selection and dosage; 3) opioid duration and follow-up; and 4) assessing risk and addressing potential harms of opioid use. The CDC will likely issue a final version by end of the year.

Kate Nicholson, executive director of the National Pain Advocacy Center, is among the many observers pleased with the balance struck by the new guidelines. "We went from one side of the pendulum, with overly liberal prescribing of opioids, and that did harm, to just looking at gross drops in prescribing without looking at individual needs. And that did harm," she commented to the ***New York Times.***

INSIDE THIS ISSUE

CASE LAW UPDATE

By Lindsay Underwood

What Evidence is Required to Establish Causation?

The North Carolina Court of Appeals recently issued a new decision concerning medical treatment, and what evidence is necessary to prove causation and establish compensability.

In ***Mahone v. Home Fix Custom Remodeling***, the claimant worked for a home remodeling company. On July 24, 2018, the claimant climbed into the attic of a potential customer to take measurements for an estimate when the floor beneath him collapsed. He fell twenty feet and suffered severe injuries to his cervical and thoracic spine, and fractured ribs on his left side. He was unconscious when EMS responded to the injury. The claimant underwent immediate surgery for his spinal injuries; a cognitive screening and mental assessment was completed to evaluate for possible traumatic brain injury (TBI).

It was determined inpatient neuropsychological services were not warranted, though the claimant was provided with verbal and written information regarding treatment for a mild TBI. On November 2, 2018, Dr. Lance Goetz wrote a letter stating the claimant was hospitalized and under his care. In that letter, Dr. Goetz stated the claimant had incurred a traumatic brain injury with loss of consciousness. Dr. Goetz was not deposed as part of the case, and the physician who was deposed did not provide an opinion on the TBI or causation either in his records or during his testimony.

Defendants denied the claim on the basis that there was no employer/employee relationship. At the Deputy Commissioner level, the main issues presented were whether the claimant was permanently and totally disabled, and what attendant care the claimant was entitled to. Following the hearing, Defendants accepted compensability of the spine, rib fractures, and hematoma of the parietal bone. The TBI was not accepted.

The Deputy Commissioner found claimant had failed to present evidence regarding how many hours per day he required attendant care, or the appropriate rate of care. Further, it was not yet possible to determine whether the claimant met the requirements for permanent total disability. The claimant appealed to the Full Commission. The Commission entered an Opinion and Award finding which concluded the claimant had not presented sufficient medical evidence of causation linking his TBI to the July incident, and, thus, the claimant was not entitled to medical compensation for the treatment of his TBI. The Commission found the claimant required attendant care but there was insufficient evidence in the record on which to base such an award. Both parties appealed to the Court of Appeals.

The Court ultimately found the Commission applied the incorrect legal standard in concluding the claimant's TBI was not compensable. The Court opined the Commission erred in stating the claimant was required to present expert testimony, either at a hearing or deposition, to a reasonable degree of medical certainty, that the TBI was causally related to the accident. The Court held the appropriate standard is that the claimant is required to present expert opinion evidence, not necessarily in the form of testimony, that it is likely the accident caused the claimant's injury. Thus, the letter written by Dr. Goetz in which he opined the claimant's TBI was likely the result of his July 24, 2018 incident was sufficient to establish causation. The Court reversed the Commission's Opinion and Award with respect to the compensability of the claimant's TBI and remanded to the Commission to make findings and conclusions applying the correct standards of proof.

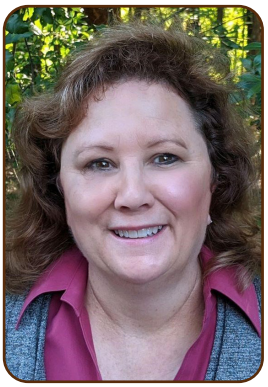
Though we do not have the final decision on remand, this case is a good reminder that if you want to contest compensability or causation of a specific aspect of the claim, you must have evidence to combat the claimant's evidence, even if said evidence is in the form of a letter or a medical record. In this case, it was likely assumed that since Dr. Goetz did not testify, and did not provide an opinion specifically to a reasonable degree of medical certainty, that his causation opinion would not be sufficient.

The Court of Appeals clearly disagreed, and specifically noted that testimony is not required by the Court to establish causation. All that is necessary is opinion evidence. In the event you are presented with a medical report or correspondence from a physician, in which it appears causation is established, even if not to a reasonable degree of medical certainty, it is a necessary next step for defendants to obtain counter evidence, and take deposition testimony of both the claimant's physician, and any IME or 2nd opinion physician, to support the defense.

Lindsay Underwood is an attorney in Teague Campbell's Raleigh office. She is a graduate of Cleveland State University and Wake Forest University School of Law.

President's Note

How Employers Can Prevail



We have received enthusiastic response to our May 19 workshop in Raleigh on how employers can prevail in extended-benefits cases. This is a fantastic opportunity for employers to learn strategy and tactics from some of the most-knowledgeable lawyers and rehab practitioners in the state.

Registration is free for members of our association, and also for members of the NC Association of Defense Attorneys. For non-members, registration fees are $75 per person. Register by email with Moby Salahuddin at mobysal@outlook.com. The workshop is scheduled for 2:00 p.m. – 5:00 p.m. at the Woman's Club and will be followed by a reception.

As many of you are aware, the NC Industrial Commission has recently issued decisions in the first round of extended benefits cases, in which claimants are arguing entitlement to temporary total disability benefits past the 500-week cap on benefits. Six cases have been heard and decided at the Deputy Commissioner level, and four of those cases are on appeal to the Full Commission. To obtain benefits beyond the 500-week cap, the claimant must request a hearing and present evidence supporting the assertion of a total loss of wage-earning capacity.

We believe some of the adverse decisions employers have suffered are likely due to inappropriate or, perhaps, ineffective use of vocational services/labor market surveys. Among other items, the May 19 workshop will cover the proper use of vocational planning for decisions on job search vs. labor market survey use. The workshop is approved for three credit hours for adjusters and we have applied for CEU approval for attorneys and rehab professionals.

We look forward to seeing you soon.
Stephanie Gay

More Workers Testing Positive for Drugs

The rate of positive drug test results among America's workforce reached its highest rate last year since 2001 and was up more than 30% in the combined U.S. workforce from an all-time low in 2010-2012, according to a recent analysis by Quest Diagnostics. Most of the increase was due to marijuana use.

The overall positivity rate in the combined U.S. workforce, based on nearly nine million urine drug tests collected between January and December 2021, was up in 2021 to 4.6% compared to 4.4% in 2020 and up 31.4 percent from the all-time low of 3.5% just 10 years ago (2010-2012). The combined U.S. workforce includes the general U.S. workforce of mostly company-policy testing by private employers as well as the federally mandated, safety-sensitive workforce, which includes federal employees and the transportation and nuclear power industries, and can include workers such as pilots, truck drivers, train conductors and others required to drug test under federal legislation.

Overall positivity in the federally mandated, safety-sensitive workforce based on nearly 2.7 million urine drug tests stayed even year over year (2.2% in 2020 and 2021) and was 4.8% higher than 2017 (2.1% in 2017 versus 2.2% in 2021). In the general U.S. workforce, positivity increased 1.8% (5.5% in 2020 versus 5.6% in 2021) and was 12% higher than in 2017 (5.0% in 2017 versus 5.6% in 2021) and up each of the last five years.

"Our Drug Testing Index reveals several notable trends, such as increased drug positivity rates in the safety-sensitive workforce, including those performing public safety and national security jobs, as well as higher rates of positivity in individuals tested after on-the-job accidents," said Barry Sample, PhD, senior science consultant for Quest Diagnostics.

Quest notes that in their eagerness to hire workers many employers may be tempted to lower their standards, but in the process they raise the specter of more drug-related impairment and worksite accidents that put other employees and the general public in harms' way.

Positivity rates for marijuana in the general U.S. workforce, based on more than 6 million urine tests, continued an upward climb, increasing 8.3% (3.6% in 2020 versus 3.9% in 2021), the highest positivity rate ever reported in Quest's drug testing index. Over five years, positivity for marijuana in the general U.S. workforce increased 50% (2.6% in 2017 versus 3.9% in 2021).

Over that period, the number of states that legalized marijuana for recreational use grew to 18 from eight, plus the District of Columbia. Despite the increase in positivity last year, fewer companies tested their employees for THC, the substance in marijuana primarily responsible for its effects, than in recent years, according to Quest.

coming up

April 18-20, 2022
NC Association of Self-Insurers' Annual Conference. **Embassy Suites by Hilton Wilmington Riverfront**

May 19, 2022 Workshop
Extended Benefits Cases: How Employers Can Prevail. **The Woman's Club of Raleigh 3300 Woman's Club Drive**

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NC Industrial Commission Update

By Bruce Hamilton

Commissioner Myra L. Griffin Reappointed to Serve Second Term at the Full Commission

Gov. Roy Cooper reappointed Commissioner Myra L. Griffin to serve a second six-year term as a Commissioner beginning July 1, 2022. Her reappointment is subject to confirmation by the North Carolina General Assembly. Griffin, who is designated vice chair of the Commission by Gov. Cooper in February 2019, has been with the Commission since 1998 serving as an Assistant Attorney General assigned to the Commission, the Executive Secretary's office, Deputy Commissioner and Full Commission.

Anne Harris Appointed to Serve as Deputy Commissioner

Anne R. Harris was recently appointed as a Deputy Commissioner. Ms. Harris has represented injured workers in workers compensation claims for 29 years and has over six years of legal experience in the areas of elder law and estate planning. She is going to hear cases primarily in the Triad region of North Carolina.

Michele Denning Appointed to Serve as Deputy Commissioner

Michele Denning was also recently appointed as a Deputy Commissioner. Ms. Denning has worked in various capacities at the IC and other state agencies that interact with the IC for the past 16 years. In 2006, Ms. Denning joined the commission and for nine years served in multiple roles including Full Commission Law Clerk, Legal Counsel to the Chairman, and Special Deputy Commissioner. In 2015, Ms. Denning joined the North Carolina Department of Justice as an Assistant Attorney General where she represented the IC and noninsured cases and penalty enforcement matters.

Ms. Denning later represented the North Carolina Department of Public Safety and Worker's Compensation litigation and in 2018 became assistant General Counsel to DPS. She returned to the IC as General Counsel in 2019. Ms. Denning will be in charge of noninsured cases throughout the state.

Revised Deputy Commissioner and Full Commission Hearing Procedures

The IC resumed in person hearings effective March 1, 2022 for both Deputy Commissioner hearings and Full Commission hearings. However, the parties may file a motion for a video conference hearing with the Deputy Commissioner. In addition, the parties may consent to a video conference hearing at the Full Commission and individual parties that wish to appear remotely may file a request with the Full Commission to appear via telephone.